

UNIVERSITY
OF CALIFORNIA
LOS ANGELES

SCHOOL OF LAW
LIBRARY

A TREATISE

ON THE

LAW OF DAMAGES,

EMBRACING

AN ELEMENTARY EXPOSITION OF THE LAW,

AND ALSO

ITS APPLICATION TO PARTICULAR SUBJECTS OF CONTRACT AND TORT.

BY

J. G. SUTHERLAND,

AUTHOR OF A TREATISE ON "STATUTES AND STATUTORY CONSTRUCTION."

SECOND EDITION,

REVISED, SECTIONIZED AND ENLARGED,

BY

THE AUTHOR

AND

JOHN R. BERRYMAN,

AUTHOR OF A "DIGEST OF THE LAW OF INSURANCE," ETC.

VOL. III.

CHICAGO:
CALLAGHAN AND COMPANY.
1893.

Copyright, 1893,
by
CALLAGHAN AND COMPANY.

T
Su844d
1893

STATE JOURNAL PRINTING COMPANY,
Printers and Stereotypers,
Madison, Wis.

TABLE OF CONTENTS.

PART II.— APPLICATION OF THE LAW OF DAMAGES TO VARIOUS CONTRACTS AND WRONGS.

CHAPTER XVIII.— AGENCY.

SECTION 1.— PRINCIPAL AND AGENT.

References are to sections.

The reciprocal obligations of principal and agent . . . 768, 769
Agent's particular duties and liabilities 770, 771
Neglect of duty or agreement concerning insurance 772
Disregard of orders for the purchase and shipment of goods . . 773
Miscellaneous illustrations of agent's liability 774
Defaults in regard to commercial paper 775, 776
Same principles applied to factors 777
Sales at unauthorized price 778, 779
Duty to sell at certain times 780, 781
Terms of sale 782
Guaranty commission 783
Rendering accounts 784
Remitting funds 785
Liability of brokers 786
Damages for acting as agent without or in excess of authority . . 787

SECTION 2.— AGENT AGAINST PRINCIPAL.

Agent's rights 788
Reimbursement of expenditures 789
Factor's right to reimburse himself by sales 790
Agent may charge for exchange 791
How right of reimbursement affected by mode of doing business . 792
Agent's right to indemnity 793
No indemnity for unlawful act 794
Measure of recovery 795

SECTION 3.— THIRD PERSONS AGAINST AGENT.

When agent liable to third persons 796
Agent liable on implied warranty of authority 797
The measure of damages 798
Recovery of money from agent 799
Agent liable for his torts 800

CHAPTER XIX.— INSURANCE.

Growth and importance of insurance contracts 801
Kinds of insurance 802

SECTION 1.— MARINE INSURANCE.

Cause of damage must be proximate 803
Extent of injury; manner of ascertainment 804

755847

References are to sections.

Interpretation of contract 805
Valued policies 806
What constitutes a total loss; "wholly destroyed" 807
Contract methods for fixing damages 808
When proofs of loss a condition precedent 809
Manner and time of making proofs 810
Preliminary proofs for information only 811
Pleadings 812
Rule of damages on open policies 813, 814
Loss in excess of sum fixed in policy 815
Damages in case of partial loss 816
Losses adjusted on the principle of indemnity 817
General average 818, 819

SECTION 2.— FIRE INSURANCE.

Nature of contract; how made 820
General rule of damages 821
Contribution if more than one policy 822
Mitigation of liability 823
What jury may consider 824
Proof of damages 825
General average in fire insurance 826
Recoveries in special cases 827
Insurance on commission goods 828
Insurance by mortgagee 829
Contracts to replace or rebuild 830

SECTION 3.— LIFE AND ACCIDENT INSURANCE.

Definition of life insurance 831
Character of the contract 832, 833
When life insurance a collateral security 834
Accident policies 835
Difference between English and American decisions as to scope of recovery 836
Restatement of the measure and elements of damage 837
Insurer's liability for terminating the contract 838
Refusal to issue paid-up policy 839
Liability of re-insurer 840

CHAPTER XX.— LANDLORD AND TENANT.

SECTION 1.— LANDLORD AGAINST TENANT.

Action for use and occupation 841
Measure of recovery 842, 843
Actions for rent 844
Amount as affected by subsequent facts 845
Recovery of rent payable in specific articles or as taxes . . . 846
Termination of lease by lessor 847
Recovery of rent barred by eviction of lessee 848
Apportionment of rent 849, 850
Partial destruction of demised property 851
Entire destruction of demised premises 852
When premises taken for public use 853
Lessee's liability for interest 854
Covenants for repairs 855
Measure of liability for not making repairs 856–858
Liability of assignee of lease for repairs 859
Damages for repairs and non-repairs in special cases . . . 860
Covenants not to sublet or assign 861
Covenants to insure 862

References are to sections.

SECTION 2.— TENANT AGAINST LANDLORD.

Lessor's covenant for quiet enjoyment 863
The general rule of damages 864
Special and consequential damages 865, 866
Recovery for damages to business 867-870
Mitigation of damages by lessee 871
Lessor's covenant to repair, etc. 872
Lessor's duty concerning repairs 873
Liability for special and consequential damages 874
Removal of fixtures 875
Recoupment 876

CHAPTER XXI.— CARRIERS.

SECTION 1.— ACTIONS BY CARRIERS.

Breach of contract to furnish goods for shipment 877
Measure of damages on charter-parties 878
Recovery for partial breach 879
Carrier must mitigate his loss 880
Shipper's rights in profits made by carrier 881
Burden of proof 882
Damages for breach of charter to load with enumerated articles . 883
Carrier's actions for freight 884
Freight charges as affected by value of property 885
Discriminations unlawful where conditions same 886
When freight due and earned 887, 888
When shipper not liable for freight 889
When *pro rata* freight due 890
Same subject; transshipment of freight 891
Right to freight where cargo insured 892
Rule for adjusting *pro rata* freight 893
Charges and expenses where delivery hindered or prevented . . 894
Freight under charter to load with enumerated articles . . . 895
Recoupment against freight 896
Damages for detention of vessel 897

SECTION 2.— ACTIONS AGAINST CARRIERS.

General statement of carrier's liability 898
When damages measured by cost of transportation 899
Liability for loss of shipper's profits 900
Increased expenditures; loss of customers 901
Not liable for remote consequences 902
Must respond for negligent delay 903
Limitation of liability by contract 904
Illustrations of liability for delay; unmarketable property. . . 905
Loss of market value, quantity or quality 906
Vindication of the rule stated 907, 908
Application of the rule to ocean carriage 909
Delay after notice of arrival 910
Increased cost of obtaining property 911
Expense of further transportation 912
Liability for delay where facts are known 913, 914
Mental anguish as an element of damage 915
Carrier's responsibility in caring for property 916
Burden of proof as to injury or loss 917
Damages where goods have a market value 918
Damages for injury or loss of non-marketable property . . . 919
Interest on damages 920
Owner's efforts to lessen loss 921
When damages less than value of goods at destination . . . 922

References are to sections.

Same subject; criticism of the rule stated 923
Same subject; loss at place of shipment 924
Same subject; shipper's conduct may affect damages . . . 925
Qualification of carrier's liability by notice 926
Liability for partial loss when value limited 927
Apportionment of damage in case of mutual fault 928
Liability not mitigated by insurance 929
Exemplary damages 930
For what losses carrier responsible 931
Damages where there are successive carriers 932
Proof of value 933

SECTION 3.—CARRIERS OF PASSENGERS.

Nature of their obligations 934
Damages for refusing to carry 935
Same subject; loss of time, expense, exposure 936
Same subject; exemplary damages 937
Removal of passenger at wrong place 938
Same subject; consequential damages 939
Passenger's indiscreet acts not ground of damage 940
Protection of passengers 941
Damages for mental suffering 942
Mental suffering independently of other pain 943
Past and prospective damages 944
Proof of damage 945, 946
Recovery for special loss 947
Wrongfully placing passenger in second-class car 948
Mitigation of damages 949
Exemplary damages 950
Rule different in some states 951
Injury to wife, child or servant 952
Excessive verdicts 953
Loss of baggage 954
Measure of damages 955
Liability of sleeping-car companies 956

CHAPTER XXII.—TELEGRAPH COMPANIES.

Nature of their duty 957
Limitation of liability 958
Liability for neglect where message in cipher 959
Same subject; opposing view 960
Liability where object of sender known 961
Same subject; illustrations 962–964
Loss of claim; physical pain 965
Liability for expenses 966
Loss of employment 967
When company charged with knowledge of sender's purpose . . 968
Same subject; details need not be disclosed 969
Same subject; result of the decisions 970
Same subject; opposing view 971
Form of action; who may sue 972
Mitigation of damages by injured party 973
Exemplary damages 974
Damages for injured feelings 975
Reasons upon which liability rested 976
Same subject; opposing authorities 977
Grounds upon which liability denied 978
Summary of the authorities 979
Author's conclusions 980
Notice to the company 981
Measure of damages 982

References are to sections.

CHAPTER XXIII.— BREACH OF MARRIAGE PROMISE.

Nature of the action 983
Seduction as an aggravation 984
Consequences of seduction 985
Injury to feelings and other elements of damage 986
Same subject; exemplary damages 987
Damages for loss of marriage 988
What will excuse a breach of the contract 989
What may be proved in mitigation 990

CHAPTER XXIV.— EJECTMENT.

Proceedings regulated by statute 991

SECTION 1.— MESNE PROFITS.

The remedy for 992
What may be allowed as damages 993
Recovery limited to compensation 994
Proof of rental value 995
What property withheld 996
Interest 997
Compensation on recovery of a term 998
Claims for improvements, taxes, etc. 999
Remedy under the code 1000

SECTION 2.— DOWER.

The right of 1001
It is assignable on a valuation 1002
Damages for detention of dower 1003
Extinguishment of dower right 1004
Reprisals 1005
Dower limited to husband's equitable interest 1006
Dower right subject to incumbrance 1007

CHAPTER XXV.— INJURIES TO REAL PROPERTY.

Scope of chapter 1008

SECTION 1.— TRESPASS TO REAL PROPERTY.

The gist of the action 1009
Definition of trespass and scope of the remedy 1010
Damages confined to compensation 1011
Damages where tenant sues 1012
Damages where suit by executor, etc. 1013
Damages measured by benefit received 1014
Damages for destruction of property 1015
Occupation of land by railroads 1016
Damages for permanent wrong 1017
Damages where injury remediable 1018
Cutting trees; mining ores 1019
Same subject; when value computed 1020
Liability for additional injury to land 1021
Damages to unsecured ice 1022
Injuries to crops 1023
Destruction of fences 1024
Injuries to party-walls 1025
Interest 1026
Mitigation of damages 1027
Aggravations and special damages 1028–1030
Exemplary damages 1031
Same subject; mitigations 1032

References are to sections.

SECTION 2.— INJURY TO INHERITANCE.

Injury to the rights of parties not in possession . . . 1033, 1034

SECTION 3.— NUISANCE.

What is a nuisance 1035
General principles of the law of nuisance 1036
Wrong-doer liable for at least nominal damages 1037
Usually a continuing wrong requiring successive actions . . . 1038
What recoverable in the first action 1039
Continuing liability of the erector 1040
Damages may include future expenditures 1041
When nuisance not a continuing wrong 1042–1045
Same subject; result of the cases 1046
Depreciation in value as damages 1047
Other elements of damage 1048
Injuries to crops, trees, etc. 1049
Liability for remoter consequences 1050, 1051
Exemplary damages 1052
Removal of lateral support to land 1053
Interference with business 1054
Mitigation of damages 1055
Same subject; deduction for benefits 1056
Damages affected by interest in estate 1057
Private remedy for public nuisance 1058
Joint and several liability 1059
Pleading 1060

CHAPTER XXVI.— TAKING PROPERTY FOR PUBLIC USE.

The power of eminent domain 1061
Consequential injury where property not taken 1062
What is just compensation 1063
Measure of compensation 1064
Injury to property not taken 1065
Same subject; what facts pertinent 1066–1070
Same subject; remote damages 1071
Same subject; expenditures to lessen loss 1072, 1073
Basis for estimating value of land 1074
Same subject; value for special purpose 1075
Compensation for wrong-doer's improvements 1076
Compensation affected by title and nature of interest taken . . 1077
Same subject; condemnation of railroad property 1078
Same subject; injury to franchise 1079
Same subject; New York elevated road cases 1080
Same subject; injury to various interests 1081, 1082
Assessment of damages and benefits, time of 1083
Deductions for benefits 1084–1087
What lands considered in assessing benefits and damages . . . 1088
Proof of value and damages 1089
Effect of judgment for compensation 1090
Interest 1091

CHAPTER XXVII.— TRESPASS TO PERSONAL PROPERTY.

When damages may exceed compensation 1092
Certainty of damages 1093
Remedy more comprehensive than trover 1094
Aggravations increase damages 1095
Measure of damages for taking or destroying property . . . 1096
Same subject; quantity of interest 1097
Same subject; market value 1098

References are to sections.

Same subject; non-marketable property 1099
Special and consequential damages 1100–1102
Expenses to recover or restore property 1103
Mitigation of damages 1104
Application of property to owner's benefit 1105
Damages against trespasser from the beginning . . . 1106, 1107

CHAPTER XXVIII.— CONVERSION.

The action of trover 1108
The general rule of damages 1109, 1110
Other rules of damages 1111
Time of conversion 1112
Proof of value 1113
Same subject; fixtures 1114
Interest 1115
Recovery for property subject to sale 1116
Damages if property without market value 1117
Damages if property of fluctuating value 1118
Same subject; criticism and modification of the rule . . . 1119
Same subject; conflict in New York cases 1120
Same subject; Pennsylvania rule 1121
Same subject; Massachusetts rule 1122
Same subject; English cases 1123
Same subject; rule in North Carolina 1124
Departure from the general rule sometimes justifiable . . . 1125
Recovery where value of property enhanced by defendant . 1126–1128
Special or consequential damages 1129
Attorney's fees 1130
Exemplary damages 1131
Conversion of money securities 1132
Conversion of insurance policies 1133
Conversion of deeds, etc. 1134
Conversion of shares of stock 1135
Recovery limited to plaintiff's interest 1136, 1137
Mitigation of damages 1138–1141
Plaintiff's duty to mitigate damages 1142

CHAPTER XXIX.— REPLEVIN.

Section 1.— Plaintiff's Case.

Definitions. 1143
Measure of damages 1144
Exemplary damages 1145
Special and consequential damages 1146
Recovery if property not returned 1147, 1148
Damages affected by the object of the action 1149
Recovery for use and increase in value 1150
Intermediate injury and depreciation 1151–1153
Increase in value by defendant 1154

Section 2.— Defendant's Case.

Successful defendant's rights 1155
A plaintiff obtaining possession and failing in his suit a wrong-doer . 1156
Measure of damages 1157
Special and consequential damages 1158
Mitigation of damages 1159
Recovery affected by interest in property 1160
Recoupment 1161
Part of property found for each party 1162

References are to sections.

CHAPTER XXX.—FRAUD.

Scope of the natural and proximate consequences . . . 1163–1165
False representations 1166
Same subject; materiality 1167
Same subject; reliance upon representations 1168
Same subject; defendant's belief in representations . . . 1169
Same subject; representations need not be made to plaintiff . . 1170
The measure of damages 1171
Same subject; another rule 1172
Same subject; other elements of damage 1173, 1174
Remote and contingent damages 1175, 1176
Expenses of litigation 1177
Exemplary damages 1178
Parties 1179
Pleading 1180

CHAPTER XXXI.—INFRINGEMENT OF PATENT-RIGHTS.

Statutory remedies 1181
Same subject; judicial summary 1182
Damages recoverable at law 1183, 1184
Same subject; profits as damages 1185
Same subject; other measures of damage 1186
Interest on damages 1187
Exemplary damages 1188
Compensation in equity 1189
Same subject; computation of profits 1190, 1191
Computation to what time made 1192
Rule when whole article not patented 1193, 1194
Same subject; ascertainment of profits 1195
Profits recoverable though no license fee established . . . 1196
Interest 1197

CHAPTER XXXII.—INFRINGEMENT OF COPYRIGHT.

Copyright is statutory 1198
Compensatory and penal recoveries 1199

CHAPTER XXXIII.—INFRINGEMENT OF TRADE-MARKS.

Nature of the right to a trade-mark and of the wrong of infringement 1200
The measure of damages 1201, 1202

CHAPTER XXXIV.—SLANDER AND LIBEL.

Section 1.—Plaintiff's Case.

Nature of the wrong 1203
Accusations actionable *per se* 1204
Malice the gist of the action 1205
General damages, how proven 1206, 1207
Same subject; aggravation of damages 1208, 1209
Same subject; wealth and rank of the parties 1210, 1211
Evidence of reputation 1212
Injuries to business 1213
Mental suffering 1214
Special damages 1215
Exemplary damages 1216
Damages in discretion of jury 1217

References are to sections.

Special damages where words not actionable *per se* . . . 1218, 1219
Same subject; injury to feelings 1220
Same subject; natural consequences 1221
Criticism of the doctrine last stated 1222
Slander of title 1223

SECTION 2.— THE DEFENSE.

Failure of plea of justification 1224
Same subject; effect of statutes 1225
Evidence in mitigation; plaintiff's bad character 1226
Same subject; evidence of common reports as to plaintiff's guilt . 1227
Same subject; proof of truth of words 1228, 1229
Same subject; effect of statutes 1230
Evidence in mitigation generally 1231–1233

CHAPTER XXXV.— MALICIOUS PROSECUTION.

Nature of the wrong 1234, 1235
Unauthorized suit or appeal 1236
Elements of damage 1237, 1238
Evidence in mitigation 1239, 1240

CHAPTER XXXVI.— PERSONAL INJURY.

Elements of damage 1241
Physical and mental pain 1242–1245
Loss of time, injury to business, diminished capacity . . . 1246
Same subject; pleading 1247
Same subject; evidence 1248
Same subject; measure of recovery 1249
Expenses for surgical and medical aid, etc. 1250
But one action maintainable; prospective damages 1251
Husband's or parent's action 1252
Exemplary damages 1253
Pecuniary circumstances of parties 1254
Evidence in mitigation 1255
Province of the jury, and instructions thereto 1256
False imprisonment 1257, 1258

CHAPTER XXXVII.— DAMAGES RESULTING FROM DEATH.

No action for at common law 1259
Nature of the statutory action 1260
Diversities as to beneficiaries 1261
Only pecuniary losses compensated in England and Canada . . 1262
Same subject; rule in the United States 1263
At least nominal damages recoverable 1264
Recovery by widow 1265
Recovery by husband 1266
Children's loss from death of parents 1267
Facts and circumstances to be considered in estimate of damages 1268–1271
Recovery for death of child 1272–1275
Damages recoverable by collateral kindred 1276
Damages to the deceased's estate 1277
Special damages 1278
Contracts exempting from liability 1279
Where the injury is done in another state 1280

References are to sections.

CHAPTER XXXVIII.—SEDUCTION.

The technical not the real gist of the action 1281
Who may maintain the action 1282
Evidence for plaintiff and damages recoverable 1283
Evidence for defendant in mitigation 1284
Criminal conversation 1285

CHAPTER XXXIX.—DAMAGES FOR TORTS IN ADMIRALTY.

Fundamental difference between liability in admiralty and at common law 1286
Division of loss in collision cases 1287
Rule applicable to other torts 1288
Liability confined to proximate loss 1289
Total loss; elements of damage 1290
Total loss, what is 1291
Partial loss; elements of damage 1292
Same subject 1293
Interest 1294
Mitigation of liability 1295
Recovery by owner of cargo 1296

TABLE OF CASES.

References are to sections.

Aaron v. Second Ave. R. Co., 944.
Abbot v. Shepherd, 842.
v. Tolliver, 1251, 1255.
Abbott v. Abbott, 1009.
Abeles v. Bransfield, 1249.
v. Western U. T. Co., 959.
Aber v. Bratton, 1144, 1146.
Aborn v. Mason, 1128.
Abraham v. Kidney, 1283.
Abrahams v. Cooper, 1257.
Abrams v. Smith, 1231.
Achorn v. Piper, 1218.
Ackenburgh v. McCool, 768.
Ackerson v. Erie R. Co., 951.
Ackley v. Kellogg, 931.
Adair v. Bogle, 865, 870.
Adams v. Barry, 1060.
v. Blankinstein, 931.
v. Blodgett, 1010, 1020, 1127.
v. Chicago, etc., R. Co., 1082.
v. Hall, 1059.
v. Hastings, etc., R. Co., 1016, 1042, 1046.
v. Haught, 887.
v. Keystone Manuf. Co., 1196.
v. McKenzie, 807.
v. O'Connor, 1097.
v. Robinson, 774.
v. Sayre, 768.
Adams Exp. Co. v. Stettaners, 904.
Adamson v. Jarvis, 793, 794.
v. Peterson, 1136.
v. Rose, 865.
Adden v. White M. R., 1066, 1071, 1084, 1086.
Addington v. Allen, 1170.
v. Cullinane, 1201, 1202.
Adkins v. Williams, 1206.
Adler v. Fenton, 1176.
Adreon v. Hawkins, 842.
Ætna Ins. Co. v. Church, 768.
v. Johnson, 813, 821.
v. Sabine, 787.
v. Stevens, 811.
v. Tyler, 810, 814.
Agate v. Lowenbein, 1034.
Agnew v. Johnson, 1109.
Agricultural etc., Ass'n v. State, 1273.
Ahrens v. Adler, 1171.
Aiken v. Benedict, 1035.
v. Telegraph Co., 957.
Aikin v. Buck, 1097.
Ainley v. Manhattan Ry. Co., 1252.
Ainslie v. Mayor, 993.
Ainsworth v. Ritt, 852.
Aird v. Fireman's Journal Co., 1225.
Alabama, The, and The Gamecock, 1296.
Alabama Gold L. Ins. Co. v. Garmany, 838.
Alabama, etc., R. Co. v. Burkett, 1082.
v. Frazier, 1246, 1253.
v. Hill, 1241.
v. Sellers, 937, 938.
v. Wilkinson, 938.
v. Yarborough, 1244, 1246, 1248.
Alaska, The, 1293.
Albany City Ins. Co. v. Whitney, 818.
Albany Street, In re, 1074.
Albert v. Blecker Street, etc., R. Co., 1098.
Alberts v. Albertz, 986, 990.
Alden v. Pearson, 917.
v. Wright, 1175.
Alderman v. French, 1224, 1227.
Aldrich v. Boston, etc., Co., 951.
Aldworth v. Lynn, 1044.
Alexander v. Baltimore, 1063.
v. Bishop, 864, 869.
v. Bradley, 1004.
v. Continental Ins. Co., 823.
v. Herr, 994, 1238.
v. Jenkins, 1204.
v. Kerr, 1037.
v. Railway Co., 1228.
v. Western U. T. Co., 961.
Alexandre v. Sun Ins. Co., 815.
Allaire v. Ouland, 793.
v. Whitney, 876, 1168.
Allan v. Mawson, 775.
Allegaert v. Smart, 848.
Allegheny v. Black, 1086.
Allegre v. Insurance Co., 813.
Allen v. Addington, 1166.
v. Baker, 988, 990.
v. Bates, 887.
v. Boston, 1067, 1074, 1077.

References are to sections.

Allen v. Brown, 774.
v. Butman, 1160.
v. Charlestown, 1085.
v. Coates, 1139.
v. Culver, 855.
v. Darby, 1155.
v. Dykers, 1109.
v. Fox, 1144, 1148, 1157.
v. Hillman, 1204.
v. Judson, 1160.
v. McConihe, 780.
v. McCoy, 1002.
v. Smith, 997.
v. South Boston R. Co., 1171.
v. Suydam, 775, 787.
v. Thayer, 1008.
v. Truesdell, 1165.
v. Worthy, 1038.
Allerton v. Allerton, 1174.
Alley v. Daniel, 1095.
v. Neeley, 1206.
Allgor v. Stillwell, 1535.
Alling v. Boston, etc., R. Co., 954.
Allison v. Chandler, 867, 868, 869, 1028, 1029, 1093.
v. Taylor, 999.
Alloway v. Nashville, 1064, 1068, 1074, 1075, 1083, 1091.
Allred v. Bray, 1030, 1098.
Allsop v. Allsop, 1218.
Allyn v. Providence R., 1082.
Alpin v. Morton, 1206.
Alt v. Weidenberg, 1097.
Alton, etc., R. Co. v. Carpenter, 1063.
Am Ende v. Seabury, 1191, 1196.
America, The, 1291.
American Bank N. Co. v. New York E. R. Co., 1080.
American Braided Wire Co. v. Thompson, 1196.
American Contract Co. v. Cross, 954.
American Exp. Co. v. Lesem, 931.
v. Parsons, 1132.
v. Patterson, 1258.
v. Sands, 904.
v. Second Nat. Bank, 917.
American Grocer v. Grocer Pub. Co., 1200.
American Ins. Co. v. Durham, 803.
v. Griswold, 806, 813.
American Central Ins. Co. v. McLanahan, 830.
American Life & H. Ins. Co. v. Robertshaw, 834.
American L. Ins. & Trust Co. v. Shultz, 839.
American U. T. Co. v. Daugherty, 958, 961.
Ames v. Hilton, 1031.
v. Palmer, 1108, 1136.
v. Schuesler, 842.
Amiable Nancy, The, 773, 1290, 1296.
Amory v. Hamilton, 770, 782.
v. McGregor, 920.
Amoskeag Manuf. Co. v. Garner, 1201.
v. Spear, 1200.
v. Worcester, 1074.
Ampleman v. Citizens' F. Ins. Co., 807.
Amsden v. Floyd, 842.
Anchor Milling Co. v. Walsh, 1144, 1157.
Anderson v. Buckton, 1028.
v. Chicago, etc., Ins. Co., 848.
v. Durant, 1137.
v. Fisk, 999.
v. Pittsburgh L. Co., 1190.
v. Reynolds, 876.
v. Ryan, 1283.
v. Sloane, 1101, 1102, 1103, 1129, 1151.
Anderson, etc., R. Co. v. Kernodle, 1038, 1039.
Andes Ins. Co. v. Fish, 814.
Andrews v. Chicago, etc., Ry. Co., 1277.
v. Clark, 1112.
v. Durant, 920, 1109.
v. Hartford, etc., R. Co., 1260.
v. Jones, 873.
v. Van Duser, 1212, 1226.
Angell v. Hartford Ins. Co., 802, 820.
Anglo-American P. & P. Co. v. Baie, 1243.
Angus v. Clifford, 1169.
Annas v. Milwaukee, etc., R. Co., 1265.
Ann D. Richardson, The, 887.
Anonymous, 1155, 1204, 1221, 1226.
Ansyln v. Frank, 1171.
Anstell v. Crawford, 778.
Anthony v. Stephens, 1227.
Applegate v. Ruble, 1283.
Archer v. Williams, 1118.
Arden v. Pullen, 851.
Area v. Milliken, 772.
Argentino, The, 1290, 1292.
Argotsinger v. Vines, 1019.
Arkansas Cattle Co. v. Mann, 1108, 1109.
Arkwright v. Newbold, 1172.
Armory v. Delamirie, 1097, 1113.
Armroyd v. Union Ins. Co., 890.
Armstrong v. Jackson, 1243.
v. Wheeler, 850.
Armytage v. Haley, 953.
Arnold v. Covington Bridge, 1083.
v. Illinois C. R. Co., 904.
v. Kelly, 1108.
v. Woodward, 1000.
Arrington v. Wilmington, etc., R. Co., 931.

References are to sections.

Arrott v. Brown, 784.
Arthur v. Franklin, 1007.
v. Lane, 1157.
v. Ship Cassius, 918.
Arzaya v. Villalba, 1145, 1146.
Ash v. Marlow, 1239.
Ashburner v. Balchen, 878.
Asher v. Louisville & N. R. Co., 1064, 1087.
Ashford v. Choate, 1223.
Ashmead v. Wilson, 993.
Ashland Mut. Ins. Co. v. Housinger, 827.
v. Thompson, 821.
Ashley v. Harrison, 1219.
v. Root, 768.
v. Warner, 864, 869.
Ashmore v. Penn. S. T. Co., 904.
Aslin v. Parkin, 992, 993.
Aspinwall v. Chicago, etc., R. Co., 1083.
v. Torrance, 797.
Astor v. Miller, 849.
Atchinson v. Baker, 983.
Atchison v. King, 1246.
v. Steamboat, 1101.
Atchison, etc., R. Co. v. Blackshire, 1064.
v. Gough, 1072, 1088.
v. McGinnis, 1245, 1249.
v. Miller, 884.
v. Moore, 1256.
v. Rice, 1257.
v. Washburn, 904.
v. Wilson, 1266, 1268.
Atherton v. Fowler, 1157.
Atkin v. Merrell, 1003.
Atkins v. Chilson, 856.
v. Gladwish, 1245.
v. Yeoman, 1004.
Atkinson v. Beall, 856.
v. Burton, 777.
v. Hewett, 1034.
v. Stewart, 1007.
v. Ward, 769, 774.
Atkisson v. The S. B. Castle Garden, 918.
Atlanta v. Central R. Co., 1087.
v. Dooley, 1098.
v. Green, 1084.
v. Word, 1056.
Atlanta Ins. Co. v. Manning, 810, 811.
Atlanta, etc., R. Co. v. Johnson, 1251.
v. Hodnett, 1174.
v. Newton, 1265, 1268.
v. Texas Grate Co., 932.
v. Venable, 1269.
v. Wood, 1243.
Atlantic Bank v. Harris, 1171.
Atlantic, etc., Coal Co. v. Maryland Coal Co., 1011, 1020, 1031.
Atlantic Milling Co. v. Robinson, 1201.
v. Rowland, 1201.
Atlantic, etc., R. Co. v. Campbell, 1089.
v. Dunn, 950.
v. Hudson, 1101.
v. Koblentz, 1091.
v. Robbins, 1039, 1046.
Atlas, The, 1288, 1296.
Atlee v. Northwestern Union Packet Co., 1288.
Attack v. Bramwell, 1140.
Attersol v. Stevens, 1012.
Attix v. Pelan, 870.
Attorney-General v. Guardian Mut. L. Ins. Co., 838.
v. Stewart, 1035.
v. Tomline, 1014.
Atwater v. Whiteman, 1172.
Atwell v. Miller, 896.
Atwill v. Mackintosh, 1204.
Attwood v. Bangor, 1035.
Atwood v. Union Mut. F. Ins. Co., 814, 827.
Au v. New York, etc., R. Co., 1265, 1266.
Aubery v. Fisk, 769.
Auburn, etc., P. R. Co. v. Douglass, 1200.
Auchmuty v. Ham, 1059.
Audenried v. Woodward, 845.
Auditor v. Crise, 1082.
Augusta v. Cunningham, 794.
v. Marks, 1087.
Augusta & S. R. Co. v. Randall, 1243, 1256.
Aultman v. Lee, 776.
Aurora v. Gillett, 1051.
v. Reed, 1061.
Aurora F. & M. Ins. Co. v. Kranick, 811.
Aurora Hill Mining Co. v. Eighty-five Mining Co., 1020.
Austin v. Bacon, 1210.
v. Barrows, 1176.
v. Debman, 1235.
v. Field, 852.
v. Hanchett, 1233.
v. Huntsville Coal & M. Co., 1020.
v. Jones, 1153.
Autenrieth v. St. Louis, etc., R. Co., 1047.
Avent v. Hord, 992, 993.
Averett v. Brady, 994, 996, 999.
Avery v. Brown, 876.
v. Halsey, 793.
v. Meikle, 1201.
v. Ray, 1244, 1255.
Avinger v. South Carolina Ry. Co., 930.
Avon Marine Ins. Co. v. Barteaux, 818.

References are to sections.

Ayer v. Bartlett, 1034, 1114.
v. Spring, 1002.
v. Western U. T. Co., 958, 973.
Ayre v. Craven, 1204.
Ayres v. Chicago & N. R. Co., 898, 907, 933.
v. Covill, 1226.
v. French, 1108.
v. Hartford Ins. Co., 810.
v. Hubbard, 1020, 1127, 1128.

B—— v. I——, 1211, 1212.
Babb v. Curators of State University, 1042, 1054.
v. Talcott, 1161.
Babcock v. Gill, 1126.
Babonneau v. Farrell, 1213.
Backenstoss v. Stahler, 1157.
Backus v. Gould, 1199.
v. Richardson, 1204.
Bacon v. Bronson, 1163.
v. Frisbie, 1167.
v. Towne, 1239, 1240.
Baddeley v. Mortlock, 989.
Badeley v. Vigurs, 859
Baden v. McKenney, 1002.
Badgley v. Decker, 1281, 1282, 1283.
Bahia v. San Francisco Ry. Co., In re, 1122, 1171.
Bailey v. Damon, 879, 880, 887.
v. Dean, 1223.
v. Godfrey, 1136.
v. Hyde, 1226, 1228.
v. Kalamazoo Pub. Co., 1233.
v. Mayor, 1090.
v. Shaw, 918, 933.
Bain v. Brown, 768.
v. Clark, 769.
Bailiff of Ipswich v. Martin, 849.
Baird v. Hall, 774.
v. Shipman, 800.
Baker v. Ashe, 1171.
v. Bolton, 1259.
v. Boston, 1058.
v. Brinson, 917.
v. Cartwright, 983.
v. Drake, 768, 778, 781, 786, 1096, 1119.
v. Freeman, 1104, 1141.
v. Hart, 1126, 1128.
v. Holtpzaffell, 841.
v. Madison, 1256.
v. Root, 842.
v. Sanderson, 1056.
v. Wheeler, 1020, 1110, 1115, 1126.
Baldridge v. Dawson, 1151, 1160.
Baldwin v. Liverpool, etc., Co., 885.
v. London, etc., Ry. Co., 916.
v. Porter, 1020, 1141.
v. Soule, 1206.
v. Sullivan Timber Co., 897.
Baldwin v. United States T. Co., 914, 957, 958, 959, 971.
v. Western R. Co., 1246, 1247, 1248.
Baldy v. Stratton, 986.
Balfour v. Louisville, etc., R. Co., 1064.
Ball v. Bruce, 1282.
v. Campbell, 1141.
v. Clark, 786.
v. Liney, 1105, 1139, 1141.
v. Nye, 1035.
v. Ocean Ins. Co., 819.
v. Wyette, 855.
Ballard v. Russell, 1252.
Ballingalls v. Gloster, 775.
Ballou v. Farnum, 946, 1243, 1246, 1248.
Baltimore, The, 1290, 1291.
Baltimore v. Reynolds, 796.
Baltimore F. Ins. Co. v. Loney, 832.
Baltimore M. Ins. Co. v. Dalrymple, 1110, 1118, 1137.
Baltimore, etc., Ry. Co. v. Kemp, 1244.
v. State, 1260, 1263.
Baltimore & O. R. Co. v. Blocher, 941, 942, 950.
v. Boyd, 1010, 1014, 1031.
v. Brenig, 941.
v. Carr, 938, 939, 942.
v. Lansing, 1072.
v. Noell, 1271.
v. Pumphrey, 903, 913.
v. Rathbone, 904.
v. Reaney, 1053.
v. Skeels, 904.
v. Smith, 954.
v. Wightman, 1265, 1267, 1268, 1271.
Baltimore & P. R. Co. v. Fifth Baptist Church, 1035, 1038, 1051.
Baltimore & L. Turnpike Co. v. Cassell, 1244.
Baltzen v. Nicolay, 796, 797.
Bamfield v. Massey, 1212, 1284.
Bancroft v. Peters, 896.
v. Wardwell, 841.
Bandy v. Cartwright, 863.
Bangor Furnace Co. v. Magill, 877, 879.
Bangor, etc., R. Co. v. McComb, 1063, 1064, 1066, 1072, 1091.
Bank v. Burton, 1109.
Banker v. Caldwell, 1198.
Bankhead v. Alloway, 1169.
Bank of British N. A. v. Western Ass. Co., 806.
Bank of Commerce v. Owens, 1007.
Bank of Kentucky v. Adams Exp. Co., 904.

References are to sections.

Bank of Montgomery v. Reese, 1109, 1121.
Bank of Orange v. Brown, 768.
Bank of Orleans v. Smith, 775.
Bank of Owensboro v. Western Bank, 786.
Bank of Rochester v. Gray, 775.
Bank of Upper Canada v. Widmer, 1132.
Bank of U. S. v. Bank of Washington, 799.
Bank of Utica v. Smedes, 775.
Bank of Washington v. Triplett, 775.
Bank of Woodland v. Hiatt, 1168, 1169.
Banks v. Hatton, 1115.
v. Judah, 768.
Bannon v. Warfield, 786.
Barber v. Barber, 1210.
Barbour v. Stephenson, 1283, 1284.
Barbour County v. Horn, 1251.
Barclay v. Pickles, 853.
Barclay R., etc., Co. v. Ingham, 1067.
Barden v. Portage, 1048.
Bare v. Hoffman, 1016, 1038, 1039, 1047.
Barelli v. Hagan, 819.
Bares v. Steamship Co., 906.
Barham v. Massey, 1160.
Barhans v. Sanford, 1235.
Barker v. Anderson, 1258.
v. Baltimore, etc., R. Co., 819.
v. Braham, 1258.
v. Hodgson, 830.
v. Phenix Ins. Co., 814.
v. Railway Co., 1280.
Barlass v. Braash, 1109.
Barley v. Chicago, etc., R. Co., 1263.
Barlow v. Brands, 1206.
v. Lowder, 1242, 1251.
Barmon v. Lithauer, 1176.
Barnard v. Adams, 818, 819.
v. National F. Ins. Co., 806, 807.
v. Poor, 1101.
Barnes v. Bartlet, 1152, 1157.
v. Campbell, 1209, 1210.
v. Gay, 1006.
v. Hurd, 1252.
v. Keene, 1252.
v. Marshall, 887.
v. Martin, 1252.
v. Prudlin, 1219.
v. Strudd, 1220.
v. Viall, 1258.
Barnet v. Barnet, 1003.
Barnett v. Lucas, 1260.
v. Reed, 1235.
v. St. Anthony Falls Water Power Co., 1017.
Barney v. Douglass, 1144.
v. Dudley, 1133.
v. Frowner, 1002.
Barnsley Canal Co. v. Turbill, 1074.
Barnum v. Vandusen, 1028.
Baron v. Abeel, 993.
Barr v. Hack, 1208.
v. Moore, 1208.
Barrante v. Garrett, 1119.
Barrelett v. Bellgard, 1103, 1104, 1129.
Barrett v. Dutton, 897.
v. Rockport Ice Co., 1022.
v. Western U. T. Co., 958.
v. White, 1106.
Barrick v. Schifferdecker, 1047, 1048.
Barrill v. Philips, 790.
Barron v. Mason, 1239, 1240.
Barrow v. Arnaud, 1101, 1129.
Barry v. Bennett, 1109.
v. Pike, 797.
Bartlett v. Brickett, 1144.
v. Budd, 1142, 1296.
v. Carnley, 887.
v. Farrington, 863, 876.
v. Hamilton, 776.
v. Hoyt, 1136.
v. Kochel, 1282, 1284.
v. Western U. T. Co., 957, 958.
Bartlette v. Crittenden, 1198.
Bartley v. Richtmeyer, 1281, 1282.
Barton v. Steamship Co., 920.
Barton Coal Co. v. Cox, 1020, 1021.
Bartram v. Stone, 1253, 1255.
Barwell v. Adkins, 1207.
Basch v. Humboldt Ins. Co., 811.
Bass v. Chicago, etc., R. Co., 951, 953, 1256.
Bassett v. Elmore, 1218.
Bastable v. Denegre, 789, 793.
Bastard v. Bastard, 884.
Bate v. McDowell, 774, 784.
Bateman, Ex parte, 772, 862.
Bateman v. Blake, 1156, 1158.
v. Goodyear, 1030, 1031.
Bates v. Callender, 1131.
v. Clark, 1102, 1104.
v. Courtwright, 1105, 1141.
v. Murphy, 1138.
v. St. Johnsbury, etc., R. Co., 1184.
v. Stansell, 1118.
v. Stanton, 1136.
Batson v. Donovan, 885, 925.
Batten v. Wedgwood Coal & Iron Co., 800.
Battin v. Bigelow, 992.
Battishill v. Reed, 1046.
Baugher v. Wilkins, 863.
Baughman v. Gould, 1169.
Bauman v. Bean, 1255.
Baumier v. Antiau, 865, 871.
Baxendale v. Eastern, etc., Ry. Co., 884.
v. London, etc., Ry. Co., 787.
Baxter v. Massasoit Ins. Co., 802.

References are to sections.

Baxter v. Ryerss, 865.
v. Taylor, 1033.
v. Wynoski T. Co., 1058.
Baylis v. Lintott, 954.
Bayliss v. Fisher, 1094.
Bayly v. Lawrence, 852.
Bazon v. Steamship Co., 1102.
Beach v. Berdell, 1136.
v. Crain, 856.
v. Ranney, 1218, 1221.
v. Raritan, etc., R. Co., 1139.
Beadle v. Whitlock, 1103, 1104.
Beadles v. Hartmus, 779.
Beal v. Robeson, 1240.
Beale v. Sanders, 855.
Beall v. January, 787.
v. Rust, 1129.
Beals v. Home Ins. Co., 816, 830.
Bean v. Drew, 787.
v. Travelers' Ins. Co., 836.
v. Wells, 1171.
Beard v. Murphy, 1053.
Beardslee v. Richardson, 769, 775.
Beardsley v. Bridgman, 1206, 1227, 1228.
v. Davis, 772, 862.
v. Swann, 1242, 1250.
Beasley v. Meigs, 1224.
v. Western U. T. Co., 958, 975, 982.
Beatrice v. Havener, 1290.
Beattie v. Ebury, 1169.
Beaty v. Gibbons, 1097.
Beaupri v. Pacific, etc., T. Co., 959, 971.
Beavan v. Delahay, 855.
Beavers v. Smith, 1003.
v. Trimmer, 1035.
Becher v. Great Eastern Ry. Co., 954.
Beck v. Dowell, 1254.
Becker v. Dunham, 1136.
v. Western U. T. Co., 958.
Beckman v. Shouse, 769, 775.
Beckwith v. Griswold, 1038.
v. New York C. R. Co., 1251.
v. Sibley, 790.
Bedell v. Powell, 1218.
v. Shaw, 999.
Bedingfield v. Onslow, 1012.
Beebe v. Knapp, 1169.
Beede v. Lamprey, 1109, 1127, 1128.
Beeson v. Green Mt. G. M. Co., 1263, 1266.
Behm v. Western U. T. Co., 959.
Belcher v. Costello, 1166.
v. McIntosh, 855.
Belck v. Belck, 1206.
Belden v. Perkins, 1137.
Belfast, etc., Ry. Co. v. Keys, 954.
Belford v. Scribner, 1199.
Belfour v. Weston, 851.
Belgenland, The, 1290, 1292, 1293.
Belger v. Dinsmore, 925.
Belknap v. Boston, etc., R. Co., 1092.
Bell's Case, 838.
Bell v. Barnet, 996, 999.
v. Bartlett, 1157.
v. Cunningham, 773, 781.
v. Farnsworth, 1226.
v. Great Northern Ry. Co., 943.
v. Howard, 1217.
v. Mayor, 1007.
v. Parke, 1227.
v. Pearcy, 1239, 1240.
v. Puller, 881.
v. Smith, 819.
v. United States Stamping Co., 1185, 1190.
Bellamy v. Burch, 1204.
Bellinger v. Gervais, 776.
Bellingham Bay, etc., R. Co. v. Strand, 1088.
Belo v. Wren, 1206.
Bench v. Merrick, 989, 990.
v. Sheldon, 1166.
Benjamin v. Benjamin, 1023, 1127.
v. Storr, 1058.
Benjamin F. Hunt, The, 1293.
Benkard v. Babcock, 876.
Benner v. Evans, 1003.
Bennet v. Bittle, 847, 863.
Bennett v. Beam, 984, 986, 988, 990, 1281.
v. Bennett, 1233.
v. Bryam, 894, 903.
v. Gibbons, 1177.
v. Hyde, 1210, 1211.
v. Judson, 1169.
v. Lockwood, 1103, 1141.
v. Matthews, 1212, 1226, 1230.
v. Terrill, 1163.
v. Thompson, 1012, 1020, 1127.
Bensley v. Mountain L. W. Co., 1083.
Benson v. Chapman, 807.
v. Chicago & A. R. Co., 1039.
v. Matsdorf, 992.
v. New Jersey R. & T. Co., 911, 939.
Benson M. & S. Co. v. Alta M. & S. Co., 1020, 1126.
Bentaloe v. Pratt, 819.
Bentley v. Sill, 847.
Benton v. Brookline, 1064, 1073, 1083.
v. Pratt, 1166, 1171, 1176.
Bercich v. Marye, 1144, 1148, 1158.
Berg v. Baldwin, 1092.
Berger v. Jacobs, 1252.
Bergholf v. Heckwolf, 1156, 1157.
Bergmann v. Jones, 1214, 1216.
Bernard v. Maury, 774.
Beronio v. Southern P. R. Co., 1017.
Berrian v. Olmstead, 872.
Berry v. Adamson, 1535.
v. Bakeman, 989.

References are to sections.

Berry v. Cooper, 917.
v. Da Costa, 986.
v. Hoefner, 1152.
v. Vantries, 1131, 1157.
v. Vreeland, 988, 1095.
Berthold v. Fox, 1148, 1157.
Bessent v. Harris, 774.
Besso v. Southworth, 1052, 1054.
Besson v. Southard, 1235.
Best v. Allen, 1032.
Bethea v. McLennon, 1153.
Betsey Carnes, The, 1290.
Betteley v. Stainsby, 772, 862.
Betts v. Church, 1108.
v. Gibbons, 794.
v. Lee, 1126.
v. Williamsburgh, 1063.
Bevan v. Cullen, 769.
Beveridge v. Welch, 1102, 1151, 1157.
Bevin v. Connecticut Mut. L. Ins. Co., 832, 833.
Biays v. Chesapeake Ins. Co., 813.
Biddle v. Hussman, 849, 853, 1081.
Bidwell v. Madison, 775.
Bierbach v. Goodyear Rubber Co., 1102, 1246.
Bierbauer v. New York, etc., R. Co., 953.
Bigelow v. Collamore, 855.
v. Doolittle, 1144, 1147.
v. Rising, 1012.
v. Sprague, 1207.
v. Walker, 777.
v. West W. R. Co., 1064, 1066.
Bigelow Carpet Co. v. Dobson, 1185, 1190.
Bigelow Co. v. Heintze, 1139, 1140.
Bignell v. Buzzard, 1219.
Bignold, Ex parte, 775.
Billany v. Smith, 847.
Bills v. New York C. R. Co., 931.
Binford v. Young, 1210.
Binns v. McCorkill, 1233.
Binsse v. Wood, 854.
Birch v. Wright, 841.
Birchfield v. Russell, 1212.
Bird v. Hannibal, etc., Ry. Co., 1055.
v. Kleiner, 1169.
v. Thompson, 984.
Birdsall v. Coolidge, 1182, 1183, 1184, 1188, 1189, 1196.
Birket v. Williams, 1019.
Birkett v. Knickerbocker Ice Co., 1273, 1274.
Birney v. New York, etc., T. Co., 957, 958.
v. Wabash, etc., Ry. Co., 906, 933.
Birnie v. Main, 1006.
Bisbey v. Shaw, 1224, 1228, 1230.
Bishop v. Baker, 1030.
v. Globe Co., 1280.
Bishop v. Small, 1166.
v. Williamson, 1101.
Bissell v. Hopkins, 1115.
Bitner v. Utah C. Ry. Co., 1256.
Bize v. Dickason, 783.
Black v. Baxendale, 911.
v. Camden, etc., R. Co., 907, 918.
v. Carrollton R. Co., 944.
v. Goodrich Transp. Co., 904, 925.
v. Midland R. Co., 1262.
v. Munson, 1193.
v. Robinson, 1095, 1096, 1109.
v. Thorne, 1190.
Blackburn v. Mann, 986.
Blackmar v. Thomas, 789.
Black River & M. R. Co. v. Barnard, 1075.
Blackstock v. New York & E. R. Co., 903.
Blackstone v. Allemania Ins. Co., 840.
Blackwell v. Acton, 1146.
Blachinska v. Howard Mission, etc., 1249.
Blaen Avon Coal Co. v. McCulloch, 1010, 1020.
Blagge v. Ilsley, 1283.
Blair v. Chicago & A. R. Co., 1252.
v. Childs, 779.
v. Claxton, 847, 876.
v. Milwaukee, etc., R. Co., 1102.
Blake v. Burnham, 865.
v. Exchange Mut. Ins. Co., 822, 827.
v. Greenwood Cemetery, 1184, 1185.
v. Midland Ry. Co., 942, 977, 1243, 1260.
v. Robertson, 1184, 1185.
v. Stevens, 1228.
Blakeman v. Blakeman, 1217.
Blanchard v. Burbank, 1257, 1258.
v. Ely, 868.
v. Hill, 1200.
v. Ilsley, 1282.
v. Page, 923.
Bland v. Hixenbaugh, 1072, 1085.
Blasdale v. Babcock, 795.
Blesch v. Chicago, etc., R. Co., 1016, 1046.
Bliss v. Baltimore & O. T. Co., 966.
v. Collins, 849.
v. Hall, 1035.
Blizzard v. Hays, 1240.
Block v. Sweeney, 1096, 1098, 1105.
Blofield v. Payne, 1200.
Blood v. Wilkins, 770.
Bloodgood v. Mohawk, etc., R. Co., 1061.
Bloomington v. Miller, 1064.
Blossom v. Lycoming F. Ins. Co., 811.
Blot v. Boiceau, 770, 778, 1120.

References are to sections.

Blount v. Garen, 992.
Blue Earth Co. v. St. Paul, etc., R. Co., 1066.
Blum v. Merchant, 1109.
Blumenthal v. Brainerd, 918, 920.
Blumhardt v. Rohr, 1204, 1208, 1214.
Blunk v. Atchison, etc., R. Co., 1237, 1239.
Blunt v. Aikin, 1040.
v. McCormick, 1038.
Bly v. United States, 1126.
Blyth v. Smith, 857, 865.
Blythe v. Pratt, 853.
v. Tompkins, 1257.
Board v. Head, 1141.
Boardman v. Goldsmith, 1031.
Board of Comm'rs v. Legg, 1266, 1267.
Bodenham v. Bennett, 904.
Bodkin v. Western U. T. Co., 959.
Bodley v. Reynolds, 1117, 1129.
Bodwell v. Osgood, 1208, 1210, 1213.
v. Swan, 1206, 1210, 1227, 1228.
Boesch v. Graff, 1196.
Bogardus v. Parker, 876, 1003.
Bohan v. Port Jarvis G. L. Co., 1035.
Bohannon v. Lewis, 885.
Bohm v. Metropolitan E. R. Co., 1064, 1080.
Bohn v. Cleaver, 899, 900.
Bold v. O'Brien, 872.
Bolinger v. St. Paul, etc., Ry. Co., 1266.
Bolling v. Lersner, 994.
Bolton v. Ballard, 1007.
v. O'Brien, 1210.
Bomar v. Maxwell, 954.
Bonaparte v. Camden, etc., R. Co., 1061.
Bond v. Chapin, 1236.
v. Mitchell, 1136.
Bondrett v. Hentigg, 803.
Bondurant v. Crawford, 1168.
Bonesteel v. Bonesteel, 1257.
Bonino v. Caledonio, 1255.
Bonner v. Coleman, 1156.
v. Peterson, 1004, 1007.
v. Welborn, 1054.
Bonnin v. Elliott, 1216.
Bononi v. Backhouse, 1053.
Bonsall v. McKay, 1032.
Bonsteel v. Vanderbilt, 936.
Boogher v. Bryant, 1238.
Booker v. Venice & C. Ry. Co., 1081.
Boom Co. v. Patterson, 1074.
Booth v. Powers, 1132.
v. Sherwood, 1009.
v. Spuyten Duyvil R. M. Co., 913, 914.
Boothby v. Androscoggin, etc., R. Co., 1053.
Bopp v. Fox, 1007.
Borden v. Hingham Mut. F. Ins. Co., 821.
Boreel v. Lawton, 848.
Bork v. Norton, 888.
Borland v. Barrett, 1243.
Borlander v. Gentry, 1107.
Bornman v. Tooke, 896.
Borup v. Nininger, 775.
Boster v. Chesapeake & O. Ry. Co., 953.
Bostick v. Rutherford, 1239, 1240.
Boston, The, 918, 931.
Boston Carpet Co. v. Journeay, 769.
Boston Loan Co. v. Myers, 1144, 1157.
Boston Water-power Co. v. Boston, 1061.
Boston & A. R. Co. v. Greenbush, 1077.
v. Richardson, 1171.
Boston, etc., Ry. Co., In re, 1075.
Boston & M. R. v. Montgomery, 1070.
Boston & W. R. v. Old Colony R., 1078, 1084.
Bostwick v. Losey, 873, 874.
Botelar v. Bell, 1232.
Bottorf v. Wise, 994.
Boucher v. Sherwan, 1117.
Boucicault v. Wood, 1198, 1199.
Boulter v. Webster, 1264.
Bourke v. Cork, 1268.
Bourland v. Eidson, 1228, 1232.
Bourne v. Ashley, 1109, 1113, 1142, 1296.
Boutell v. Warne, 1137.
Boutwell v. Harriman, 1127.
Bovee v. Danville, 1243.
Bowas v. Pioneer Tow Line, 1244.
Bowe v. Hunking, 872.
Bowen v. Atlanta, etc., R. Co., 1066, 1089.
v. Hall, 1226, 1227.
v. Lake Erie T. Co., 963.
v. Morris, 798.
v. New York C. R. Co., 941.
Bower v. Birdsell, 1137.
v. Derideker, 1230.
v. Fenn, 1167, 1169.
Bowers v. Union P. R. Co., 1256.
Bowes v. Howe, 775.
Bowie v. Berry, 1002.
Bowles v. Rome, etc., R. Co., 1274.
Bowman v. Parker, 1171, 1174.
v. Teal, 903.
Bowyer v. Cook, 1036, 1040.
Boyce v. Cannon, 1144.
v. Wabash Ry. Co., 1280.
Boyd v. Brown, 1102.
v. Browne, 1169.
v. Byrd, 1282.
v. Cowan, 992.
v. Fitt, 770.
v. Negley, 1091.

References are to sections.

Boyer v. Boyer, 1007.
Boylan v. Huguet, 1109, 1118, 1129.
Boylston Ins. Co. v. Davis, 1124, 1153.
Boynton v. Chase, 874.
v. Clinton, etc., Ins. Co., 821.
v. Kellogg, 989, 990.
Bracegirdle v. Orford, 1030, 1095.
Bracey v. Kibbe, 1282, 1283.
Bracken v. Neill, 1101.
Bracket v. McNair, 900, 906.
Bradburn v. Great Western R. Co., 949.
Braden v. Walker, 1224.
Bradford v. Boylston Ins. Co., 813.
v. Fox, 775, 776.
Bradford Oil Co. v. Blair, 845, 854.
Bradhurst v. Columbian Ins. Co., 819, 888, 890.
Bradlaugh v. Edwards, 1238.
Bradley v. Amis, 1038.
v. Burkett, 1136.
v. Cramer, 1206, 1207, 1209, 1210.
v. Davenport, 841.
v. Denton, 878, 880.
v. Fuller, 1176.
v. Gamelle, 1147.
v. Gardner, 1232.
v. Rea, 1165.
v. Richardson, 783.
Bradlie v. Maryland Ins. Co., 807.
Bradshaw v. Buchanan, 1031.
v. Rogers, 1061.
Bradstreet v. Baldwin, 888.
Bradt v. Towsley, 1218.
Brady v. Northwestern Ins. Co., 830.
v. Weeks, 1035.
v. Whitney, 1139.
Brainerd v. Arnold, 845.
Braithwaite v. Power, 887, 903.
Brakken v. Minneapolis, etc., Ry. Co., 1016.
Brand v. Henderson, 789.
Brandon v. Allen, 1235.
Brannin v. Johnson, 1096.
Brashear v. Chandler, 855.
Brasher v. Holtz, 1109.
Brass v. Worth, 1120.
Brauer v. The Almoner, 917.
Bray v. Gunn, 787.
Bredow v. Mutual Savings Inst., 1132.
Breed v. Eastern R. Co., 1081.
Breese v. United States T. Co., 958.
Breon v. Henkle, 1282.
Bresnahan v. Michigan C. R. Co., 1260.
Brewer v. American Ins. Co., 806, 814.
v. Beckwith, 992.
v. Dew, 1094, 1107.
v. Jacobs, 1238, 1240.
v. Palmer, 841.
Brewster v. De Fremery, 872.
v. Silliman, 1148, 1154.
v. Sussex R. Co., 1046.
v. Van Liew, 1109, 1118.
Brichta v. New York Ins. Co., 828.
Brickett v. Davis, 1227.
Bridge v. Oshkosh, 1256.
Bridger v. Asheville & S. R. Co., 1252.
Bridges v. Dill, 1024.
Bridgman v. Hopkins, 1226, 1227.
v. Steamboat Emily, 900.
Brierly v. Kendall, 1097.
Brigg Collenberg, The, 887.
Briggs v. Boston, etc., R. Co., 1136, 1137.
v. Brushaber, 1171.
v. Evans, 1281, 1282.
v. Hall, 847, 848.
v. New York C. R. Co., 903, 911.
Brigham v. Carlisle, 868.
Bright v. Boyd, 999.
Brightman v. Reeves, 1132.
Brinckerhoff v. Wemple, 1082.
Bringard v. Stellwagen, 1140.
Brink v. Dolsen, 785.
v. Freoff, 1137.
v. Hanover Fire Ins. Co., 811.
v. Kansas City, etc., Ry. Co., 1055.
Brinkley v. Walcott, 842.
Brinley v. National Ins. Co., 821, 824, 830.
Brinsmead v. Harrison, 1108.
Brisbane v. Pomeroy, 1171, 1172.
Brisbine v. St. Paul, etc., R. Co., 1082.
Briscoe v. McElween, 1096, 1109.
Bristol, The, 1291.
Bristol Manuf. Co. v. Gridley, 1060, 1247.
British Columbia, etc., Co. v. Nettleship, 920.
Brittain v. Barnaby, 887.
Brittanic, The, 1296.
Britton v. Street Ry. Co., 1251.
Brizsee v. Maybee, 1144, 1145, 1152, 1157, 1158.
Broadwell v. Paradice, 1156, 1157.
Brock v. Gale, 914.
Brockway v. Thomas, 868.
Brodie v. Ophir S. M. Co., 1184, 1188.
Brolaskey v. Loth, 843.
Bromley v. Wallace, 1285.
Bronson v. Bruce, 1204, 1208, 1231, 1233.
Brooke v. Clarke, 1256.
v. Louisiana Ins. Co., 817.
Brooker v. Coffin, 1204.
v. McLean, 1025.
Brooklyn E. R. Co., In re, 1080.
Brooklyn L. Ins. Co. v. Weck, 838.
Brooks v. Cunningham, 846.

References are to sections.

Brooks v. Harrison, 1204, 1216.
v. MacDonnell, 815.
v. Oriental Ins. Co., 817.
v. Schwerin, 1252.
Brosnan v. Sweetzer, 1250.
Broughton v. McGrew, 1211.
Broussard v. Sabine, etc., Ry. Co., 1049.
Brower v. Merrill, 1056.
Brown v. Adams, 846.
v. Allen, 1031, 1095, 1098, 1113, 1118.
v. Arrott, 769, 770, 771, 775, 784.
v. Barnes, 1210.
v. Barrington, 872.
v. Beatty, 1292.
v. Blunt, 1163.
v. Bridges, 1095.
v. Brown, 1002.
v. Calumet River Ry. Co., 1089.
v. Chadsey, 1257, 1258.
v. Chapman, 1235.
v. Chicago, etc., R. Co., 938, 939, 940, 942, 1244, 1246.
v. Clayton, 789, 792.
v. Condry, 1102.
v. Corey, 1089.
v. Cunard Steamship Co., 927.
v. Cunningham, 1022.
v. Evans, 1253, 1255.
v. Galloway, 994.
v. Gray, 1166.
v. Hannibal, etc., R. Co., 949, 1242, 1243.
v. Haynes, 1137.
v. Illius, 1035.
v. Lake, 1030.
v. McCloud, 992.
v. McGran, 778, 779.
v. Manter, 1010.
v. Memphis & C. R. Co., 938, 950, 953.
v. Montgomery, 1132.
v. Murdock, 1109.
v. Nickerson, 1213.
v. Orvis, 1230.
v. Phœnix Ins. Co., 807.
v. Quincy Mut. F. Ins. Co., 816.
v. Ralston, 887, 890.
v. Royal Ins. Co., 830.
v. Sax, 1020, 1126.
v. Smith, 1102, 1162, 1239.
v. Southern P. R. Co., 1256.
v. Stanford, 1155.
v. Stapyleton, 818.
v. Sullivan, 1242, 1243.
v. Swineford, 1253.
v. Thomas, 1097.
v. Ware, 1097.
v. Watson, 1057.
v. Western U. T. Co., 958, 961, 965.
Brown v. Windsor, 1053.
v. Woodliff, 1047.
v. Woods, 1171, 1173.
v. Worcester, 1077.
Brownell v. McEwen, 1283.
Browning v. Skillman, 1097.
Bruce v. Cincinnati R. Co., 1280.
v. Davenport, 768.
v. Jones, 806.
v. Reed, 1216, 1231.
v. Soule, 1204.
v. Welch, 875.
Bruen v. Ogden, 1149.
Brunson v. Lynde, 1212.
Brunswick v. Harmer, 1207.
Brunswick, etc., R. Co. v. McLaren, 1089.
Brunswig v. White, 1272.
Brushaber v. Stegemann, 1257.
Bryant v. American T. Co., 914, 958, 965.
v. Commonwealth, 807.
v. Rich, 941.
v. Southwestern R. Co., 904.
Buchan v. Sumner, 1007.
Buck v. Hermance, 1185, 1188.
v. Hersey, 1213.
v. Pike, 856.
v. Remsen, 1136.
v. Rodgers, 873, 874.
Buckland v. Hall, 849.
Buckle v. Knoop, 887.
Buckley v. Artcher, 1167.
v. Buckley, 1148, 1150, 1153, 1158.
Bucklin v. Beals, 1140.
Buckmaster v. Grundy, 854.
v. Smith, 1137.
Bucknam v. Nash, 1054.
Budd v. Crea, 989, 990.
v. Multnomah St. Ry. Co., 1119, 1135.
v. Walker, 993.
Buddin v. Fortunato, 1012.
Buddington v. Shearer, 1059.
Budlong v. Cunningham, 1171.
Buerk v. Imhauser, 1186, 1189, 1193, 1196.
Buffalo v. Pratt, 1077.
Buffalo, etc., R. Co. v. Brainard, 1061.
v. Ferris, 1087.
Buford v. Caldwell, 1169.
Bulkley v. United States, 878.
Bull v. Gould, 1255.
Bullard v. Bowers, 1006, 1007.
Buller v. Harrison, 799.
Bullock v. Cloyes, 1209.
v. Dommitt, 855.
Bumstead v. Dividend Mut. Ins. Co., 811.
Bunnell v. Greathead, 1285.
Burckhalter v. Coward, 1210, 1224.
Burdell v. Denig, 1183, 1185, 1189, 1190.

References are to sections.

Burdett v. Withers, 855.
Burgess v. Alliance Ins. Co., 821, 827.
v. Gunn, 887.
Burgett v. Burgett, 1240.
Burke v. Melvin, 1255.
v. Miller, 1212.
v. Railway Co., 977.
v. Savage, 1079.
Burkes v. Hubbard, 1118.
Burkett v. Griffith, 1221, 1223.
Burkhart v. Jennings, 1235.
Burkle v. Ells, 916.
Burks v. Shain, 984.
Burlington, etc., R. Co. v. Chicago Lumber Co., 885, 897.
v. Johnson, 1081.
v. Thompson, 1280.
Burman v. Rodocanachi, 806.
Burmster v. Hodgson, 897.
Burn v. Morris, 1105.
Burnett v. Simpkins, 989, 990, 1211.
v. Wells, 1213.
Burney v. Pledger, 1111, 1118.
Burnham v. Best, 841, 854.
v. Marshall, 1128.
v. Webster, 1257.
Burpee v. Sparhawk, 1171.
Burr v. Stenton, 863.
v. Woodrow, 1000.
Burrage v. Melson, 1145.
Burrell v. New York, etc., Co., 1060.
Burrill v. Cleeman, 894.
v. Phillips, 782.
v. Stevens, 1167.
Burt v. Advertiser Newspaper Co., 1221, 1222, 1231, 1233.
v. Bowles, 1167.
v. Burt, 1157.
v. Dutcher, 1120.
v. McBain, 1206, 1231.
v. Merchants' Ins. Co., 853, 1081.
v. Wigglesworth, 853, 1074, 1081.
Burtch v. Nickerson, 1204, 1213.
Burton v. Hughes, 1097.
v. March, 1209, 1210, 1212, 1226.
v. St. Paul, etc., Ry. Co., 1235, 1239.
v. Tannehill, 1108.
v. Wilmington, etc., Ry. Co., 1265, 1268.
Bush v. Prosser, 1227, 1229, 1230, 1231.
Bushnell v. Metz, 1256.
Bussey v. Excelsior Co., 1183.
Bussman v. Ganster, 851, 858.
Butcher v. Porter, 1155.
Butler v. Bangor, 1256.
v. Collins, 1098, 1113.
v. Cushing, 872.
v. Eschleman, 990.
v. Mehrling, 1144.
v. Wildman, 818.
Butman v. Hussey, 1037.
Butte Co. v. Boydston, 1072.
Butterfield v. Stephens, 779.
Butterworth v. Western Ass. Co., 810.
Buttles v. Chicago, etc., Ry. Co., 1023.
Button v. McCauley, 990.
Butts v. Edwards, 1140.
v. Phelps, 774.
Byne v. Moore, 1535.
Byram v. McGuire, 1178.
Byrket v. Monohon, 1211, 1224.
Byrne v. Minneapolis, etc., Ry. Co., 1049.
v. Schiller, 896.
v. Schwing, 782.
v. Weeks, 896.
Byrom v. Chapin, 1034.

Cable v. Dakin, 1145, 1158.
Cabot v. Christie, 1169.
Cadle v. Muscatine, etc., R. Co., 1043.
Caffe v. Bertrand, 1113.
Caffrey v. Darby, 771, 775, 776.
Cage v. Phillips, 876.
Cagger v. Lansing, 1000.
Cahill v. Eastman, 1035.
v. London, etc., Ry. Co., 954.
Cahn v. Western U. T. Co., 959, 961.
Calcraft v. Harborough, 1285.
Calder v. Smalley, 1256.
Caldwell v. Bank, 1082.
v. Brown, 1273.
v. Bruggerman, 1148.
v. Cowan, 1108.
v. Fenwick, 1151.
v. Henry, 1171.
v. Murphy, 944, 945, 947, 1246.
v. New Jersey Steamship Co., 941, 950, 951.
v. Southern Exp. Co., 903.
Caledonian R. Co. v. Colt, 923.
v. Walker's Trustees, 1071.
California Dry Dock Co. v. Armstrong, 1033.
California Nav. & Exp. Co. v. State Investment & Ins. Co., 807.
California & P. R. Co. v. Armstrong, 1076, 1083.
California S. R. Co. v. Southern P. R. Co., 1072.
Calkins v. Bertrand, 1193.
Callaghan v. Myers, 1199.
Callander v. Oelrichs, 772.
Calloway v. Middleton, 1227.
Calumet River Ry. Co. v. Moore, 1074, 1089.
Cambridge v. Anderton, 807.
Camden, etc., R. Co v. Baldauf, 904, 954.

References are to sections.

Cameron v. Rich, 917.
Camp v. Camp, 1032.
v. State, 1255.
v. Western U. T. Co., 957.
Campbell v. Arnold, 1009.
v. Brown, 994, 999.
v. Butts, 1207, 1208.
v. Campbell, 1007, 1204, 1211, 1226.
v. Chamberlain, 1102.
v. Head, 1156.
v. Hillman, 1171.
v. James, 1189.
v. Metropolitan Street R. Co., 1062.
v. Philadelphia, 1082.
v. Seaman, 1036.
v. Shields, 847, 876.
v. Thompson, 896.
v. White, 1219.
v. Woodworth, 1096.
v. Wright, 786.
Canada, The, 1290.
Canadian, The, 939, 1250.
Canadian P. Ry. Co. v. Robinson, 1262.
Candee v. Western U. T. Co., 958, 959, 970.
Canning v. Fibush, 842.
v. Williamstown, 942, 978, 1243, 1245.
Cannon v. Western U. T. Co., 958, 959.
Canton v. Smith, 1132.
Capp v. Topham, 789.
Capper v. Forster, 883, 895.
Cardival v. Smith, 1235.
Carew v. Boston Elastic F. Co., 1189, 1196.
v. Otis, 799.
Carey v. Berkshire R. Co., 1259.
v. Rocherean, 800.
v. Sheets, 1258.
Carl v. Ayers, 1239, 1240.
v. Granger Coal Co., 845.
v. Sheboygan, etc., R. Co., 1016, 1046, 1047.
Carli v. Union Depot, etc., Co., 1016.
Carlin v. Chappel, 1053.
Carlisle v. Callahan, 1029, 1100.
Carll v. Butman, 1006.
Carlyon v. Lannan, 1109.
Carman v. Bean, 994.
Carner v. St. Paul, etc., Ry. Co., 1009, 1019.
Carpenter v. Dresser, 1104.
v. Easton, etc., R. Co., 1090.
v. Going, 1141.
v. Jennings, 1087.
v. Landaff, 1085, 1086.
v. People, 1255.
v. Providence Ins. Co., 813, 829.
v. Sheldon, 1240.
Carpenter v. Stevens, 1152.
v. Wall, 1255.
Carr v. Hills Archimedian Lawn Mower Co., 792.
v. Moore, 1171, 1172.
v. Providence, etc., Ins. Co., 807.
Carrel v. Early, 1151.
Carrie v. Cloverdale Banking & C. Co., 1136.
Carroll v. Girard F. Ins. Co., 808.
v. Pathkiller, 1144.
v. Staten Island R. Co., 941.
v. White, 1204.
Carslake v. Mapledoram, 1204.
Carson v. Applegarth, 1148.
v. Coleman, 1061.
v. Edgworth, 1239.
v. Godley, 863.
v. Golden, 1151.
v. Marine Ins. Co., 813.
v. Prater, 1097.
Carsten v. Northern R. R. Co., 939.
Cartanos v. Ritter, 1252.
Carter v. Bailey, 1198.
v. Baker, 1184, 1185, 1186, 1196.
v. Burr, 848.
v. Collar, 842.
v. Du Pre, 1111, 1118.
v. Glass, 1169.
v. Parker, 1002.
v. Phœnix Ins. Co., 819.
v. St. Paul, etc., R. Co., 1074.
Carthage T. Co. v. Andrews, 1246, 1256.
Cartmell v. Allard, 776.
Cartwright v. Greene, 783.
Carvill v. Jacks, 1163, 1170, 1171, 1174.
Cary v. Allen, 1204.
v. Gruman, 1165, 1172.
v. Whiting, 851.
Case v. Babbitt, 1159.
v. Hall, 1175.
v. Hart, 1136.
v. Hartford Ins. Co., 821.
v. Marks, 1210, 1226.
v. Rully, 819.
Casebeer v. Mowry, 1037.
Casey v. Hulgan, 1205, 1206.
Cassaboglou v. Gibb, 773.
Cassin v. Marshall, 1098.
Casson v. Field, 779.
Castello v. Landwehr, 1265.
Caswell v. Wendell, 864.
Catawissa Ry. Co. v. Armstrong, 1263, 1265, 1268.
Cates v. McKinney, 984.
Catharine, The, v. Dickinson, 1287, 1293.
Catlin v. Smith, 782.
v. Ware, 1002.
Caulfield v. Whitworth, 1224.

References are to sections.

Caulkins v. Gaslight Co., 1112.
Cavanagh v. Durgin, 1018.
Cavanaugh v. Austin, 1206, 1224.
Cawkwell v. Russell, 1035.
Cawood Patent, 1190, 1191.
Cawthorne v. Trickett, 897.
Cayuga, The, 1292.
Caze v. Baltimore Ins. Co., 890.
Cedar Rapids, etc., Ry. Co. v. Raymond, 1066, 1068.
v. Ryan, 1074.
Celluloid Manuf. Co. v. Cellonite Manuf. Co., 1190.
Center v. Davis, 874.
Central Branch Union R. Co. v. Andrews, 1082.
Central Bridge Co. v. Lowell, 1077.
Central Passenger Ry. Co. v. Kuhn, 1242, 1243, 1246, 1250.
Central P. R. Co. v. Pearson, 1071, 1075, 1089.
Central R. Co. v. Bayonne, 1077.
v. Bryant, 925.
v. De Bray, 1256.
v. English, 1055.
v. Rouse, 1269.
v. Senn, 945.
v. Smith, 953.
v. Swint, 1280.
v. Thompson, 1265, 1268.
Central R. & B. Co. v. Lanier, 1243, 1256.
v. Roach, 1268.
v. Warren, 1101.
Centralia & C. R. Co. v. Brake, 1066, 1072.
v. Rixman, 1072.
Chaddock v. Briggs, 1204, 1213.
Chadwick v. Lamb, 1137.
v. Woodward, 874.
Chaffee's Appeal, 1064.
Chalmers v. Shackell, 1229.
Chamberlain v. Boyd, 1218.
v. Chandler, 941.
v. Collinson, 1020.
v. Godfrey, 848.
v. Greenfield, 1030.
v. Shaw, 1094, 1097, 1138.
v. Western T. Co., 954.
v. Worrell, 1109.
Chamberlin v. Vance, 1206, 1227.
Chambers v. Brown, 864.
v. Porter, 1255.
v. Ross, 841, 842.
v. South Chester, 1066, 1073.
Champion v. Vincent, 1032.
Champlin v. Stoddard, 1202.
Chandler v. Allison, 871.
v. Commerce F. Ins. Co., 811.
v. Jamaica P. Aqueduct, 1082, 1089.
Chapin v. Dobson, 872.
Chapman v. Chicago & N. R. Co., 918, 920.
v. Ferry, 1199.
v. Kerr, 1148, 1151, 1157.
v. Kirby, 867, 869.
v. McCrea, 775.
v. Oshkosh, etc., R. Co., 1087, 1088.
v. Pickersgill, 1235.
v. Thornburgh, 1222.
v. Western U. T. Co., 968, 972, 975, 976, 977, 978.
Chappel v. Comfort, 897.
Charles v. Altin, 771, 862.
Charless v. Rankin, 1053.
Charleston Ins. Co. v. Neve, 810.
Charlotte, etc., R. Co. v. Wooten, 917.
Chase v. Alliance Ins. Co., 896.
v. New York, etc., R. Co., 1017, 1049, 1055.
v. Western U. T. Co., 977.
v. Worcester, 1073.
Chatfield v. Wilson, 1037.
Chatterton v. Fox, 847, 864, 865, 874, 876.
Chauncey v. Yeaton, 1115.
Chauvin v. Valiton, 1144.
Cheeney v. Nebraska & C. Stone Co., 1020.
Chellis v. Chapman, 986, 987, 988.
Chenango Bridge Co. v. Lewis, 1051.
Chesapeake & O. Canal Co. v. Grove, 1070.
Chesapeake & P. T. Co. v. Mackenzie, 1017.
Chesebro v. Powers, 1223.
Chesley v. Chesley, 986.
Chesterfield Manuf. Co. v. Dehon, 790.
Chestwood v. Mayo, 1228.
Chevalier v. Brush, 1233.
Chicago v. Allcock, 1026.
v. Colman, 1256.
v. Elzeman, 1249.
v. Garrity, 853, 1081.
v. Honey, 1250.
v. Huenerbein, 1023, 1047, 1049.
v. Jones, 1249, 1250.
v. Keefe, 1273.
v. Kelly, 1256.
v. Langlass, 1242, 1249, 1250, 1256.
v. Major, 1263, 1266.
v. O'Brennan, 947, 1250.
v. Scholten, 1263, 1264, 1265, 1268, 1273, 1276.
v. Smith, 1256.
Chicago Building Society v. Crowell, 862, 1133.
Chicago Forge & B. Co. v. Major, 1056.
v. Sanche, 1056.
Chicago Legal News Co. v. Browne, 848.

References are to sections.

Chicago & A. R. Co. v. Fisher, 1256.
v. Goodwin, 1076.
v. Shannon, 1276.
Chicago City Ry. Co. v. Wilcox, 1243.
Chicago & E. R. Co. v. Blake, 1074.
v. Dresel, 1088.
v. Holland, 1242, 1246, 1250, 1251.
v. Jacobs, 1063, 1074.
Chicago, etc., R. Co. v. Abel, 925.
v. Aldrich, 1066.
v. Andrews, 1047.
v. Austin, 1267.
v. Avery, 1256.
v. Ayres, 1062.
v. Baker, 1045, 1047.
v. Barrett, 1256.
v. Blake, 1064.
v. Bowman, 1064, 1066, 1068.
v. Boyce, 954.
v. Brisbane, 938, 940.
v. Carey, 1047, 1048, 1049, 1055.
v. Catholic Bishop, 1074.
v. Doyle, 1280.
v. Dunn, 1252.
v. Englewood C. Ry. Co., 1078.
v. Erickson, 907.
v. Fahey, 954.
v. Flagg, 942.
v. Francis, 1064.
v. Griffin, 949.
v. Hale, 913, 923.
v. Harmon, 926.
v. Harwood, 1263.
v. Hazels, 1062.
v. Hoag, 1059.
v. Hock, 1069.
v. Holdridge, 942, 953.
v. Holland, 1256.
v. Hough, 1077.
v. Howison, 1102.
v. Hughes, 953, 1256.
v. Jenkins, 897.
v. Loeb, 1016, 1042, 1046, 1082, 1090.
v. McAuley, 1090.
v. McKittrick, 1256.
v. Melville, 1061.
v. Moranda, 1265, 1268.
v. Morris, 1263, 1266.
v. Palmer, 1066.
v. Parks, 886.
v. Payzant, 953.
v. Schaffer, 1042, 1045, 1049.
v. Shannon, 1263, 1264.
v. Smith, 1064.
v. Springfield, etc., R. Co., 1072, 1073, 1078, 1091.
v. Stein, 1070.
v. Swett, 1276.
v. Ward, 1067, 1069.
v. Warner, 1242, 1248, 1256.
v. Wiebe, 1064.
Chicago, etc., R. Co. v. Willits, 1017.
Chicago & N. Ry. Co. v. Chicago, 1077.
v. Stanbro, 911.
Child v. Boston & F. Iron Works, 1185.
v. Homer, 1232.
v. Stenning, 865.
Childs v. New Haven & N. Co., 1084, 1086.
Chinnery v. Viall, 1106.
Chipman v. Hibberd, 1019.
v. Palmer, 1059.
Chippewa Lumber Co. v. Phœnix Ins. Co., 808, 827.
Chirac v. Reinecker, 992.
Chisholm v. Capital L. Ins. Co., 833.
Chismon v. Carney, 1257.
Choate v. Crowninshield, 917.
Chouteau v. St. Louis, 1047.
Christopher v. Austin, 847, 848.
Christy v. Row, 890.
Chubb v. Gsell, 1210.
Church v. Bridgman, 1233.
v. Sterling, 768.
Churchill v. Siggers, 1235, 1238.
v. Watson, 1102.
v. Welsh, 1140.
Churchman v. Kansas City, 1100.
Cilley v. Hawkins, 864, 865, 1102.
Cincinnati v. Evans, 1102.
v. Whetstone, 1091.
Cincinnati Chronicle Co. v. White Line T. Co., 913.
Cincinnati & F. Ins. Co. v. May, 803.
Cincinnati, etc., R. Co. v. Chester, 952.
v. Cole, 949.
v. Eaton, 939, 942.
v. McMullen, 1280.
v. Marcus, 925.
v. Zinn, 1071.
Citizens' Bank v. Nantucket, etc., Co. 884.
Citizens' Nat. Bank v. Oldham, 1157.
Citizens' Street Railway Co. v. Tivivane, 1252.
Cito, The, 887.
City of Alexandria, The, 1290.
City of Chester, The, 1293.
City of Lincoln, The, 1289.
City of Norwich, The, 925, 1293.
City of Peking, The, 1292.
Clannahan v. Porter, 1003.
Clapp v. Boston, 1071.
v. Hudson R. Co., 953.
v. Noble, 842.
v. Thomas, 1096, 1103.
v. Walter, 1144.
Clare v. Maynard, 1171.
Claridge v. South Staffordshire T. Co., 1097.
Clarion Bank v. Jones, 1113, 1116.

References are to sections.

Clark v. Babcock, 872.
v. Baird, 1171.
v. Bank of Wheeling, 771.
v. Barlow, 854.
v. Barnwell, 917.
v. Bates, 1105, 1114.
v. Boyreau, 992.
v. Brown, 1226, 1251.
v. Clark, 1200.
v. Cleveland, 1234.
v. Fitch, 1281, 1282, 1283.
v. Foster, 797.
v. Jones, 793.
v. Keith, 1162.
v. Lamoreaux, 1160.
v. Martin, 1144.
v. Miller, 769, 933.
v. Moody, 769, 771, 776, 784.
v. Munsell, 1227.
v. New England Ins. Co., 810, 811.
v. Nicholson, 1116.
v. Pearce, 1235, 1238.
v. Peckham, 1058.
v. Pennsylvania R. Co., 1037, 1054.
v. Pinney, 1118, 1120.
v. Reese, 986.
v. St. Clair, etc., Co., 1015, 1029.
v. United Ins. Co., 806, 814.
v. Van Northwick, 782.
v. Whitaker, 1109.
v. Wilson, 813.
Clarke v. American Dock & Imp. Co., 1237, 1257.
v. Halford, 1094, 1114, 1127.
v. Postan, 1235.
Clason v. Baldwin, 1000.
Clay v. Central R. & B. Co., 1269, 1272.
Clayton v. O'Connor, 1171, 1172.
Cleghorn v. New York, etc., R. Co., 950, 951.
Clem v. Holmes, 1283.
Clement v. British American Ass. Co., 824.
v. Duffy, 1020.
v. Western U. T. Co., 958.
Clements v. Glass, 1144.
v. Maloney, 1210.
Clemmitt v. New York L. Ins. Co., 838.
Clemson v. Davidson, 887.
Clendaniel v. Tuckerman, 830, 887, 897.
Clenighan v. McFarland, 872, 874.
Cleveland v. Bryant, 844.
v. Citizens' G. L. Co., 1035.
Cleveland, etc., R. Co. v. Ball, 1066, 1086.
v. Closser, 884.
v. Newell, 1251.
Cleveland, etc., R. Co. v. Perkins, 904.
v. Speer, 1061.
v. Sutherland, 1248.
Cleves v. Willoughby, 848, 851.
Clifford v. Cochrane, 1204, 1221.
v. Dam, 1246.
v. Watts, 845.
Clinton Wire Cloth Co. v. Gardner, 842.
Closson v. Staples, 1235, 1238.
Clough v. Tenney, 1281.
v. Unity, 1090, 1091.
Clover v. Greenwich Ins. Co., 827.
Clow v. Brogden, 858.
Clowes v. Hawley, 1134.
Clowser v. Joplin Mining Co., 1020.
Coagan v. Parker, 852.
Coal Creek M. & M. Co. v. Moses, 1020.
Coast Wrecking Co. v. Phœnix Ins. Co., 818.
Coates v. Cheever, 1006, 1007.
Coats v. Holbrook, 1200.
Cobb v. Boston, 1089.
v. Illinois C. R. Co., 990.
v. Smith, 1059.
Coburn v. Ames, 1058.
Cochrane v. Quackenbush, 1235.
v. Winburne, 1150.
Cockayne v. Hodgkisson, 1209,
Cockburn v. Alexander, 883, 895.
v. Ashland L. Co., 1113.
v. Edwards, 787.
Cockrill v. Armstrong, 1007.
Codman v. Freeman, 1097.
Codrington v. Lloyd, 1258.
Coe v. Clay, 863.
Coffeen v. Brunton, 1200.
Coffey v. National Bank, 1109.
Coffin v. Field, 1103.
v. Newburyport M. Ins. Co., 814.
v. Storer, 891, 893.
v. Taylor, 1144.
v. The Osceola, 1292.
Cogswell v. New York, etc., R. Co., 1035.
Cohen v. Dry Dock, etc., Co., 951.
v. Dupont, 848.
v. New York Mut. L. Ins. Co., 839.
v. St. Louis, etc., R. Co., 1074, 1076, 1089, 1091.
Cohn v. Norton, 864, 865.
Coil v. Wallace, 984, 987.
Cointement v. Cropper, 1237, 1240.
Coit v. Planer, 842.
Colburn v. Morrill, 847, 848.
v. Sims, 1199.
Colcough v. Nashville, etc., R. Co., 1072, 1081, 1090.
Cole v. Buckle, 556, 873.
v. Dalziel, 1137.

References are to sections.

Cole v. Goodwin, 926.
v. Holliday, 990.
v. Patterson, 849.
v. Ross, 1109.
v. Sprowl, 1038, 1058.
Coleman's Appeal, 1020, 1127.
Coleman v. Bunce, 876.
v. New York, etc., R. Co., 1244.
v. Southwick, 1256.
v. White, 1285.
Coles v. Coles, 1006.
Colgate v. Western Electric Manuf. Co., 1183.
Colladay v. Baird, 1200.
Collamer v. Page, 1156.
Collard v. South E. Ry. Co., 906, 908, 909, 910, 1244.
Collen v. Wright, 796, 797.
Colley v. Streeton, 858.
Collingridge v. Royal Exchange Ass. Co., 821.
Collins v. Albany, etc., R. Co., 953.
v. Council Bluffs, 946.
v. Hayte, 1235.
v. Hough, 1156.
v. Karatopsky, 848, 874.
v. Lowry, 1139, 1141.
v. Mack, 988.
v. Rainey, 768.
v. Stephenson, 1227.
Colman v. Crump, 1200.
Colonel Ledyard, The, 918.
Colorado, The, 1290.
Colorado M. Ry. Co. v. O'Brien, 1256.
Colrick v. Swinburne, 1047.
Colt v. Owens, 778, 786, 1119.
Colton v. Onderdonk, 1015.
Columbia, etc., Bridge Co. v. Geisse, 1061.
Columbia, etc., R. Co. v. Hawthorne, 1247.
Columbian Ins. Co. v. Ashby, 818, 819.
v. Lawrence, 808.
Columbus, The, 933.
Columbus Gas, etc., Co. v. Freeland, 1036, 1037.
Columbus & W. Ry. v. Bridges, 1268.
v. Flournoy, 913.
Colusa Co. v. Hudson, 1072, 1075.
Colvill v. St. Paul, etc., R. Co., 1064, 1066, 1067, 1074, 1089.
Colvin v. Jones, 903.
Colwell v. Manhattan Ry. Co., 1250.
Comer v. Knowles, 1257, 1258.
v. Taylor, 1283.
Comerford, The, 1293.
Commercial Bank v. Jones, 1109.
Commercial Ins. Co. v. Union Ins. Co., 802.
Comminge v. Stevenson, 1042, 1047.
Commissioners v. Detroit, etc., R. Co., 1077.
Commissioners v. Harkleroads, 1066, 1067, 1071, 1072.
v. Johnson, 853, 1081.
v. Johnston, 1085.
v. Labore, 1067.
v. Michigan C. R. Co., 1077.
v. Moesta, 1068.
v. O'Sullivan, 1087.
Commissioners of Dickinson v. Hogan, 1066.
Commissioners of State Reservation at Niagara, In re, 1079.
Commonwealth v. Boston, etc., R. Co., 1068, 1072, 1078, 1091.
v. Coombs, 1063.
v. Hide & L. Ins. Co., 814.
v. Kidder, 1035.
v. Middlesex, 1063.
v. Norfolk, 1063.
v. Todd, 876.
Commonwealth Ins. Co. v. Sennett, 813, 814, 824, 830.
Compton v. Allen, 855.
v. Martin, 1136.
Comstock v. Hier, 1132.
v. New York, etc., R. Co., 1048.
Conant v. Griffin, 1263.
Conard v. Pacific Ins. Co., 1096.
Concord Mut. Ins. Co. v. Woodbury, 829.
Concord R. v. Greeley, 1091.
Concordia Cemetery Ass'n v. Minnesota & N. R. Co., 1089.
Cone v. Lewis, 1141.
Conger v. Hudson R. Co., 903.
Congham v. King, 859.
Congregational Society v. Walker, 994.
Congress, The, 818.
Congress Spring Co. v. High Rock Spring Co., 1200.
Conhocton, etc., Co. v. Buffalo, etc., R. Co., 1035.
Conlon v. McGraw, 848, 864, 866.
Conn v. Wilson, 984.
Connal v. Fisher, 899.
Connecticut L. Ins. Co. v. Houser, 838.
Connecticut Mut. L. Ins. Co. v. New York R. Co., 1259.
v. Shaefer, 832, 833.
Connecticut River, etc., R. Co. v. Clapp, 1091.
Connell v. Putnam, 1252.
Conner v. Paul, 1260.
Conniff v. San Francisco, 1061.
Connor v. Hillier, 1135.
Conover v. Pacific Exp. Co., 904.
Conrad v. Uhrig B. Co., 1200.
Conroe v. Conroe, 1226.
Consett, The, 1290, 1292.
Consolidated Oil Well Packer v. Eaton, 1186.

References are to sections.

Consolidated Real Estate & F. Ins. Co. v. Cashow, 840.
Converse v. Burrows, 914.
Conway v. Nicol, 1285.
Cooch v. Gerry, 994.
Cook v. Anderson, 848, 851.
v. Andrews, 845.
v. Barkley, 1227, 1233.
v. Clay St. R. Co., 1263, 1266, 1274.
v. Cook, 1218.
v. Ellis, 1253.
v. Hamilton, 1144.
v. Hartle, 1105.
v. Jennings, 890.
v. Loomis, 1105, 1109, 1138, 1139, 1140.
v. Medbury, 841.
v. Redman, 1010.
v. Soule, 873, 876.
v. South Park Com., 1083, 1091.
v. Webb, 992.
Cooke v. England, 856.
v. Wildes, 1209.
v. Wise, 854.
Cooley v. Betts, 785.
Coolidge v. Choat, 1096, 1098.
v. Neat, 986, 988, 990.
Coombe v. Sansom, 1134.
Coon v. Moffitt, 1281, 1282, 1283.
Cooney v. Chase, 1237, 1238, 1240.
Cooper v. Barber, 1229.
v. Chitty, 1108.
v. Hall, 1037.
v. Mullins, 978.
v. Newman, 1105, 1138.
v. Randall, 1042.
v. Schlesinger, 1173.
v. Young, 913.
Copeland v. Mercantile Ins. Co., 768.
Copper v. Powell, 776.
Corbett v. Gilbert, 1166.
Corcoran v. Corcoran, 1219.
v. Harran, 1255, 1256.
Corlies v. Cumming, 790.
Cornell v. Jackson, 848.
v. Le Roy, 810.
v. Payne, 1238.
Cornely v. Marckwald, 1183, 1185.
Corn Exchange Nat. Bank v. Bly, 1144.
Corning v. Corning, 1255.
Cornish v. Cleife, 855.
Corson's Appeal, 832.
Cortelyou v. Lansing, 1132.
Cory v. Burr, 803.
Coryell v. Colbaugh, 987.
Costello v. Burke, 1082.
Cothran v. Ellis, 786.
v. Hanover Nat. Bank, 1132.
v. Western U. T. Co., 961.
Cotton v. James, 1239.
Cottrell v. Russell, 1101.
Cotulla v. Kerr, 1204, 1206.
Cotzhausen v. Simon, 1169.
Coulthurst v. Sweet, 887.
County Comm'rs v. Hamilton, 1252.
Courcier v. Ritter, 778.
Cousins v. Merrill, 1223.
Covell v. Hill, 1138.
Coventry v. Barton, 793, 794.
Covert v. Sargent, 1189.
Covington v. Roberts, 818.
Covington, etc., Ry. Co. v. Packer, 1263.
v. Piel, 1061, 1064.
Coward v. East Tennessee, etc., R. Co., 954.
Cowden v. Lockridge, 1146.
v. Wright, 952, 1252.
Cowdery v. Woburn, 1067.
Cowing v. Rumsey, 1184, 1185.
Cowley v. Davidson, 900, 903, 906, 920.
v. Dunlop, 775.
Cox v. Fenwick, 859.
v. Glue, 1009.
v. Jagger, 1001.
v. Mason City, etc., Ry. Co., 1088.
v. Prentice, 799.
v. Taylor, 1235.
v. Vanderkleed, 942.
Coxe v. England, 1020.
C. P. Raymond, The, 1292.
Cragin v. New York C. R. Co., 904.
Craig v. Brown, 1204.
v. Cook, 1031.
v. Kline, 1145.
v. McHenry, 1132.
v. Parkis, 811.
v. Ward, 1169.
Craige v. Morris, 1005.
Crain v. Petrie, 968.
Craker v. Chicago & N. R. Co., 941, 942, 951, 979, 1243.
Cram v. Dresser, 848, 876.
Cramer v. American Exp. Co., 905.
v. Noonan, 1204, 1216.
Crampton v. Valido Marble Co., 1109.
Crandall v. Quinn, 990.
Crane v. Aiken, 818, 819.
v. Douglass, 1233.
v. Hardman, 847, 848, 854, 874, 876.
v. Onderdonk, 700.
v. Palme, 1007.
Crank v. Forty-second St., etc., Ry. Co., 1251.
Cranston v. Marshall, 938, 939.
Crater v. Binninger, 1165, 1167, 1171.
Cravens v. Gant, 1168.
Crawford v. Cockran, 774.
v. Delaware, etc., R. Co., 1251.
v. Jesup & M. Paper Co., 897.

References are to sections.

Crawford v. Jones, 841.
v. Maxwell, 1024.
v. Parsons, 869.
v. Williams, 887, 890, 891.
Crawson v. Western U. T. Co., 977.
Creamer v. Bowers, 1185, 1192, 1196.
Creecy v. Pearce, 1007.
Creevy v. Carr, 1233.
Cregin v. Brooklyn C. R. Co., 1252.
Cressey v. Parks, 1105.
Crete v. Childs, 1255.
Criner v. Pike, 1097, 1107.
Crise v. Auditor, 1082.
Croade v. Ingraham, 1001.
Crockett v. Lashbrook, 992.
Cromie v. Kentucky & L. Mut. Ins. Co., 806.
Crommelin v. Coxe, 1058.
v. New York & H. R. Co., 897.
v. Thiess, 842.
Cropsey v. Murphy, 1035.
Crosby v. Loop, 849.
Crosby Valve Co. v. Safety Valve Co., 1190, 1193, 1197.
Crosland v. Hall, 1167, 1171.
Cross v. Sackett, 1170.
v. Tome, 845.
Crosse v. Bilson, 1144, 1155.
Crossen v. Hutchinson, 775.
Crossley v. O'Brien, 1077.
Crouch v. Briles, 841.
v. Great N. Ry. Co., 899.
Crowe v. Aiken, 1198.
Crowell v. Hospital of St. Barnabas, 1007.
Crozier v. Craig, 988.
v. People, 1255.
Cruger v. McLaury, 849.
Cruikshank v. Gordon, 1204, 1209, 1225.
Crumb v. Oakes, 1109.
Crump v. Ingersoll, 768.
Cruts v. Wray, 1160.
Cuba, The, 887.
Cud v. Rutter, 1118.
Culver v. Harper, 1006.
v. Hill, 873.
Cumberland Coal Co. v. Sherman, 768.
Cumberland, etc., Co. v. Hitchings, 1036, 1038, 1039, 1042.
Cumberland Valley Mut. Prot. Co. v. Schell, 821.
Cuming v. Brooklyn City R. Co., 952, 1252.
Cummerford v. McAvoy, 1233.
Cummings v. Williamsport, 1064.
Cummins v. Crawford, 953.
v. Des Moines, etc., Ry. Co., 1066, 1070, 1073, 1082, 1088.
v. Hanson, 844.
Curd v. Wunder, 1108, 1136.
Curl v. Chicago, etc., R. Co., 950.
Curlew v. Laurie, 1030.
Curling v. Long, 887.
Curry v. Commonwealth Ins. Co., 821.
v. Curry, 793.
v. Pringle, 1258.
v. Wilson, 1113.
Curtin v. Mittany V. R. Co., 1072, 1089.
Curtis v. Curtis, 1004.
v. Groat, 1126.
v. St. Paul, etc., R. Co., 1064, 1066, 1089.
v. Ward, 1105, 1141, 1158.
Curtiss v. Rochester, etc., R. Co., 942, 944, 945, 1242, 1251.
Cushing v. Boston, 1072.
v. Longfellow, 1127.
v. Seymour, etc., Co., 1129, 1141.
v. Wells, etc., Co., 918, 920.
Cushingham v. Phillips, 848.
Cushman v. Northwestern Ins. Co., 806, 816.
v. Ryan, 1255.
v. Waddell, 1255.
Cushwa v. Cushwa, 992.
Cuthbert v. Kuhn, 849, 850, 853.
Cutler v. Bell, 774.
v. James Goold Co., 1109.
v. Smith, 1031.
Cutting v. Cox, 1008.
v. Grand Trunk Ry. Co., 907, 908, 918.

Dabney v. New England Mut. Mar. Ins. Co., 819.
Daggett v. Davis, 1135.
v. Wallace, 983, 984, 988.
Dahill v. Booker, 1139.
Dailey v. Crowley, 1105, 1139.
v. Grimes, 849.
v. Houston, 1253, 1254.
Dain v. Wycoff, 1210, 1282, 1283, 1284.
Dakin v. Oxley, 887.
Dalby v. India & L. L. Ass. Co., 832.
Dale v. Smithson, 1200.
Dallam v. Fitler, 1104.
Dallas & W. Ry. Co. v. Spicker, 1265.
Dalman v. Koning, 1284.
Dalton v. Gerrish, 851.
v. Laudahn, 841, 844, 1140.
v. Southeastern Ry. Co., 1[illegible], 1273.
Daly v. Byrne, 1208.
Dalzell v. Davenport, 1089.
Damainville v. Mann, 850.
Dame v. Kenney, 1227.
Damon v. Moore, 1282, 1283.
Damron v. Roach, 1010, 10[illegible].
Dana v. Fiedler, 920.

References are to sections.

Danforth v. Smith, 1007.
Daniel v. Holland, 1109.
v. Obert, 1024.
v. Western U. T. Co., 959.
Daniels v. Chicago, etc., R. Co., 1083.
v. C. I. & N. R. Co., 1076, 1083.
v. Savannah, etc., Ry. Co., 1272.
v. Union P. R. Co., 1256.
Danzieger v. Boyd, 992, 993, 995.
D'Arcy v. Lyle, 789, 793.
Darley Main Colliery Co. v. Mitchell, 1017.
Darling v. Tegler, 1157.
D'Armon v. Pullen, 848.
Darnall v. Hill, 1003.
Daubet v. Kirkman, 990.
Daugherty v. American U. T. Co., 960, 961, 973.
Davenport v. Ledger, 1098, 1100.
v. Peoria Ins. Co., 802.
David v. Southwestern R. Co., 1265.
Davidson v. B. & M. R. Co., 1061.
v. Ernest, 841.
v. Fischer, 872.
v. Goodall, 1281, 1282, 1283.
v. Graham, 917.
v. Gunsolly, 1097, 1136.
v. Gwynne, 896.
v. Michigan C. R. Co., 1101.
v. Tulloch, 1172.
Davies v. Underwood, 856.
Davis v. Brown, 1204.
v. Cayuga, etc., R. Co., 954.
v. Central R. Co., 953.
v. Charles River B. Co., 1089.
v. Cincinnati, etc., R. Co., 911.
v. Davis, 1144.
v. Doe, 992.
v. Easley, 1020, 1126.
v. Elliott, 1171.
v. Fairclough, 1109.
v. Gardiner, 1219.
v. Garrett, 770, 773, 775, 803.
v. Griffith, 1232.
v. Guarnieri, 1266, 1276.
v. Hamlin, 768.
v. Hutton, 1002.
v. Kendall, 1200.
v. Lambertson, 1036.
v. Lewis, 1233.
v. Louk, 996.
v. Patterson, 896.
v. Ruff, 1213.
v. Shepstone, 1206.
v. Sladden, 1204.
v. Western U. T. Co., 974.
Davis S. M. Co. v. Best, 1141, 1146.
Dawson v. Donati, 848.
v. McGill, 993.
v. Wetherbee, 1157.
Day v. Connecticut L. Ins. Co., 838.
v. Watson, 847.
Day v. Woodworth, 1131, 1182, 1188.
Daylight Burner Co. v. Odlin, 782.
Dayton v. Monroe, 1168.
v. Trull, 776.
Deal v. Osborne, 1160.
Dealy v. Lance, 1115.
Dean v. Chicago & N. Ry. Co., 1101.
v. Mason, 1190.
v. Ritter, 878, 882.
v. Roesler, 864.
v. Tucker, 993.
v. Vaccaro, 918.
Deane v. Hodge, 1184.
Dearborn v. Boston, etc., R. Co., 1064, 1067.
Dearlove v. Herrington, 1031.
De Boul v. Freeport, etc., R. Co., 1064, 1089.
Decatur v. Fisher, 1256.
Deck v. Smith, 1148, 1158.
Decker v. Mathews, 1132.
De Clerq v. Mungin, 1125.
De Coster v. Mass. Min. Co., 1017.
Decoux v. Lieux, 1239, 1240.
De Crespigny v. Wellesley, 1233.
De Cuadra v. Swann, 896.
Dedekam v. Vose, 896.
Dedham v. Natick, 1282.
De Forest v. Fulton F. Ins. Co., 828.
v. Leete, 1060.
Defries v. Davis, 1207.
Deisher v. Gehre, 1110.
v. Stein, 863.
Delaney v. Blizzard, 1058.
v. Rochereau, 800.
Delano v. Bedford Ins. Co., 807.
v. Curtis, 1105, 1139.
v. Montague, 842.
Delany v. Hill, 1132.
v. Stoddard, 775.
Delaware Canal Co. v. Lee, 1090.
v. Wright, 1037.
Delaware, etc., R. Co. v. Burson, 1039, 1083, 1091.
v. Jones, 1266.
v. Walsh, 942.
De La Lazardi v. Hewit, 782.
De La Zerda v. Korn, 868.
Delegal v. Highley, 1206, 1223, 1239.
v. Naylor, 1232.
Delie v. Chicago, etc., R. Co., 1244.
Delvee v. Boardman, 1283.
Demarest v. Little, 1266, 1278.
De May v. Roberts, 979, 1166.
De Medina v. Grove, 1235.
v. Poulson, 841.
Deming v. Railroad Co., 906, 908, 911, 914.
Denham v. Kirkpatrick, 1176.
Denn v. Chubb, 991, 993.
v. McShane, 992.
Dennick v. Railroad Co., 1280.

References are to sections.

Dennis v. Barber, 1109, 1131, 1132.
v. Clark, 952, 1252.
v. Dennis, 1103.
v. Stoughton, 1102.
Dennison v. Ford, 869.
v. Hyde, 1093, 1104.
v. Lee, 854.
Denslow v. Van Horn, 986, 988, 989, 990.
Densmore v. Mathews, 1097.
Denston v. Perkins, 769, 790.
Dent v. Pickens, 984, 987, 988.
Denton v. Great Northern Ry. Co., 938, 939.
v. Jackson, 786.
v. Nanny, 1007.
Denver v. Bayer, 1046.
Denver, etc., R. Co. v. De Witt, 911.
v. Frame, 919.
v. Harris, 950, 1244.
Denver City I. & W. Co. v. Middaugh, 1070.
Depau v. Ocean Ins. Co., 818.
De Pew v. Robinson, 1204, 1213, 1216.
Derringer v. Plate, 1200.
Derry v. Peek, 1169, 1172.
De Rutte v. New York, etc., T. Co., 957, 963.
Deshler v. Beers, 782.
De Tastett v. Crousillat, 772.
Detmold v. Drake, 1091.
Detroit v. Beecher, 1068, 1071, 1072.
Detroit Daily Post Co. v. McArthur, 951, 1208, 1216, 1217, 1233.
Devaughn v. Heath, 1031.
Devereaux v. Buckley, 906, 908.
Devery v. Grand Canal Co., 1046.
Devlin v. Pike, 1110.
Dewey v. Gray, 847.
v. Osborn, 994.
De Winte v. Wiltse, 868.
Dewit v. Greenfield, 1224, 1226, 1227, 1228, 1229.
De Witt v. Morris, 1159.
Dexter v. Manley, 863, 864, 866, 876.
v. Spear, 1208.
v. Syracuse, etc., R. Co., 954.
Dial v. Holter, 1204.
Dibble v. Augur, 1186.
v. Brown, 954.
v. Morris, 1101, 1131.
Diblin v. Murphy, 953.
Dicken v. Shepherd, 1215.
Dickenson v. Fitchburg, 1063, 1064, 1074, 1082, 1083, 1089.
Dickinson v. Baltimore, 1034.
v. Boyle, 1028.
v. Noland, 1156.
Dickson v. Reuter T. Co., 972.
v. Screven, 776.
Dibble v. Railroad Co., 1260.
Diehl v. Adams Co. Mut. Ins. Co., 811.
Dietrich v. Northampton, 1267.
Digby v. Atkinson, 855, 858.
Dike v. Propeller St. Joseph, 819.
Dillenback v. Jerome, 1096, 1109, 1115.
Diller v. Roberts, 842.
Dillingham v. Russell, 951.
Dilworth v. McKelvy, 1160.
Dimmitt v. Hannibal, etc., R. Co., 1242.
Dingle v. Hare, 1172.
Dinsman v. Wilke, 1258.
Distin v. Rose, 1225, 1227, 1230.
Dixon v. Bell, 1250.
v. Calcraft, 897.
v. Caldwell, 1109.
Dixon Crucible Co. v. Guggenheim, 1200.
Doane v. Keating, 819.
Dobell v. Stevens, 1167, 1168.
Dobbin v. Thornton, 897.
Dobbins v. Duquid, 864, 866, 867, 868, 869, 871.
Dobson v. Cothran, 1255.
v. Dornan, 1190.
v. Hartford Carpet Co., 1185, 1190, 1193.
v. Land, 829.
Dod v. Monger, 1107.
Dodd v. Norris, 1284.
v. Wakeman, 768.
Dodds v. Hakes, 864.
Dodge v. Alger, 1257.
v. Barton, 819.
v. Chandler, 1160.
v. County Comm'rs, 1090.
v. Perkins, 771, 776.
v. Tilston, 792.
Doe v. Davis, 993.
v. Filliter, 993, 1031.
v. Gwinnell, 1002.
v. Hare, 993, 999.
v. Huddart, 993.
v. Perkins, 993.
v. Roe, 999, 1225.
Doherty v. Dolan, 864.
v. Munson, 1258.
Dolan v. Van Demark, 1160.
Dole v. Lyon, 1221.
Dolevin v. Wilder, 1230, 1231.
Dollard v. Roberts, 1252.
Dominion Tel. Co. v. Silver, 1218.
Donaldson v. Beckel, 1198.
v. Mississippi R. Co., 944, 1263, 1268.
Donivan v. Manhattan Ry. Co., 951.
Donnell v. Jones, 1102, 1235.
Donnelly v. Harris, 1255.
v. Hufschmidt, 1250.
Donner v. Ogilvie, 848.
Donnes v. Back, 1118.
Donohue v. Kendall, 872.

References are to sections.

Doolittle v. McCullough, 1105.
Dorchester v. Coventry, 1002.
Dority v. Dunning, 1039.
Dorlan v. East Brandywine & W. R. Co., 1047.
Dormer v. Fortesque, 1004.
Dorr v. New England Ins. Co., 807.
Dorrah v. Illinois C. R. Co., 938, 943.
Dorrill v. Stephens, 854.
Dorsey v. Gassaway, 1114.
v. Manlove, 1095, 1096.
v. Moore, 1034.
Dorwin v. Potter, 868, 873, 874, 876.
Doss v. Doss, 1094.
v. Jones, 1224.
v. Missouri, etc., R. Co., 950.
Dothage v. Stuart, 999.
Dottarer v. Bushey, 1204.
Doty v. Burdick, 1009.
Dougherty v. Chesnutt, 1020.
v. Stepp, 1010.
Dougherty Co. v. Tift, 1079.
Douglas v. Merceles, 1113.
Douglass v. Gausman, 988.
v. Kraft, 1109, 1119.
v. Murphy, 772, 862.
v. Tousey, 1217.
Doupe v. Genin, 851, 872.
Dow v. Adams, 854.
Dowd v. Faucett, 999.
Downer v. Madison Co. Bank, 776.
Downing v. Palmateer, 854.
Downman v. Jones, 796.
Dows v. Congdon, 1081.
v. National Bank, 1110.
Doyle v. Eccles, 1132.
v. Jessup, 1281, 1284.
v. Kiser, 954.
Doyley v. Roberts, 1213.
Drain v. Doggett, 776.
Drake v. Auerbach, 1147.
v. Chicago, etc., Ry. Co., 1023, 1047, 1049.
v. Cockroft, 848, 876.
Draper v. Baker, 1253.
Dresser Manuf. Co. v. Waterston, 1128.
Drew v. Beall, 1172.
v. Red L. T. Co., 917.
v. Sixth Ave. R. Co., 944.
Drexel v. Man, 992, 994.
Driess v. Frederich, 1244.
Driggs v. Dwight, 864, 865.
Drinkwater v. Dinsmore, 836, 1249, 1250, 1251.
Driskell v. Hanks, 1005.
Driver v. Western U. R. Co., 1069, 1083, 1088.
Drown v. Allen, 1226.
Drucher v. Manhattan Ry. Co., 1080.
Drummond v. Humphreys, 793.
Drury v. Midland R., 1067, 1068, 1091.
D. S. Gregory, The, 949, 1256.
Duberly v. Gunning, 1285.
Du Bost v. Beresford, 1099.
Duckworth v. Johnson, 1264.
Dudgeon v. Pembroke, 803.
Dudley v. Kennedy, 1058.
v. Minnesota & N. Ry. Co., 1066, 1088.
Duff v. Williams, 1169.
Duffie v. Hays, 880.
Duffield v. Rosenzweig, 867.
Dufort v. Abadie, 1214.
Duffy v. Byrne, 1180.
v. Chicago, etc., R. Co., 953.
v. Thompson, 954.
Dufourcet v. Bishop, 918.
Duke v. Missouri P. Ry. Co., 1250.
Du Laurans v. St. Paul R. Co., 941, 950.
Duncan v. Hayes, 1035.
v. Hill, 793.
v. Great Western Ins. Co., 807.
v. Markley, 1038.
v. Topham, 811.
Dungan v. Von Puhl, 996.
Dunlap v. Clark, 986, 988.
v. International Steamboat Co., 925, 954.
v. Yoakum, 996.
Dunlop v. Higgins, 869.
Dunn v. Burlington, etc., Ry. Co., 1256.
v. Large, 994.
v. Mackey, 786.
v. White, 1169.
Dunnahoe v. Williams, 1144.
Dunne v. Thorpe, 1132, 1176.
Dunnell v. Mason, 783.
Dunning v. Merchants' Mar. Ins. Co., 807.
Dunseth v. Bank of U. S., 1002.
Dunsmore v. Central Iowa Ry. Co., 1055.
Duntley v. Boston & M. R. Co., 925.
Dupont v. McAdow, 987, 988, 990.
Dupuis v. Chicago, etc., Ry. Co., 1068, 1083.
Durden v. Barnett, 1252.
Durgin v. American Exp. Co., 925, 926.
Durham & N. R. v. Trustees of Bullock Church, 1070, 1074.
Durkee v. Central P. R. Co., 1252.
Durrell v. Carver, 953.
v. Haley, 1167.
Duryea v. Mayor, 1039.
Dusar v. Murgatroyd, 924.
Dusenbury v. Ellis, 798.
Duthie v. Hilton, 887.
Dutro v. Kennedy, 1146.
v. Wilson, 1033.
Dutton v. Gerrish, 848.

References are to sections.

Dutton v. Wilner, 768.
Duvall v. Fuhrman, 986, 987.
v. Waters, 1033.
Dwight v. Chase, 1167.
v. Cutler, 841.
v. Elmira, etc., R. Co., 1019.
v. Enos, 1148.
v. Hampden, 1074, 1084, 1089.
Dwyer v. Carroll, 866.
v. Meehan, 1218.
Dyer v. Grand Trunk Ry. Co., 896.
v. Piscataqua Ins. Co., 803, 819.
Dyett v. Pendleton, 847, 848.

Eagan v. Gault, 1228.
Eager v. Atlas Ins. Co., 817.
Eagle v. Swayze, 874.
Eagle Ins. Co. v. Lafayette Ins. Co., 840.
Eames v. Prentice, 1030.
Earl v. Spooner, 1140.
v. Tupper, 1101.
Earle v. Holderness, 1140.
Earl of Chesterfield v. Duke of Bolton, 855.
Earl of Leicester v. Walter, 1211, 1226, 1227, 1229.
Earl of Northampton's Case, 1233.
Earl of Sheffield v. London Joint Stock Bank, 1123.
Earnest v. Express Co., 925.
Easdaile v. Sowerby, 775.
East v. Chapman, 1240.
v. Pace, 1140.
East Brandywine, etc., R. Co. v. Ranck, 1064, 1089.
Easterbrook v. Erie Ry. Co., 1017.
Eastern, etc., Ry. Co. v. Brown, 951.
Easterwood v. Quin, 1233.
Eastin v. Bank of Stockton, 1235, 1238.
East Line, etc., Ry. Co. v. Smith, 1269.
Eastman v. Harris, 1126.
Easton v. Woods, 1139.
East Pennsylvania R. Co. v. Hiester, 1089.
East St. Louis & C. Ry. Co. v. Frazier, 1256.
East Tennessee, etc., R. Co. v. Burnett, 1091.
v. Hall, 906.
v. Hunt, 887, 897.
v. Johnson, 906, 908, 913, 920.
v. Johnston, 904, 918, 932.
v. Lockhart, 938, 940.
v. Nelson, 903, 905.
Eaton v. B. C. & M. R. Co., 1061.
v. Caldwell, 1157.
v. Welton, 769.
v. Winnie, 1169.
Eaton, etc., Co. v. Avery, 1167, 1170.
Eberly v. Rupp, 1235.
E. B. Ward, Jr., The, 1280.
Eby v. Schumacher, 773, 781.
Eckstein v. Whitehead, 797.
Edelsten v. Edelsten, 1200, 1201.
Eden v. Lexington, etc., Ry. Co., 1252, 1259.
v. Luyster, 1244.
Edgar v. Newell, 1227, 1233.
Edge v. Strafford, 842.
Edgerly v. Farmers' Ins. Co., 808.
Edgerton v. Page, 848, 876.
Edmands v. Boston, 853, 1071, 1081.
Edmondson v. Nuttall, 1105, 1140.
Edmonson v. Kite, 841.
Edmundson v. Baxter, 896.
v. Welsh, 1006.
Edmunson v. Machell, 1282.
Edsall v. Brooks, 1209.
Edson v. Weston, 1136.
Edwards v. Baltimore Ins. Co., 809, 811.
v. Beach, 1095.
v. Beebe, 1101.
v. Dickinson, 1134.
v. Hodding, 799.
v. Howell, 1204.
v. New York & H. R. Co., 848.
v. Todd, 896.
Egbert v. Greenwalt, 1285.
Ege v. Kille, 994.
Egler v. Marsden, 841.
Ehrgott v. Mayor, 1244, 1246.
Eichar v. Kistler, 1284.
Eight Hundred Bales of Cotton, 819.
Ela v. French, 814, 820.
Elder v. True, 864.
Eldred v. Leahy, 848, 876.
Elevated Union R. Co., In re, 1080.
Elgin v. Welch, 1059.
Elizabeth v. Pavement Co., 1190.
Elizabethtown, etc., R. Co. v. Combs, 1044, 1047.
v. Helm, 1087.
Elkhart v. Ritter, 1243, 1251.
Elkin v. Moore, 854.
Elkins v. Empire T. Co., 925.
Ellery v. Cunningham, 785.
Ellicott v. Lamborne, 1060.
Ellington v. Ellington, 1281.
Elliot v. Hughes, 1118.
Elliotson v. Feetban, 1035.
Elliott v. Aiken, 847.
v. Boyles, 1206.
v. Fitchburg R. Co., 1037.
v. Pray, 872.
v. Russell, 1255.
v. Swartwout, 799.
v. Van Buren, 1217, 1242, 1243.
v. Walker, 769, 784, 789, 793.
Ellis v. Albany City Ins. Co., 820.

References are to sections.

Ellis v. American T. Co., 958, 963.
v. Kansas City, etc., R. Co., 1051.
v. Lersner, 1148.
v. Lindley, 1206.
v. Rock Island, etc., R. Co., 1076.
v. Willard, 888.
v. Wire, 1020, 1110, 1126, 1127.
Ellmaker v. Franklin Ins. Co., 830.
Elmer v. Fessenden, 1215, 1233, 1249.
El Modello Cigar Manuf. Co. v. Gato, 1200, 1201.
Elsee v. Smith, 1235.
Ellsworth v. Central R. Co., 1046.
v. Cordrey, 768.
v. Potter, 1031.
Ellsworth, etc, R. Co. v. Gates, 1081.
Elmore v. Brooks, 800.
Elroy v. Goble, 1037.
Elsam v. Faucett, 1285.
Elsas v. Second Ave. R. Co., 1251.
Eltringham v. Earhart, 1254.
Elwood v. Western U. T. Co., 972.
Ely v. Mumford, 1168.
Embree v. Ellis, 1003.
Emerson v. Western U. R. Co., 1083.
Emery v. Boston Marine Ins. Co., 802.
v. Dunbar, 896.
v. Gowen, 1281.
v. Huntington, 819.
v. Lowell, 1047, 1050, 1055.
Emilie, The, 1292.
Emma Kate Ross, The, 1292.
Empire Gold M. Co. v. Bonanza Gold M. Co., 1010, 1020.
Empire State F. Co. v. Grant, 1160.
Empire T. Co. v. Wamsutta O. R. & M. Co., 904, 917.
Empress Eugenie, The, 1291.
Emrich v. Ireland, 994.
Enders v. Board of Public Works, 1118.
Enfield v. Colburn, 1167.
Engelsdorff v. Sire, 865, 869.
English v. Key, 849.
Enoch Morgan's Sons Co. v. Troxell, 1201.
Enos v. Enos, 1210.
Ensley v. Nashville, 1019, 1020.
Eppes v. Cole, 841.
v. Tucker, 819.
Equitable L. Ins. Co. v. Patterson, 833.
Erichsen v. Barkworth, 897.
Erie Dispatch v. Johnson, 918.
Erie Ry. Co. v. Lockwood, 917, 920.
v. Wilcox, 904.
Erie T. & T. Co. v. Grimes, 970, 982.
Ernest v. Stoller, 782.
Erwin v. Davenport, 800.
Escopiniche v. Stewart, 890.
Espy v. Jones, 990.
Esseltyne v. Elmore, 897.
Estell v. Myers, 1171.
Eten v. Luyster, 867.
Estep v. Estep, 872.
Estes v. Estes, 1206.
Esty v. Baker, 1036, 1040.
Etheridge v. Osborn, 848.
Etherington v. Prospect Park, etc., Ry. Co., 1263, 1266, 1274.
Eufaula v. Simmons, 1047, 1051.
Evans v. Harlow, 1223.
v. Harries, 1219.
v. Kymer, 1132.
v. Murphy, 848.
v. Potter, 777.
v. Root, 778.
v. Rudy, 911.
v. St. Louis, etc., Ry. Co., 938, 950.
Evansich v. Railway Co., 1252.
Evansville, etc., Ry. Co. v. McKee, 793.
Evelyn v. Raddish, 856.
Evening News Ass'n v. Tryon, 1231, 1233.
Everson v. Seller, 1126, 1127.
Everest v. Buffalo L. Oil Co., 1193.
Everett v. Southern Exp. Co., 925.
v. Union P. R. Co., 1074.
Evertson v. Sawyer, 842.
v. Tappen, 1007.
Evetts v. Tendick, 996.
Eviston v. Cramer, 1216.
Ewalt v. Gray, 999.
Ewart v. Kerr, 896, 1125.
v. Street, 917.
Ewbank v. Nutting, 1113.
Ewen v. Chicago, etc., R. Co., 1275, 1278.
Ewing v. Blount, 1104, 1109, 1118, 1139, 1141.
v. Handley, 999.
Ewins v. Calhoun, 1166.
Eyre v. Dunsford, 1166.
Ezell v. Dudson, 1252.

Fabens v. Mercantile Bank, 775.
Fagan v. Whitcomb, 856.
Faget v. Brayton, 1144.
Fail v. Presley, 1115.
Fairbank v. Phelps, 1108, 1136.
Fairbanks v. Williams, 1119.
v. Witter, 1101.
Fairchild v. California Stage Co., 942, 1243.
Fairfax v. New York, etc., R. Co., 955.
Fairman v. Fluck, 876, 1161.
Falk v. Fletcher, 1109.
v. Waterman, 1101.
Fallon v. Manning, 1157, 1160.
Fall River Works v. Fall River, 1089.

References are to sections.

Fannie Tuthill, The, 1292, 1293.
Faris v. Lewis, 1165.
Farley v. Craig, 849, 850.
v. Danks, 1235.
v. Ranck, 1209.
v. Union Mut. L. Ins. Co., 839.
Farman v. Lauman, 1257.
Farmers' Bank v. McKee, 1137.
Farmers' Ins. Co. v. Curry, 806.
v. Frick, 811.
v. New Holland Turnpike Co., 821.
Farnham v. Camden, etc., Co., 904.
Farnham v. Foule, 775.
Farnsworth v. Rockland, 1074.
Farrand v. Marshall, 1053.
Farrar v. Talley, 1238.
Farrell v. Colwell, 1104, 1139.
Farris v. Ware, 1174.
Farwell v. Davis, 911.
v. Price, 1113.
v. Thomas, 897.
v. Warren, 1031.
Faucitt v. Booth, 1224.
Faulkner v. Brown, 1097.
v. South Pacific R. Co., 903, 906.
Favor v. Philbrick, 914.
Favorita, The, 1292, 1293.
Fay v. Allen, 1193.
v. Holloran, 849, 851.
v. O'Neill, 1234.
v. Prentice, 1035.
v. Swan, 1243.
Faynan v. Knox, 1237.
Featherston v. Wilkinson, 891, 901.
Feaver v. Montreal T. Co., 972.
Feeney v. Long Island R. Co., 1251.
Feeter v. Heath, 798.
Feise v. Linder, 1204.
Felkner v. Scarlet, 1283.
Fell v. McHenry, 1132.
v. Northern P. R. Co., 938, 942, 950, 953.
v. Rich Hill Coal M. Co., 1243.
Fellerman v. Dolan, 1232.
Fellows v. Goodman, 1258.
Fenelon v. Butts, 977, 1243, 1255, 1257, 1258.
Fenn v. Curtis, 1170.
v. Harrison, 798.
v. Western R. Co., 923.
Fenwick v. Robinson, 817.
Ferguson v. Davis Co., 977, 1243.
v. Firmenich Manuf. Co., 1051.
v. Hogan, 1144.
Fernander v. Dunn, 865.
Fernwood v. Masonic Hall Ass'n, 1098.
Fero v. Roscoe, 1224.
Ferrin v. Symonds, 1010.
Ferris v. Bramble, 1061.
v. Comstock, 1171.
Ferris v. Paris, 785.
Fernsler v. Moyer, 1282.
Fick v. Runnels, 782.
Fidler v. McKinley, 984, 1282.
Field v. Columbet, 993, 994.
v. Farrington, 779.
v. Post, 1149.
Fields v. Williams, 1104.
Fifield v. Whittemore, 1193.
Filber v. Dautermann, 1204.
Filer v. New York C. R. Co., 944, 1249, 1251, 1252.
Filey v. Meyers, 845.
Fillebrown v. Grand Trunk Ry. Co., 904.
v. Hoar, 848, 866, 1252.
Filley v. Fassett, 1200.
Final v. Backus, 1109, 1110, 1126.
Fink v. Schroyer, 944.
Finley v. Hershey, 1043, 1047.
Finn v. Providence Gas & W. Co., 1067, 1070.
Finnerty v. Tipper, 1208.
Finney v. Warren Ins. Co., 803.
Fire Ass'n v. Rosenthal, 816, 828, 830.
Fire Ins. Co. v. Felrath, 809.
Firestone v. Firestone, 1007.
Firmin v. Firmin, 1020, 1127.
First Baptist Church v. Brooklyn Ins. Co., 802, 820.
v. Scehnectady, etc., R. Co., 1035, 1037, 1058.
First Nat. Bank v. Boyce, 1109, 1138.
v. Crowley, 1160.
v. Fourth Nat. Bank, 775.
v. Marietta, etc., R. Co., 954.
v. Strong, 1109, 1118.
v. Western U. T. Co., 968.
First Nat. Bank of Joliet v. Adam, 847.
First Parish v. Middlesex, 1071, 1081.
First Parish of Shrewsbury v. Smith, 1012.
Fish v. Chapman, 904, 926.
v. Dodge, 1035, 1036.
Fishback v. Miller, 1167.
Fisher v. Brown, 1112, 1118, 1132.
v. Dowling, 1010.
v. Jansen, 1248, 1251.
v. Mellen, 1169.
v. Morgan, 1003.
v. Patterson, 1226, 1227, 1233.
v. Prince, 1140.
v. Whoollery, 1147, 1149.
Fisk v. Commercial Ins. Co., 817.
v. Hicks, 1171, 1172.
Fiske v. Chesterfield, 1091.
Fitch v. Newberry, 884.
Fitchburg, etc., Corp. v. Melven, 848.
Fitchburg R. Co. v. Boston & M. R. Co., 1061.
Fitton v. Phœnix Ass. Co., 820.

References are to sections.

Fitzgerald v. Dobson, 1256.
v. Stewart, 1227.
Fitzgibbon v. Brown, 1239, 1240.
Fitzgibbons v. Freisem, 871.
Fitzhugh v. Wyman, 1148.
Flagg v. Low, 866.
Flanagan v. Womack, 1253.
Flash, The, 899, 902, 906.
Fleet v. Lockwood, 1155.
Fleming v. Chicago, etc., R. Co., 1072.
v. Smith, 807.
Fletcher v. Burrows, 1227.
v. Cole, 1097.
v. Great Western R. Co., 1074.
v. Peck, 1061.
Flint v. Clark, 1206.
v. Norwich, etc., T. Co., 941.
Flint, etc., R. Co. v. Detroit, etc., R. Co., 1078.
v. Gordon, 1081.
Floyd v. Bovard, 769, 1136.
Flureau v. Thornhill, 864.
Flynn v. Nash, 873.
Flynt v. Chicago, etc., Ry. Co., 1011.
Foels v. Tonawanda, 1255.
Fogg v. Hill, 843.
Foley v. Wyeth, 1053.
Follett v. Jewett, 1230.
Folsom v. Apple River, etc., Co., 1023, 1049.
v. Underhill, 1250.
Fontaine v. Boatmen's Sav. Inst., 1006.
Foot's Case, 1155.
Foot v. Tracy, 1227.
Foote v. Cincinnati, 853.
v. Clifton, 1037.
v. Merrill, 1019, 1110, 1127.
Forbes v. Aspinall, 806, 817.
v. Boston & L. R., 1109, 1138.
v. Connecticut Mut. L. Ins. Co., 832.
v. Dallett, 917.
v. Loftin, 1250.
Ford v. Chicago, etc., R. Co., 1046.
v. Jones, 1243, 1255, 1284.
v. Monroe, 952, 1259.
v. Roberts, 1109.
v. Santa Cruz R. Co., 1058.
v. Williams, 1141.
Fordyce v. McCants, 1273.
Fore v. Western, etc., R. Co., 1009, 1016.
Forest v. Elwes, 1123.
Forrestier v. Bordman, 769, 774, 782, 784, 931.
Forsyth v. Wells, 1020, 1127, 1128, 1131.
Fort v. Orndoff, 873, 874.
Fortman v. Rottier, 1234, 1235.
Fort Plain Bridge Co. v. Smith, 1058.
Fort Worth, etc., Ry. Co. v. Pearce, 1013.
Fort Worth St. R. Co. v. Whitten, 1249.
Forward v. Adams, 1204.
Forwood v. North Wales Mut. Mar. Ins. Co., 807.
Fosdick v. Greene, 1112.
Foshay v. Ferguson, 1239, 1240.
Foster's Appeal, 1007.
Foster v. Dow, 1236.
v. Equitable Ins. Co., 828, 829.
v. Fletcher, 1009.
v. Kennedy, 1171, 1174.
v. Peyser, 848.
v. Preston, 785.
v. Schofield, 1283
v. Waller, 782.
v. Weaver, 1126.
Fotheringham v. Adams Exp. Co., 1257.
Foulger v. Newcomb, 1213, 1218.
Foulkes v. Sellway, 989, 990.
Fountain v. Boodle, 1209.
v. Schulenberg, 846.
v. West, 1212.
Fountain Oil Co. v. Phelps, 768.
Fowle v. New Haven & N. Co., 1016, 1039, 1044, 1046, 1047, 1055.
v. Park, 1201.
Fowler v. Abrams, 1169.
v. Bott, 851.
v. Bowen, 1213.
v. Gilman, 1136.
v. Merrill, 1109.
v. Rathbones, 818.
Fox v. Boston & M. R. Co., 932.
v. Broderich, 1208.
v. Chicago, etc., R. Co., 1250.
v. Jones, 1113.
v. Mackreth, 1175.
v. Saint John, 1252.
v. Stevens, 1283.
Fragin v. Pearson, 1151.
Fralick v. Presley, 1144.
Fraloff v. New York, etc., R. Co., 954, 955.
France v. Gaudet, 1098, 1113, 1117, 1118, 1129.
Francis v. Ocean Ins. Co., 807.
v. Schoellkopf, 1047, 1051, 1056, 1057, 1058.
v. Somerville Ins. Co., 811.
v. St. Louis T. Co., 836, 939, 940, 1244.
Frank v. Maguire, 849.
Frankfurter v. Bryan, 1238, 1239.
Franklin v. Browne, 1204.
v. Greene, 1175.
v. McCorkle, 1282.
v. National Ins. Co., 821.
Franklin Ins. Co. v. Chicago Ice Co., 811.
v. Hamill, 830.
v. Sears, 772.

References are to sections.

Franklin Ins. Co. v. Southwestern Ry. Co., 1268, 1273.
v. Taylor, 802.
Frayes v. Worms, 818, 819.
Frazer v. Berkeley, 1255.
v. Frazer Lubricator Co., 1201.
Frazier v. Fredericks, 1147, 1149.
v. McCloskey, 1208.
Freddie L. Porter, The, 1290.
Freeborn v. Norcross, 1144.
Freedel v. North Carolina R. Co., 1084.
Freeman v. Clute, 868.
v. Venner, 1132, 1175.
Freer v. Cowles, 1118, 1139.
Freese v. Tripp, 977.
Frei v. Vogel, 1160.
Freidenheit v. Edmundson, 1029, 1098.
Fremont, etc., R. Co. v. Crum, 1019.
v. Whalen, 1064, 1066, 1070, 1087.
French v. Buffalo, etc., R. Co., 917.
v. Connecticut River L. Co., 1054, 1055, 1058.
v. Fuller, 1009.
Freon v. Carriage Co., 1117.
Freshwater v. Nichols, 1136.
Freudenstein v. Heine, 1037, 1038.
Frey v. Drahos, 1115, 1153.
Frick v. St. Louis, etc., Ry. Co., 1252.
Freid v. Royal Ins. Co., 814.
Friend v. Dunks, 1217.
Frierson v. Hewitt, 1235.
Frith v. Barker, 887.
Fritz v. Hobson, 1054, 1058.
v. Tudor, 1002.
Frolich v. McKiernan, 1204.
Froman v. Sierra Nevada S. M. Co., 1119.
Frost v. Saratoga Mut. Ins. Co., 810.
Frostburg v Dufty, 1039.
Frothingham v. Everton, 770, 778.
v. Morse, 1109.
v. Prince, 814.
Fry v. Bennett, 1207, 1208.
Frye v. Lockwood, 799.
v. Maine Central R. Co., 877.
Fryer v. Kennersley, 1209.
Fulkerson v. George, 1206.
v. White, 785.
Fullenwider v. McWilliams, 1235, 1238.
Fuller v. Boston Mut. F. Ins. Co., 820.
v. Bowker, 1247.
v. Dean, 1226, 1227.
v. Edings, 1071.
v. Ellis, 774, 792.
v. Fenner, 1218.
v. Naugatuck R. Co., 1252.
v. Ruby, 848.
Fullerton L. Co. v. Spencer, 1096.
Fulsome v. Concord, 1251.
Funston v. Chicago, etc., Ry. Co., 1256.
Furlong v. Cooney, 993, 994, 997.
Furman Street, In re, 1063, 1074.
Furman v. Van Sise, 1282.
Furnish v. Missouri P. Ry. Co., 1252.
Furniss v. Hudson River Co., 1061, 1090.

Gails v. Hailman, 929.
Gainard v. Rochester, etc., R. Co., 1251.
Gains v. Western R. Co., 953.
Gainsford v. Carroll, 1118.
Gaither v. Blowers, 1254.
v. Kansas City, etc., R. Co., 1266.
Galbraith v. Fleming, 1255.
Galbreath v. Gray, 1003.
Gale v. New York, etc., R. Co., 1249, 1256.
Galena, etc., R. Co. v. Ennor, 1118.
Galigher v. Jones, 778, 786, 1118, 1119, 1121.
Gall v. Comber, 783.
Gallager v. Brunell, 1167, 1223.
Gallaway v. Burr, 1240.
Gallena v. Hot Springs R., 942, 950.
Galloway v. Courtney, 1227.
Gallwey v. Marshall, 1204.
Galt v. Archer, 887.
Galveston v. Barbour, 1272.
v. Posnainsky, 1256.
Galveston Oil Mills v. Malin, 1256.
Galveston C. R. Co. v. Hewitt, 1256.
Galveston Wharf Co. v. Gulf, etc., Ry. Co., 843.
Gammon v. Freeman, 1006.
Ganong v. Green, 1136.
Ganter v. Atkinson, 1012.
Gantt v. American Central Ins. Co., 840.
Gardere v. Blanton, 1020.
Gardner v. Field, 1098, 1113.
v. Grannis, 999.
v. Keteltas, 863.
Garland v. Salem Bank, 775.
Garr v. Selden, 1204.
Garretson v. Brown, 1096.
v. Clark, 1190, 1193.
Garrett v. Western U. T. Co., 958.
Garvey v. Wayson, 1234, 1237.
Gaston v. Bates, 1003.
v. Bristol & E. Ry. Co., 884.
Gates v. Fleischer, 1244.
v. Green, 851.
v. Northern Pacific R. Co., 1055.
v. Rifle Boom Co., 1127.
Gathercole v. Miall, 1207.
Gauche v. London, L. & G. Ins. Co., 808.
Gaudet v. Brown, 894.
Gaulden v. Shehee, 1171.
Gay v. Gardiner, 1091.
v. Winter, 1278.

References are to sections.

Gayford v. Nichols, 1053.
Gazelle, The, 897, 1292.
Gazelle, The, and Cargo, 878.
Gee v. Lancashire & Y. Ry. Co., 913, 914.
Geiselman v. Scott, 1244, 1255.
Geismer v. Lake Shore, etc., Ry. Co., 903.
Genau v. District of Columbia, 858.
General Mut. Ins. Co. v. Sherwood, 803.
General Rucker, The, 1243.
Gentry v. Burnett, 1151.
George v. Fisk, 1012.
v. Haverhill, 1248.
v. Skivington, 1173.
v. Van Horn, 1282.
George and Richard, The, 1267, 1289.
Georgia v. Kepford, 1215.
Georgia Ins., etc., Co. v. Dawson, 803.
Georgia P. R. Co. v. Freeman, 1256.
v. Fullerton, 1096, 1101.
Georgia R. v. Hayden, 939.
v. Olds, 950, 951.
v. Pittman, 1268.
Georgia R. & B. Co. v. Berry, 1047.
v. Garr, 1266.
Georgia S. R. Co. v. Neel, 1247.
Gere v. Council Bluffs Ins. Co., 824.
Gerhard v. Neese, 911.
German-American Ins. Co. v. Etherton, 808.
German F. Ins. Co. v. Gauten, 811.
Germania F. Ins. Co. v. Curran, 810.
Gerrish v. Newmarket M. Co., 1056.
Gerzebek v. Lord, 873.
Getty v. Devlin, 1164.
Getz v. Philadelphia & R. R. Co., 1069, 1071, 1081, 1091.
Getzandaffer v. Caylor, 849.
Geveke v. Grand Rapids & I. R. Co., 1248, 1250.
Gheen v. Johnson, 727.
Ghegan v. Young, 849.
Ghen v. Rich, 1108, 1109, 1127, 1142.
Giaccomini v. Bulkely, 1024.
Gibbon v. Paynton, 925.
Giblin v. McIntyre, 1243.
Gibbons v. Missouri P. Ry. Co., 1072.
Gibbs v. Cruikshank, 1146.
v. Gildersleeve, 911.
v. Grey, 891.
v. Randlett, 1257.
Gibson v. Brown, 887.
v. East Tennessee, etc., R. Co., 949.
v. Gibson, 1252.
v. Humphrey, 1129, 1140.
v. Perry, 851.
v. Sturge, 887.
Giddings v. Sears, 792.
Giese v. Schultz, 984, 985, 988.
Giesy v. Cincinnati, etc., R. Co., 1061, 1087.
Gihon v. Stanton, 789, 790.
Gilbert v. Greeley, etc., R. Co., 1058.
v. Kennedy, 1012, 1028, 1055, 1093.
v. Peck, 1139.
Gile v. Stevens, 1047, 1056.
Giles v. Comstock, 847, 848.
v. Dugro, 848
v. O'Toole, 864, 865, 868, 869.
Gilhooley v. Washington, 843, 848.
Gilkey v. The Beta, 1289, 1293.
Gill v. Brown, 796.
v. Rochester, etc., R. Co., 1275.
Gillard v. Brittan, 1106, 1140.
Gillett v. Ellis, 819.
v. Mead, 1283.
v. Western R. Co., 1101.
Gillespie v. Thomas, 853.
Gillham v. Madison C. R. Co., 1061.
Gilliam v. Moore, 1006.
Gillies v. Wofford, 1144.
Gillingham v. Dempsey, 918.
Gilman v. Holey, 1255.
v. Lowell, 1224, 1227, 1228.
Gilmer v. Eubank, 1208.
v. Lime Point, 1075.
Gilmore v. Borders, 1224.
v. Driscoll, 1017.
v. Pittsburgh, etc., Ry. Co., 1081.
Gilreath v. Allen, 1216.
Gilson v. Wood, 1096.
Girot v. Graham, 1239.
Givens v. Van Studdiford, 1047, 1054, 1059.
Gizler v. Witzell, 1255.
Glanders v. Graff, 1208.
Glascock v. Bridges, 1240.
Glaspell v. Northwestern P. R. Co., 1172.
Glaspy v. Cabot, 1110, 1113, 1128.
Glass v. Garber, 869, 1102.
Glaucus, The, 1292.
Gleason v. Gary, 1055.
v. Moen, 876.
Glendell v. Thomas, 896.
Globe Ins. Co. v. Sherlock, 807.
Glover v. Wilson, 854.
Goddard v. Grand Trunk Ry., 941, 950, 951, 953, 1243.
v. Mallory, 931.
v. Westcott, 983, 986, 988, 989.
Godin v. London Ass. Co., 806.
Godman v. Meixsel, 792.
Godsall v. Boldero, 832.
Goggin v. Kansas, etc., R. Co., 904.
Gold v. Bissell, 1258.
Goldey v. Penn. R. Co., 904.
Goldsmith v. Henderson, 906.
v. Joy, 1253, 1255.
Goller v. Fett, 994, 1020, 1127.
Good v. Buckeye Ins. Co., 816, 830.

References are to sections.

Good v. Mylin, 994, 1101, 1238.
Goodall v. Thurman, 984, 988.
Goodbread v. Ledbetter, 1226, 1232.
Goodenow v. Tappan, 1204.
Gooding v. Shea, 1034.
Goodman v. Floyd, 1150.
Goodno v. Oshkosh, 953, 1246, 1251, 1256.
Goodrich v. Dorset Marble Co., 1039.
v. Thompson, 774.
Goodsell v. Hartford, etc., R. Co., 1260.
Goodtitle v. Tombs, 993, 994.
Goodwillie v. McCarthy, 819.
Goodwin v. Francis, 797, 798.
v. Massachusetts Mut. L. Ins. Co., 833.
Gordon v. Anthony, 1186.
v. Bowne, 807.
v. Buchanan, 798.
v. George, 859.
v. Insurance Co., 807.
v. Jenney, 1151, 1153.
v. Jones, 1031.
Gore v. Brazier, 864, 1002.
Gorgas v. Philadelphia, etc., R. Co., 1067, 1086.
Gorman v. Sutton, 1224.
v. Wheeler, 782.
Goshen v. England, 1242, 1255.
Gott v. Pulsifer, 1223.
Gottbehuet v. Hubachek, 1213.
Gough v. Farr, 988.
v. Goldsmith, 1221.
Gould v. Barnard, 1155.
v. Cayuga Co. Nat. Bank, 1168, 1174.
v. McKenna, 1255.
v. Oliver, 819.
v. Scannell, 1156.
v. Thompson, 841.
v. Weed, 1232, 1233.
Goulds' Manuf. Co. v. Cowing, 1193.
Goulet v. Asseler, 1097.
Gourdier v. Cormack, 1012.
Gove v. Blethen, 1204.
v. Watson, 1139.
Gower v. Andrew, 768.
Grabenheimer v. Blum, 1174.
Grable v. Margrave, 1254, 1283.
Grace v. Dempsey, 1255, 1258.
v. McArthur, 1206, 1217.
Gracie v. New York Ins. Co., 816.
Graessle v. Carpenter, 1018.
Grafton Bank v. Flanders, 798.
Graham v. Chicago, etc., Ry. Co., 884.
v. Connersville, etc., R. Co., 1083.
v. Davis, 917.
v. Geneva, etc., Manuf. Co., 1183.
v. Maitland, 777.
v. O'Callaghan, 1146.
v. Pacific R. Co., 950, 951.
Graham v. Pittsburgh, etc., R. Co., 1083, 1088.
v. Plate, 1200, 1202.
v. Smith, 1284.
v. Stone, 1230, 1231.
Grainger v. Hill, 1235.
v. Martin, 807.
Grand v. Pendergast, 899.
v. Van Vleck, 1095.
Grand Canal Co. v. Fitzsimmons, 848.
Grand Junction R. & D. Co. v. County Comm'rs, 1078.
Grandona v. Lovdal, 1060.
Grand Rapids v. Grand Rapids & I. R. Co., 1077.
Grand Rapids B. Co. v. Jarvis, 1061.
Grand Rapids, etc., R. Co. v. Chesebro, 1064, 1066.
v. Horn, 1089.
Grand Rapids & I. R. Co. v. Weiden, 1068.
Grand Trunk Ry. v. Jennings, 1265.
Granger v. Collins, 863.
Granite State, The, 1291.
Grannis v. Chicago, etc., Ry. Co., 1256.
Grant v. Brooklyn, 1246.
v. Hardy, 1163.
v. King, 1109.
v. Ludlow, 776.
v. Smith, 1020, 1126.
v. Willey, 986.
Gravel v. Clough, 1118.
Graves v. Berdan, 852, 863.
v. Dawson, 1234.
v. Joice, 992.
v. Lake Shore Ry. Co., 925.
v. Porter, 850.
v. Washington Mar. Ins. Co., 807.
Gray v. Bass, 778.
v. Bullard, 1144.
v. Cincinnati S. R. Co., 953.
v. Crocheron, 1139.
v. Durland, 1281, 1282.
v. Manhattan Ry. Co., 1084.
v. Missouri P. R. Co., 918.
v. Murray, 772, 774.
v. Stevens, 1096.
v. Waln, 819, 890.
v. Waterman, 1032.
Great Falls Manuf. Co. v. United States, 1074.
Great Northern Ry. Co. v. Shepherd, 954.
Great Western Ins. Co. v. Staaden, 810.
Great Western Ry. Co. v. Miller, 951.
v. Redmayne, 913.
Greeley v. Stilson, 1127.
Greely v. Bartlett, 782, 789.
v. Hunt, 775.
v. Tremont Ins. Co., 819.

References are to sections.

Green v. Biddle, 999.
v. Boston & L. R. Co., 919, 1099, 1117.
v. Button, 1222.
v. Chicago, 1063.
v. Eales, 855, 858.
v. Fall River, 1084.
v. Hall, 1128.
v. Hudson R. Co., 1252, 1259.
v. Spencer, 984.
v. Sperry, 1140.
v. State, 1071.
v. Stephens, 1139.
v. Tennant, 1002.
v. Williams, 864, 865, 868, 871, 1102.
Greenbaum v. Austin, 1006.
Greene v. Hallenback, 1168.
v. Nunnemacher, 1035, 1058, 1059.
v. Pacific Ins. Co., 807.
Greenfield Bank v. Leavitt, 1101, 1103, 1141.
Greenfield Savings Bank v. Simons, 768.
Greening v. Wilkinson, 1096, 1118.
Greenleaf v. McColley, 986, 988.
v. Moody, 774.
Greentree v. Rosenstock, 768, 785.
Greenup v. Stoker, 986.
Greenville, etc., R. Co. v. Partlow, 1032, 1063, 1085.
Greenwell v. Ross, 880.
Greenwich Ins. Co. v. Raab, 803.
Greenwood v. Greenwood, 1281, 1282.
v. Pierce, 1166, 1172.
v. The Fletcher, 1293.
Greer v. Mayor, 1017.
Gregory v. Chambers, 1238, 1240.
v. Cotterell, 1094.
v. Derby, 1235.
v. New York, etc., R. Co., 1251.
Gresham v. Taylor, 1023.
Greve v. First Division St. Paul & P. Ry. Co., 1076.
Grey v. Mobile Trade Co., 917.
Grider v. Dent, 1284.
Griebel v. Rochester P. Co., 1204, 1205.
Gries v. Zeck, 1250.
Griffey v. Kennard, 994.
Griffin v. Colver, 773, 869, 874, 906, 959.
v. Creppin, 1009.
v. Knisely, 842.
v. Regan, 1002.
v. Shreveport & A. R. Co., 1062.
Griggs v. Austin, 896.
v. Smith, 1006.
Grigsby v. Clear Lake Water Co., 1058.
Grindle v. Eastern Exp. Co., 914.
Gring v. Lerch, 984, 989.
Grinnell v. Wells, 1252.
Grinnell v. Western U. T. Co., 958.
Griswold v. New York Ins. Co., 887, 890.
Griveaud v. St. Louis, C. & W. Ry. Co., 1246.
Grogan v. Broadway F. Co., 1275.
Groman v. Kukkuk, 1243, 1255.
Gross v. Hays, 1145.
v. Rice, 1257.
Grosso v. Railroad Co., 1259.
Grotemkemper v. Harris, 1264.
Groton v. Dallheim, 775.
Grove v. Dubois, 783.
Groves v. Rochester, 1256.
Gruber v. Baker, 1164.
Gruman v. Smith, 778, 786, 1119, 1136.
Guchenheimer v. Angewine, 1126.
Guest v. Reynolds, 1053.
Guibert v. British Ship George Bell, 1290, 1294, 1296.
Guiding Star, The, 917.
Guernsey v. Shellman, 1101.
Guerry v. Kerton, 1118.
Guilford v. McKinley, 1137.
Guilhon v. Lindo, 1200.
Guirney v. St. Paul, etc, Ry. Co., 793.
Guiterman v. Liverpool, etc., Steamship Co., 933.
Gulf, etc., Ry. Co. v. Evansich, 1249.
v. Fuller, 1084.
v. Gordon, 1246.
v. Head, 940, 1256.
v. Helsley, 1047, 1055.
v. Holliday, 1049.
v. James, 1240.
v. Keith, 1101.
v. Levy, 975, 977, 978.
v. Loonie, 961, 970, 971, 973.
v. McCorquodale, 900, 906.
v. Pool, 1049.
v. Tait, 1047.
v. Wilson, 958.
Gulf, etc., T. Co. v. Richardson, 975, 982.
Gunderson v. Northwestern E. Co., 1273.
Gunn v. Burghart, 1113.
Gunther v. Ullrich, 1171.
Guptill v. Verback, 989.
Guthman v. Castleberry, 876, 1161.
Gutteridge v. Munyard, 855.
Guy v. Oakley, 777.
Guyon v. Serrell, 1202.
Gwinnell v. Eamer, 1035.

Haas v. Kansas City, etc., R. Co., 903.
Hackett v. Brown, 1232.
v. Railroad, 905, 906.
v. Richards, 845.
Haddock v. Taylor, 1174.
Haddrick v. Heslop, 1239.

References are to sections.

Hadley v. Baxendale, 835, 903, 907, 913, 914, 959.
v. Clarke, 888.
v. Heywood, 1285.
v. Insurance Co., 813.
v. Western U. T. Co., 962, 970, 972.
Hagaman v. Moore, 1084, 1085, 1089.
Hagan v. Providence, etc., R. Co., 951.
Hagar v. New England, etc., Ins. Co., 813, 817.
Hagedorn v. St. Louis Ins. Co., 896.
Hagg v. Augusta, etc., Ins. Co., 813.
Haight v. Hoyt, 1168.
Hainer v. Lee, 1144.
Haines v. Schultz, 1216.
v. Welling, 1231, 1233.
Hair v. Little, 1115.
Hairston v. Medley, 782.
Halcomb v. Stubblefield, 1098.
Halden v. Crafts, 785.
Hale v. Bonner, 915, 979.
v. James, 1002.
v. Munn, 1006.
v. Philbrick, 1168.
v. Wall, 776.
v. Wiles, 1185.
Hales v. London, etc., Ry. Co., 905.
Haley v. Dorchester Ins. Co., 814.
Hall v. Burgess, 847.
v. Chicago, etc., R. Co., 1256.
v. Crandall, 798.
v. Delaplaine, 811.
v. Fond du Lac, 1249.
v. Galveston, etc., R. Co., 1273, 1274.
v. Hollander, 952, 1252.
v. Horton, 865.
v. Lauderdale, 797.
v. Memphis & C. R. Co., 949.
v. New Jersey, etc., Co., 916.
v. Ocean Ins. Co., 807, 817.
v. Ray, 1105.
v. South Carolina R. Co., 950.
v. Storrs, 782.
v. Suydam, 1239.
v. Western Transp. Co., 842.
v. Wright, 830, 990.
Hallack v. Johnson, 1256.
Hallam v. Todhunter, 1172.
Hallett v. Novion, 1105, 1113.
v. Wylie, 851.
Halligan v. Wade, 847, 848.
Hallock v. Commercial Ins. Co., 820.
v. Miller, 1218, 1219.
Hallowell v. Guntle, 1212, 1226.
Halsey v. Brotherhood, 1223.
v. Lehigh Valley R. Co., 1056.
Halstead v. Nelson, 1207.
Halwerson v. Cole, 887.
Ham v. Wisconsin, etc., Ry. Co., 1066, 1088.
Hamburg-Bremen F. Ins. Co. v. Garlington, 807, 830.
Hamer v. Hathaway, 1115, 1119.
v. McFarlin, 1226.
Hamden v. Rice, 1012.
Hamersley v. New York, 1091.
Hamilton v. Bark Kate Irving, 933.
v. Billingsley, 1169, 1171.
v. Cunningham, 775.
v. Lau, 1097.
v. Lomax, 1282.
v. McPherson, 873, 921.
v. Smith, 1237, 1240.
v. Third Ave. R. Co., 942, 950, 951, 1031, 1243.
v. Western N. C. R. Co., 906.
Hamlin v. Great Northern Ry. Co., 938, 939.
v. Spaulding, 1258.
Hammat v. Russ, 1015, 1028.
Hammer v. Wilsey, 1103.
Hammon v. Cottle, 776.
Hammond v. Christie, 769.
v. Mukwa, 953, 1248.
v. Schiff, 1025.
Hampton v. Brown, 1136.
v. Jones, 1237.
v. Specknagle, 797.
Hancock v. Gomez, 774.
Hand v. Baynes, 774, 920.
v. Winton, 1204.
Handforth v. Maynard, 1022.
Hanna v. Grand Trunk Ry. Co., 1280.
Hannen v. Ewalt, 850.
Hannibal, etc., Bridge Co. v. Schaubacher, 1066, 1073, 1088.
Hannibal, etc., R. Co. v. Martin, 942.
v. Swift, 954.
Hanover v. Bartels, 1144.
Hanover Water Co. v. Ashland Iron Co., 1017.
Hansard v. Robinson, 1132.
Hansbrough v. Stinnett, 1206, 1207.
Hanselman v. Kegel, 1144, 1147, 1149, 1157.
Hansford v. Payne, 1260.
Hanson v. Edgerly, 1163.
v. Fowle, 1243.
v. Herrick, 1107.
Hapgood v. Batcheller, 784.
Harcourt v. Harrison, 1215.
Hardacre v. Stewart, 799.
Harder v. Harder, 1019, 1034.
Hardin v. Ely, 782.
v. Kennedy, 1024.
Harding v. Brooks, 1211.
v. Carter, 769, 1133.
v. Larkin, 865.
Harley v. Platts, 1111, 1118.
Hardman v. Willcock, 769.
Hardrop v. Gallagher, 1612.
Hardy v. Nelson, 864, 865.

References are to sections.

Hargrave v. Le Breton, 1219.
Hargreaves v. Hutchinson, 1113.
Harker v. Dement, 1012, 1097, 1107.
Harkruder v. Moore, 1239.
Harman v. Cundiff, 1206, 1210.
Harmon v. Harmon, 1206.
v. Railroad, 1016, 1046, 1047.
Harmony v. Bingham, 903.
Harold v. New York, etc., R. Co., 1242, 1256.
Harpham v. Whitney, 1239.
Harries v. Edmonds, 880.
Harriman v. Queen Ins. Co., 807, 811.
Harrington v. St. Paul, etc., R. Co., 1046.
Harris v. Arnott, 1217.
v. Eagle Ins. Co., 806, 816, 821.
v. Eldred, 1101.
v. Goslin, 855.
v. Jacobs, 897.
v. Jones, 855.
v. Louisville, etc., R. Co., 1257, 1258.
v. Moody, 819.
v. Packwood, 884.
v. Panama R. Co., 918, 932.
v. Rand, 887, 890.
v. Scaramanga, 818.
v. Schuylkill, etc., R. Co., 1074.
v. Smith, 1136.
v. Tumbridge, 1119.
Harrisburg, The, 1259.
Harrisburg Electric L. Co. v. Goodman, 1147.
Harrison v. Cage, 983, 988.
v. Ely, 1253.
v. Glover, 779.
v. Harrison, 1118, 1121, 1123.
v. Iowa, etc., R. Co., 1064.
v. Kiser, 1018.
v. Missouri P. Ry. Co., 1096, 1101.
v. Sterett, 1058.
v. Swift, 983, 988.
v. Taylor, 1201.
v. Wood, 1001.
Hart v. Blum, 1110.
v. Direct United States C. Co., 959.
v. Pennsylvania R. Co., 925.
v. Railroad Co., 1250.
v. Skinner, 1140.
v. Spalding, 918.
v. Western R. Co., 1244.
v. Western U. T. Co., 957, 958.
v. Windsor, 847, 848, 851, 855.
Hartgraves v. Duval, 1155.
Hartley v. Herring, 1204, 1218, 1219.
Hartranft v. Hesser, 1209.
Hartshorn v. Chaddock, 1048.
v. Worcester, 1073.
Hartz v. St. Paul, etc., R. Co., 1038, 1046.
Harvey v. Connecticut, etc., R. Co., 900.
v. Pocock, 1107.
v. Terre Haute, etc., R. Co., 926.
v. Turner, 770, 784.
Harwood v. Bloomington, 1087.
v. Keech, 1208, 1209.
v. Lowell, 1252.
Haskell v. Hunter, 1113.
Haskins v. Lumsden, 1211.
Haslam v. Galena, etc., R. Co., 1064, 1074.
Hass v. Prescott, 1160.
Hastings v. Palmer, 1221.
v. Pepper, 931.
v. Stetson, 1206, 1221, 1233.
Hatch v. Cincinnati, etc., R. Co., 1066, 1071.
v. Dwight, 1047.
v. Fuller, 1283.
v. Hart, 1101.
v. Vermont, etc., R. Co., 1058.
Hatcher v. Briggs, 999.
v. Pelham, 1109, 1118.
Hatfield v. Central R. Co., 1047.
v. Fullerton, 876, 1161.
v. Lasher, 1227, 1231, 1233.
Hauk v. Brownell, 1166, 1174.
Haun v. Wilson, 1212.
Haven v. Wakefield, 876.
Havilah, The, 1291.
Haviland v. Parker, 1104, 1156.
Hawes v. Kansas City, etc., Co., 1256.
v. Knowles, 951.
Hawkes v. Carter, 1233.
Hawkesworth v. Thompson, 1035.
Hawkins v. Front Street Cable Ry. Co., 1252.
v. Globe Printing Co., 1226, 1228, 1231.
v. Great W. R. Co., 904.
v. Hoffman, 954.
Hawley v. Bradford, 1007.
Hawthorne v. Siegel, 866, 1029.
Hay v. Cohoes Co., 1053, 1058.
v. Reid, 1227.
Haycraft v. Creary, 1166.
Hayden v. Albee, 1042, 1050.
v. Bradley, 873.
v. Florence Sewing M. Co., 868.
v. Shed, 1235.
Hayes v. Chicago, etc., R. Co., 1019.
v. Massachusetts L. Ins. Co., 1132, 1133.
v. Ottawa, etc., R. Co., 1068, 1086, 1087.
v. Wells, etc., Co., 925.
Hayner v. Cowden, 1204.
v. Smith, 847, 1252.
Haynes v. Leland, 1231, 1233.
v. Sinclair, 1283.

References are to sections.

Hays v. Blizzard, 1234.
v. Creary, 1257.
v. Millar, 917.
v. Moynihan, 858, 860.
v. Railroad Co., 978.
v. Riddle, 1136.
v. Stone, 785, 794.
Hayward v. Seaward, 1140.
Haywood v. Foster, 1228, 1229.
Hazard v. Irwin, 1166, 1169.
Hazelton v. Manhattan F. Ins. Co., 818.
Head v. Georgia P. Ry. Co., 950, 951.
v. Providence Ins. Co., 820.
Heald v. Macgowan, 1117.
v. Sargeant, 1106.
Healy v. Hutchinson, 1113.
v. McManus, 848.
Heaney v. Heeney, 1055.
Heard v. James, 1020, 1127, 1128, 1145, 1149.
Hearne v. Lewis, 849.
Hearsey v. Pruyn, 799.
Heartt v. Rhodes, 776.
Heath v. Franklin Ins. Co., 810, 811.
v. Heape, 1239.
v. Lent, 1102, 1235.
Heaton v. Wright, 1230.
Hebert v. Lege, 1012.
Hecklin v. Ess, 1148.
Hecksher v. McCrea, 880.
Hedden v. Griffin, 1174.
Hedderich v. Smith, 875.
Heddles v. Chicago & N. R. Co., 1243, 1256.
Hedgepeth v. Robertson, 1032.
Heebner v. Eagle Ins. Co., 807, 813.
Heeg v. Licht, 1035.
Hegeman v. McArthur, 847, 848.
v. Western R. Co., 953.
Heidenheimer v. Schlett, 1098.
v. Sides, 1095.
Heil v. St. Louis, etc., Ry. Co., 918.
Heilbroner v. Hancock, 878.
Heilman v. Westchester F. Ins. Co., 830.
Heinemann v. Heard, 773.
Heirn v. McCaughan, 937, 939.
Heiser v. Loomis, 1247, 1255.
Heiserman v. Burlington, etc., Ry. Co., 884.
Helburn v. Mofford, 851.
Helder, Ex parte, 796.
Helme v. Philadelphia L. Ins. Co., 838.
Hemmer v. Cooper, 1166.
Hemphill v. Flynn, 842.
Hemstead v. Colburn, 1157.
Henderson v. Detroit, 841.
v. Fox, 1206, 1224.
v. Jackson, 1235.
v. Maid of Orleans, 918.
Henderson v. Railroad Co., 1166.
v. Western M. & F. Ins. Co., 824.
Henderson & N. R. Co. v. Dickerson, 1064, 1087.
Hendricks v. Decker, 1097.
v. Evans, 1112, 1126.
v. Spring Valley Mining & S. Co., 1017.
Hendry v. Squier, 873.
Hening v. United States Ins. Co., 802.
Hennies v. Vogel, 1252.
Henry v. Dubuque, etc., R. Co., 1083.
v. Norwood, 1226.
v. Sioux City & P. Ry. Co., 1256.
Henry Buck, The, 913, 921.
Henshaw v. Bank, 1112.
v. Marine Ins. Co., 814.
Henson v. Veatch, 1227.
Henwood v. Cheeseman, 841.
Hepburn v. Sewell, 1105, 1108, 1139.
Herbert v. Union Ins. Co., 890.
Herdic v. Young, 1020, 1127, 1128, 1154, 1158.
Herfoot v. Cramer, 1171, 1172.
Herman v. Brookerhoff, 1235.
Herreshoff v. Tripp, 993.
Herrick v. Lapham, 1206, 1218.
v. Minneapolis, etc., R. Co., 1280.
Herring v. Jester, 1281, 1283.
Hersberg v. Sachse, 1144.
Hersey v. Walsh, 1132.
Hersh v. Ringwalt, 1218, 1233.
Hertzog v. Hertzog, 864.
Heslop v. Chapman, 1239.
Hess v. Buffalo, etc., R. Co., 1059.
Hesseltine v. Stockwell, 1128.
Hetherington v. Northeastern Ry. Co., 1268.
Heubach v. Rother, 783.
Heucke v. Milwaukee City Ry. Co., 1242.
Hewett v. Chicago, etc., Ry. Co., 907.
Hewit v. Mason, 1219.
v. Prime, 1281, 1282, 1283.
Hewitt v. Pioneer Press Co., 1227.
Hewlett v. George, 1257.
Hext v. Gill, 1053.
Hexter v. Knox, 858, 866, 867, 873, 874.
Hey v. Wyche, 862.
Heydon and Smith's Case, 1097.
Heyer v. Carr, 1144.
v. Salsbury, 1267.
Heylyn v. Adamson, 775.
Heyne v. Blair, 1239, 1240.
Heys v. Tindall, 786.
Heyward v. Cuthbert, 1003.
Hibbard v. Foster, 1012.
v. New York & E. Ry. Co., 951.
Hibernia Ins. Co. v. O'Connor, 811.

References are to sections.

Hibernia Ins. Co. v. Meyer, 811.
Hickman v. Dill, 1160.
Hicks v. Empire F. Ins. Co., 811.
v. Faulkner, 1239, 1240.
v. Foster, 1238.
v. Hannibal, etc., R. Co., 951.
v. Shield, 896.
Hidden v. Waldo, 789, 790.
Higgins v. Halligan, 842.
v. Louisville, etc., R. Co., 950, 953.
v. Mansfield, 1102.
v. Watervliet F. Co., 951.
v. Whitney, 1105.
Highland Ave., etc., R. Co. v. Matthews, 1016.
Hilbourne v. Suffolk, 1084, 1085, 1088.
Hildreth v. Jones, 1007.
v. Thompson, 1001.
Hill v. Barclay, 856.
v. Bloomer, 1155.
v. Boston, etc., R. Co., 925.
v. Hunt, 776.
v. Idle, 897.
v. Leadbetter, 896.
v. Maupin, 984.
v. Ward, 1223.
v. Wilson, 1283, 1284.
v. Winsor, 1144, 1246.
Hilliard Flume Co. v. Woods, 1118, 1128.
Hillier v. Allegheny Ins. Co., 821.
Hillman v. Halliday, 954.
Hills v. Bannister, 799.
Hilton v. Vanderbilt, 779.
Hinchey v. Koch, 1148, 1157.
Hinchman v. Stiles, 1006.
Hinckley v. Beckwith, 873, 874.
v. New York C. R. Co., 931.
Hinde v. Smith, 778.
Hiner v. Richter, 1171, 1172.
Hines v. Sinclair, 1283.
Hinkle v. Davenport, 1206, 1227.
Hinkson v. Morrison, 1152.
Hinman v. Heyderstadt, 1020.
Hinsdale v. White, 848, 859.
Hinsdell v. Weed, 896.
Hinton v. Cream City R. Co., 1256.
Hintze v. Thomas, 850.
Hiort v. London, etc., Ry. Co., 1140.
Hirsch v. Feeney, 1240.
Hitchler v. Voelker, 1255.
Hitchcock v. Harrington, 1003.
v. North, 1240.
v. Watson, 768.
Hitchman v. Whitney, 1283.
Hite v. Long, 1094.
Hoadley v. Watson, 1253.
Hoag v. Breman, 1156.
v. Hatch, 1204.
Hoard v. Garner, 775, 776.
Hobbs v. Harvey, 1002.
v. London, etc., R. Co., 938, 939, 940, 942, 1244.
Hobson v. Lord, 819.
Hodgkins v. Price, 997, 998.
Hodsall v. Stallebrass, 1252.
v. Taylor, 1283.
Hoeser v. Kraeka, 1150.
Hoff v. Baum, 842.
Hoffman v. Ætna Ins. Co., 824.
v. Delihanty, 842.
v. Insurance Co., 827.
v. Kermerer, 1284.
v. Noble, 1138.
v. Northern P. R. Co., 938, 950.
v. Union Ferry Co., 1292.
v. Western Ins. Co., 824.
Hogan v. Central Pacific R. Co., 1058.
v. Cregan, 1255, 1283, 1284.
v. Delaware Ins. Co., 806.
Hogg v. Dorrah, 1204, 1213.
v. Pinckney, 1235.
Holbrook v. Connor, 1166.
v. Finney, 1006.
v. Young, 847, 876.
Holcomb v. Noble, 1169.
Holdich's Case, 838.
Holford v. Adams, 884.
Holland v. Seven Hundred, etc., Tons of Coal, 884, 888, 914.
v. Turner, 775.
Holleran v. Bagnell, 1268.
Holley v. Burgess, 1212.
Holliday v. Cohen, 1102.
v. Parker, 1281, 1282.
v. Sterling, 1235.
Hollingsworth v. Funkhouser, 999.
v. Shaw, 1204.
Hollister v. Nowlen, 884, 885, 925, 954.
Holloway v. Griffith, 983, 988, 990.
Holmes v. Carolina C. R. Co., 949, 950.
v. Corthell, 1058, 1060.
v. Davis, 997, 1000.
v. Guion, 847.
v. Halde, 1247.
v. Holmes, etc., Co., 1200.
v. Oregon, etc., R. Co., 1265, 1268, 1277.
v. Seely, 1008, 1009.
v. Wilson, 1036, 1040, 1041.
Holsapple v. Rome, etc., R. Co., 904.
Holt v. Sargent, 1017.
v. Van Eps, 1132.
Holton v. Daly, 1260, 1266, 1276.
v. Noble, 1163.
v. Smith, 1138.
Holyoke v. Grand Trunk R., 944.
Home Ins. Co. v. Adler, 802, 821, 823.
v. Baltimore W. Co., 811, 822, 828.
v. Garfield, 830.
v. Lindsey, 809, 811.
Home L. Ins. Co. v. Sherman, 847, 848.
Homer v. Hathaway, 1109.
v. Perkins, 1166.
Hone v. Mutual Safety Ins. Co., 840.

References are to sections.

Honeycutt v. St. Louis, etc., Ry. Co., 1256.
Honore v. Lamar F. Ins. Co., 829.
v. Murray, 854.
Honsee v. Hammond, 1012, 1017.
Hood v. Finch, 1082.
v. Mathis, 841.
Hooker v. Hammill, 1156, 1157.
Hooks v. Smith, 1159.
Hope, The, 1290, 1292.
Hooper v. Savannah, etc., Ry. Co., 1064.
Hoopes v. Meyer, 848.
Hopewell v. Price, 1155.
Hopkins v. Atlantic, etc., R. Co., 950, 952.
v. Burney, 1155.
v. Ratliff, 872, 873.
v. Westcott, 954.
v. Western P. R. Co., 1038.
Hopper v. Haines, 1109.
v. Hopper, 1003.
Hopple v. Higbee, 1093, 1141.
Hornby v. Lacy, 783.
Horne v. Midland Ry. Co., 914.
v. Walton, 1163.
Horner v. Guiser Manuf. Co., 1136.
v. Lawrence, 800.
Hornketh v. Barr, 1283.
Hornsby v. Fielding, 778.
Hornstein v. Atlantic, etc., R. Co., 1083, 1084.
Horsford v. Wright, 864.
Horton v. Cooley, 843.
Hosher v. Kansas City, etc., R. Co., 1083, 1084, 1089.
Hosley v. Brooks, 1210.
Hostetter v. Vowinkle, 1201.
Hotchkiss v. Auburn, etc., R. Co., 992.
v. Lathrop, 1232.
v. Oliphant, 1231, 1233.
Hot Springs R. Co. v. Tyler, 1016.
Houck v. Southern P. Ry. Co., 948, 950, 953.
Hough v. Bowe, 1139, 1141.
v. Dickinson, 1100.
Houghkirk v. Delaware, etc., Canal Co., 1274.
Housel v. Thrall, 782.
Houston, etc., R. Co. v. Adams, 1014, 1015, 1023, 1024.
v. Boehm, 1242, 1246.
v. Burke, 919.
v. Cowser, 1269, 1272.
v. Ford, 953.
v. Hill, 900.
v. Jackson, 920.
v. Lee, 1256.
v. Leslie, 1244.
v. Rand, 938, 942.
v. Shafer, 1244.
v. Smith, 898, 900, 902.
Houston, etc., R. Co. v. Willie, 1251.
Hove v. Mason, 890.
Hover v. Penn. Co., 1280.
How v. How, 1004.
Howard v. Delaware & H. R. C. Co., 1264, 1276.
v. Keech, 1209.
v. Manderfield, 1027.
v. Mansfield, 1141.
v. Rugland, 1148.
v. Sexton, 1207, 1208.
Howard Oil Co. v. Davis, 1246, 1256.
Howcott v. Collins, 854.
Howe v. Buffalo, etc., R. Co., 793, 794, 795.
v. Farrar, 1097.
v. Handley, 1157.
v. Perry, 1210, 1231.
v. Ray, 1064.
v. Sutherland, 782.
v. Wade, 791.
Howe Machine Co. v. Bryson, 836.
Howell v. Cheatham, 1208.
v. Goodrich, 1251.
v. Howell, 1231.
v. Morlan, 774.
v. Richards, 863.
v. Scoggins, 1101.
v. Young, 771.
Howes v. Ashfield, 1246, 1248.
v. Martin, 865.
Howland v. Davis, 779.
Hoxsie v. Empire Lumber Co., 1110, 1128.
Hoyt v. Gelston, 1097, 1107.
v. Macon, 1235.
v. New York Ins. Co., 833.
v. Southern, etc., T. Co., 1018.
H. S. Benjamin W. & C. Co. v. Merchants' Exch. Bank, 1132.
Hubbard v. Briggs, 1166, 1170.
v. Harnden Exp. Co., 914.
v. Russell, 1035.
Hubbel v. Blandy, 1118, 1119.
v. Great Western Ins. Co., 807.
Hubbell v. Meigs, 1171.
Huckins v. People's Ins. Co., 827.
Hudson v. Ede, 897.
Hufnagel v. Mt. Vernon, 1057.
Huftalin v. Misner, 1031.
Hugg v. Augusta Ins. & B. Co., 887.
Huggeford v. Ford, 1152, 1157.
Huggins v. Clark, 999.
Hughes v. Anderson, 1052.
v. Hood, 864, 865.
v. McDonough, 1244.
v. Quentin, 1101, 1129.
v. Vinland F. Ins. Co., 808.
Huizega v. Cutter & S. L. Co., 1246.
Hulbert v. Topeka, 1260.

References are to sections.

Hulehan v. Green Bay, etc., R. Co., 1250.
Huline v. Brown, 863, 876.
Hull v. Marshall Co., 796.
Humble v. Shoemaker, 1282.
Hume v. Arrasmith, 1204.
v. Tufts, 1097.
Humphreis v. Parker, 1210.
Humphrey v. Phinney, 1002.
Humphries v. Brogden, 1053.
v. Parker, 1239.
Hungerford v. Redford, 1020, 1127, 1158.
Hunsacker v. Sturgis, 768.
Hunt v. Chicago, etc., R. Co., 1248.
v. Cope, 847, 848.
v. Haskell, 890.
v. Potter, 875.
v. Wadleigh, 775.
Hunter v. Fry, 878.
v. Ogden, 1252.
v. Prinsep, 889.
v. Stewart, 947.
Huntingdon, etc., Coal Co. v. English, 1121.
Huntingdon, etc., R. Co. v. Decker, 1263.
Huntley v. Bacon, 1097.
v. Russell, 1033.
Hurd v. Gallaher, 1157.
v. Hubbell, 1109.
Hurlburt v. Green, 1104, 1141.
v. Hardenbrook, 1237.
Hursh v. St. Paul, etc., R. Co., 1083.
Hurst v. Coley, 1132.
v. Detroit City R., 1260, 1264, 1273.
Hurt v. Southern R. Co., 945.
v. St. Louis, etc., Ry. Co., 953, 1252.
Hurtin v. Union Ins. Co., 890.
Huson v. Dale, 1224, 1229.
Hussey v. Ryan, 1244, 1252.
Hussner v. Brooklyn City R. Co., 1047.
Huston v. Wickersham, 994.
Hutchings v. Ladd, 774.
Hutchins v. Kimmell, 1285.
v. St. Paul, etc., R. Co., 1273, 1274.
v. Western, etc., R. Co., 954.
Hutchinson v. Chicago & N. Ry. Co., 1065.
v. Parker, 1018.
v. Wheeler, 1228.
Huzzey v. Field, 951.
Hyatt v. Adams, 1252, 1259.
Hyde v. Cookson, 1138, 1158.
v. Greuch, 1234, 1239, 1240.
v. Middlesex, 1073.
v. Stone, 1115.
Hyde Park v. Washington Ice Co., 1074, 1084.
Hynds v. Schenectady Ins. Co., 810.
Hynes v. Patterson, 1130, 1132.
Iberia, The, 1290.
Ihl v. Forty-second Street, etc., R. Co., 1275.
Iler v. Baker, 1117.
Illinois Ins. Co. v. Marseilles Manuf. Co., 820.
Illinois Mut. F. Ins. Co. v. Andes Ins. Co., 840.
Illinois C. R. Co. v. Barron, 942.
v. Cobb, 906, 913.
v. Copeland, 955.
v. Crudup, 1260, 1273, 1274.
v. Finnegan, 1101.
v. Grabill, 1039, 1045, 1046, 1047, 1054.
v. Hammer, 950.
v. Haynes, 920.
v. Latimer, 953.
v. McClellan, 906.
v. Owens, 907.
v. Parks, 953.
v. Sutton, 942, 943.
v. Weldon, 1263, 1267.
Illinois, etc., R. Co. v. Switzer, 1067.
Illinois, etc., R. & Coal Co. v. Cobb, 1008, 1012.
v. Ogle, 1020.
Independent Mut. Ins. Co. v. Agnew, 821.
Indiana Car Co. v. Parker, 1242, 1246, 1250.
Indiana C. R. Co. v. Hunter, 1063.
v. Moore, 873.
Indiana, etc., R. Co. v. Allen, 1016, 1064, 1082.
v. Eberle, 1016.
Indianapolis v. Gaston, 836, 945, 946, 949, 1243, 1246, 1248, 1250, 1251.
Indianapolis, etc., R. Co. v. Birney, 940, 1244, 1250.
v. Bush, 1255.
v. Milligan, 953.
v. Stables, 942, 943, 1243, 1245.
Ingalls v. Lord, 775, 1132.
Ingels v. Mast, 1193.
Ingersoll v. Jones, 1282, 1284.
v. Musgrove, 1185, 1186, 1196.
v. Sergeant, 849.
v. Starkweather, 768.
Ingerson v. Miller, 1282.
Ingledew v. Northern R., 906, 907, 911, 918.
Ingram v. Lawson, 1223, 1228, 1246.
v. Rankin, 1096, 1109, 1111, 1118, 1125.
Ingwersen v. Rankin, 1035.
Inman v. Foster, 1226, 1227, 1233.
v. Western Ins. Co., 811.
Insurance Co. v. Ayres, 827.
v. Boon, 803, 821.
v. Brame, 1259.

References are to sections.

Insurance Co. v. Express Co., 803, 821.
v. Fogarty, 807.
v. Insurance Co., 840.
v. Leslie, 806.
v. Mordecai, 805.
v. Morse, 808.
v. Piaggio, 821.
v. Transportation Co., 803, 813.
International, etc., Ry. Co. v. Benitos, 1012.
v. Brazzil, 1256.
v. Cocke, 1101.
v. Gilbert, 940, 942, 953.
v. Irvine, 945.
v. Kindred, 1272.
v. Kuehn, 1265.
v. Nicholson, 918, 919.
v. McDonald, 1269.
v. Ormond, 1269.
v. Pape, 1049.
v. Ragsdale, 1012.
v. Smith, 953.
v. Telephone & T. Co., 1092.
v. Terry, 938.
v. Tisdale, 903.
v. Wilkes, 942, 953.
Invincible, The, 917.
Ionic, The, 954.
Ionides v. Universal Ins. Co., 803, 1222.
Ireland v. Metropolitan E. R. Co., 1080.
Irick v. Fulton, 999.
Irish v. Cloyes, 1139.
Irons v. Field, 1204.
Irvine v. Midland, etc., Ry. Co., 899, 902.
Irving v. Greenwood, 989.
v. Manning, 807.
v. Richardson, 806.
Irwin v. Brandwood, 1213.
v. Dearman, 1282.
v. Sprigg, 1055.
v. Williar, 794.
Isle Royal M. Co. v. Hertin, 1128.
Israel v. Brooks, 1239, 1240.
Ives v. Carter, 1171, 1178.
v. Humphreys, 1092, 1095.
v. Ives, 1009.
v. Jones, 794.
Izon v. Gorton, 851, 852.

Jackel v. Reiman, 1032.
Jacks v. Dyer, 999.
Jackson v. Armstrong, 1171.
v. Aspell, 1001.
v. Baker, 774.
v. Collins, 1180.
v. Davenport, 992.
v. Isaacs, 896.
v. Kiel, 1047.
v. Loomis, 999.
Jackson v. Pesked, 1033.
v. Richards, 775.
v. Sacramento, etc., R. Co., 917.
v. Stetson, 1224.
v. Todd, 1012.
v. Wood, 993, 997.
Jacksonville, etc., Ry. Co. v. Adams, 1076.
Jacksonville & S. Ry. Co. v. Walsh, 1068, 1089.
Jacob v. Louisville, 1087.
Jacobs v. Bangor, 1256.
v. Crum, 1238, 1239, 1240.
v. Hoover, 1255.
Jacobus v. Monongahela Nat. Bank, 1101.
v. St. Paul, etc., R. Co., 904.
Jacoby v. Laussatt, 1131.
Jacques v. Bridgeport Horse R. Co., 1246, 1248.
James v. Christy, 1263.
v. Phelps, 1239.
James River Co. v. Turner, 1070, 1084.
Jamison v. Hendricks, 1139.
Jandt v. South, 1146.
Jansen v. Effey, 1157.
Jaques v. Millar, 869.
v. Stewart, 1118.
Jarman v. Stewart, 1238.
Jarvis v. Johnson, 984, 988.
v. Rogers, 1137.
v. St. Louis, etc., Ry. Co., 1051, 1055.
Jas. A. Dumont, The, 1292.
Jasper v. Purnell, 1031.
Jauch v. Jauch, 1232.
Jay v. Almy, 1257.
Jeffcoats v. Knotts, 1057.
Jefferies v. Allen, 1003.
Jeffersonville R. Co. v. Rogers, 953.
Jeffersonville, etc., R. Co. v. Esterle, 1016, 1039, 1044, 1046, 1056.
Jeffras v. McKillop, 1231.
Jeffrey v. Bigelow, 1165.
Jefts v. York, 797.
Jegon v. Vivian, 1020.
Jellett v. St. Paul, etc., Ry. Co., 931, 1109, 1139.
Jellison v. Goodwin, 1240.
Jellinghaus v. New York Ins. Co., 933.
Jenkins v. Lykes, 1009.
v. McConnico, 1109, 1118.
v. McCoy, 1009, 1023.
v. Means, 995.
Jennette v. Sullivan, 984.
Jennings v. Florence, 1235.
v. Johnson, 1160.
v. Van Schaick, 1242, 1256.
Jennison v. Hapgood, 1007.
v. Parker, 776.
Jervis v. Tomkinson, 845.

References are to sections.

Jesser v. Gifford, 1012, 1034.
Jesson v. Solly, 897.
Jewell v. Union P. Ry. Co., 1256.
Jewett v. Brooks, 864.
v. Pettit, 1174.
Joch v. Dankwardt, 945, 977, 1243.
Johannesson v. Borschenius, 1105.
John Owen, The, v. Johnson, 931.
Johnson v. Allen, 1285.
v. Bailey, 1144.
v. Blasdale, 798.
v. Brown, 1206.
v. Camp, 1095.
v. Campbell, 828.
v. Caulkins, 990, 1255.
v. Chicago, etc., Ry. Co., 1066, 1273, 1274.
v. Courts, 1101.
v. Culver, 1171.
v. Freeport, etc., Ry. Co., 1074, 1089.
v. Futch, 999.
v. Hannahan, 1030.
v. Holyoke, 1101.
v. Jenkins, 987.
v. King, 1235.
v. Lewis, 1035.
v. McKee, 1245, 1255.
v. Manhattan Ry. Co., 1246, 1251.
v. Marshall, 1118, 1151.
v. Missouri P. Ry. Co., 1256, 1264, 1274.
v. Monell, 1167.
v. New York C. R. Co., 774, 931.
v. Oppenheim, 848, 851.
v. Pensacola, etc., R. Co., 884.
v. Porter, 1046.
v. Shields, 1001.
v. Smith, 989, 990, 1210.
v. Stear, 1137.
v. Totten, 782.
v. Travis, 987, 988, 989.
v. Trenton Mut. Ins. Co., 832.
v. United States, 843.
v. Wade, 778.
v. Wallower, 1165, 1173.
v. Wells, etc., Co., 942, 943, 977, 1242, 1243, 1255.
v. Winona, etc., R. Co., 941.
Johnston v. Columbian Ins. Co., 810.
v. Disbrow, 1285.
v. Lance, 1233.
v. St. Andrew's Church, 864.
v. Whittemore, 1137.
Joliet v. Conway, 1248, 1254, 1256.
Jolly v. Single, 874.
Jones v. Allen, 1109.
v. Chapman, 1233.
v. Chicago, etc., R. Co., 1063, 1064, 1066, 1072.
v. Clarke, 1172.
v. Diver, 1204.
Jones v. Gooday, 1017.
v. Greeley, 1204, 1209, 1210, 1217.
v. Hannovan, 1037.
v. Horn, 1109, 1137, 1138.
v. Littler, 1213.
v. McNeil, 1097, 1103.
v. Marks, 786.
v. Michigan Ins. Co., 811.
v. Morehead, 1193.
v. New Orleans & S. R. Co., 1076, 1083.
v. Priester, 954.
v. Reynolds, 842.
v. Smith, 851.
v. Stevens, 1226, 1227.
v. Townsend, 1204, 1227.
v. Voorhees, 904, 954.
Jordan v. Bowen, 1249.
v. Eaton, 878.
v. Middlesex R. Co., 1249.
v. New York & H. R. Co., 1256.
v. Warren Ins. Co., 888.
José E. Moré, The, 1294.
Joseph Schlitz Brewing Co. v. Compton, 1038, 1040, 1045.
Josey v. Wilmington, etc., R. Co., 1096.
Joshua Barker, The, 924, 1296.
Joslin v. Grand Rapids Ice Co., 1246.
Josselyn v. McAllister, 1257, 1258.
Journeay v. Brackley, 850.
Joyner v. Weeks, 858.
Judah v. Randel, 807.
Judge v. New York, etc., R. Co., 994.
Judson v. Western R. Co., 926.
Just v. Porter, 1144, 1149, 1157.
Justice v. Kirlin, 1210.
v. Nesquehoning V. R. Co., 1076, 1083.
Jutte v. Hughes, 1047, 1048, 1054, 1060.

Kahn v. Freytag, 1283, 1284.
v. Love, 872.
Kalembach v. Michigan C. R. Co., 1244.
Kaley v. Shed, 1103, 1141.
Kancher v. Blinn, 1204.
Kane v. Commercial Ins. Co., 806.
v. New York E. R. Co., 1080.
Kankakee & S. R. Co. v. Horan, 1034, 1048, 1049.
Kansas City v. Kansas B. Ry. Co., 1077.
Kansas C. R. Co. v. Commissioners, 1077.
Kansas City, etc., R. Co. v. Farrell, 1070.
v. Fite, 938.
v. Kregeto, 1066, 1071, 1072.
v. Merrill, 1088.
v. Simpson, 904, 925.

References are to sections.

Kansas R. Co. v. Milman, 1016.
Kansas P. R. Co. v. Lundin, 1263, 1265, 1274.
v. Miller, 1263.
v. Nichols, 907.
v. Painter, 1248, 1254.
v. Pavey, 1256.
v. Reynolds, 906.
Kantzler v. Grant, 990.
Karney v. Paisley, 1210.
Karns v. Tanner, 1004.
Karr v. Barstow, 1149.
v. Parks, 947, 952, 1252.
Karst v. St. Paul, etc., R. Co., 1017.
Kaskaskia Bridge Co. v. Shannon, 896.
Kaspari v. Marsh, 1265.
Kauffman v. Babcock, 1237.
Kavanaugh v. Janesville, 1252.
v. Taylor, 1113, 1115.
Kaye v. Powel, 1175.
Kean v. McLaughlin, 1207.
Kearney v. Metropolitan E. Ry. Co., 1080.
Keating v. Cincinnati, 1053.
Keddie v. North British Ry. Co., 908.
Keegan v. Kinnare, 842, 863, 876.
Keeler v. Niagara F. Ins. Co., 818.
v. Wood, 865.
Keen v. Priest, 1107.
Keenan v. Cavanaugh, 1030, 1244.
v. Stimson, 1280.
Keene v. Dilke, 1103, 1141.
v. Munn, 1007.
Keenholts v. Becker, 1208, 1218, 1221.
Keep v. Fuller, 1190.
Kehoe v. Rounds, 1149.
Keightlinger v. Egan, 1256.
Keirnan v. Heaton, 1031.
Keiser v. Mahanoy City Gas Co., 1036, 1052.
Keith v. Ham, 1141.
v. Trapier, 1007.
Keithsbury, etc., R. Co. v. Henry, 1066, 1089.
Keller v. Donnelly, 1281, 1282.
v. Paine, 1113.
v. Stolzenbaugh, 1184.
Kelley v. Archer, 1140.
v. Chicago, etc., R. Co., 1263.
v. Dillon, 1233.
v. Highfield, 986, 987, 988, 989.
Kellogg v. Chicago & N. R. Co., 920, 1244.
v. Tompson, 1132.
Kelly v. Altemus, 1146.
v. Dutch Church, 864.
v. Hendry, 1260.
v. McDonald, 1095, 1096, 1104.
v. McKibben, 1146.
v. Miles, 867.
v. Partington, 1218.
Kelly v. Renfro, 990.
v. Riley, 984.
v. Rogers, 1101.
v. Sherlock, 1232.
v. Smith, 778.
v. Valentine, 1178.
Kelsey v. Hay, 1256.
v. Ward, 848.
Kemmitt v. Adamson, 1031, 1095.
Kemp v. Thompson, 1136.
v. Western U. T. Co., 967.
Kemper v. Louisville, 1029, 1044, 1051.
Kempker v. Roblyer, 774.
Kendall v. Albia, 1243, 1249, 1250, 1251.
v. Fitts, 1157.
v. Honey, 1003.
v. Stone, 1216, 1223.
v. Wilson, 1171.
Kendrick v. McCrary, 1282, 1283.
Kenkele v. Manhattan Ry. Co., 1080.
Kennedy v. Dodge, 896.
v. Gregory, 1227, 1233.
v. Holborn, 1224, 1230.
v. Shea, 1281, 1282.
v. Strong, 1109.
v. Whitwell, 1096, 1109, 1110.
Kennett v. Fiskel, 1144.
Kenney v. McLaughlin, 1227.
Kennon v. Gilmer, 1243, 1256.
Kenny v. Collier, 864, 867.
Kent v. Ginther, 1118.
v. Hudson R. Co., 906.
v. Lincoln, 1251.
Kentucky C. Ry. Co. v. Ryle, 1256.
Kentucky, etc., R. Co. v. Dills, 950
Kentucky Wagon Manuf. Co. v. Louisville & N. R. Co., 897.
Kenyon v. Woodruff, 1175.
Kepler v. Hyer, 1243.
Kepner v. Mix, 1146.
Kerfoot v. Marsden, 988.
Kernochan v. New York B. Ins. Co., 810, 821, 829.
Kerr v. Cotton, 785.
v. Merchants' Exch. Co., 852.
v. Quaker City Ins. Co., 817.
v. Shaw, 848.
v. South Park Comm'rs, 1089.
Kersenbrock v. Martin, 1157.
Kersey v. Railroad Co., 1069.
Kesler v. Smith, 1263, 1265, 1268.
Kessler v. McConachy, 847, 848.
Ketchum v. American Exp. Co., 904.
v. Texas & P. R. Co., 1256.
Keyes v. Minneapolis, etc., Ry. Co., 1101, 1245.
v. Western Vt. Slate Co., 858, 873.
Keys v. Westford, 792.
Kid v. Mitchell, 1111, 1118.
Kiddall v. Trimble, 1003.
Kidder v. Oxford, 1091.

References are to sections.

Kidney v. Stoddard, 1171.
Kier v. Peterson, 1127.
Kiernan v. Chicago, etc., Ry. Co., 1064, 1067, 1089.
v. Heaton, 1021.
v. Manhattan Q. T. Co., 1198.
Kiff v. Youmans, 1255.
Kilbourn v. Thompson, 1257.
Kilbourne v. Suffolk, 1063.
Kill v. Hollister, 808.
Kille v. Ege, 992, 994.
Killips v. Putnam F. Ins. Co., 811.
Killmer v. New York, etc., R. Co., 884.
Kimber v. Barber, 768.
Kimball, The, 896.
Kimball v. Bath, 1256.
v. Holmes, 979, 1095.
v. Howard Ins. Co., 811.
Kimmans v. Chandler, 1176.
Kinahan v. Bolton, 1200.
Kindred v. Stitt, 1257.
King v. Butler, 796.
v. Colvin, 1240.
v. Ham, 1109, 1132.
v. Iowa, etc., R. Co., 1070.
v. Little, 992.
v. Merriman, 1020.
v. Minneapolis U. Ry. Co., 1069.
v. Ohio & M. Ry. Co., 941.
v. Richards, 1136.
v. Root, 1205, 1217, 1229.
v. Sarria, 1280.
v. Shepherd, 921.
v. State Mut. F. Ins. Co., 829, 834.
v. Stetson, 1006.
v. Whiteley, 1007.
v. Woodbridge, 906.
Kingdon v. Nottle, 856.
Kinghorne v. Montreal T. Co., 971.
Kingsbury v. Westfall, 858.
Kingsland v. Clark, 853.
v. Mayor, 1079.
Kingston v. Wilson, 774.
Kinney v. Crocker, 945, 946, 947.
v. Folkerts, 1251.
v. Hosea, 1216.
v. Laughenour, 1283.
v. Roberts, 1231.
v. Watts, 864.
Kinyon v. Palmer, 1230.
Kip v. Berdan, 1283.
v. Brigham, 795.
Kirkpatrick v. Adams, 794.
Kittredge v. Peaslee, 841.
Klein v. Jewett, 942, 944, 952.
v. Thompson, 1250.
Klewin v. Bauman, 1209, 1216.
Klinck v. Colby, 1216, 1225.
Kline v. McCandless, 1104.
Klopfer v. Bromme, 1283.
Klumph v. Dunn, 1210.
Knapp v. Sioux City & P. R. Co., 1250, 1256.
v. United States & C. Exp. Co., 914, 918, 1132.
Knickerbocker Ins. Co. v. Gould, 811.
Kniffen v. McConnell, 984, 986, 988, 1210.
Knight v. Eureka, etc., Ins. Co., 803.
v. Gibbs, 1219, 1221.
v. West Jersey R. Co., 1280.
v. Wilcox, 1282, 1283.
Knisley v. Hire, 1019.
Knobell v. Fuller, 1229.
Knott v. Burwell, 1232.
Knowlton v. Fitch, 778, 786.
Knox v. Great Western O. M. Co., 1191, 1192, 1193.
v. Singmaster, 843.
Koch & Balliet's Appeal, 845.
Koenigs v. Jung, 1031.
Kohl v. United States, 853.
Kohne v. Insurance Co., 1133.
Kokomo v. Mahan, 1061.
Kolp v. Bankhead, 1010, 1019, 1031.
Kopp v. Northern P. R. Co., 1017.
Kountz v. Gates, 774.
Kramer v. Goodlander, 1019.
v. San Francisco St. R. Co., 1259.
v. Winslow, 768.
Kroeger v. Pitcairn, 796, 798.
Krohn v. Oechs, 924.
Krueger v. Le Blanc, 1023.
Krug v. Ward, 1235, 1238.
Krumm v. Beach, 1168, 1171, 1172.
Kunkel v. Markell, 1210.
Kurtz v. Frank, 984, 990.
Kuter v. Michigan C. R. Co., 954.
Kyle v. Laurens R. Co., 918.

La Baw v. Hawkins, 1183, 1191.
Lacey v. Mitchell, 1239.
Lacour v. Mayor, 867, 868.
Lacy v. Johnson, 1136.
Ladd v. Boston, 1061.
v. Newell, 1106.
La Farge v. Kneeland, 799.
v. Mansfield, 848.
Lafayette, etc., R. Co. v. Murdock, 1083.
v. Winslow, 1070.
Lafferty v. Jelley, 768.
Laffery v. Railroad Co., 1081, 1082.
Laflin v. Chicago, etc., R. Co., 1066, 1072, 1074, 1075, 1089.
Lahr v. Metropolitan E. R. Co., 1080, 1082.
Laine v. Wells, 1228.
Laing v. Colder, 942, 945, 946, 947.
v. Nelson, 1097.
Laird v. Taylor, 1240.
Lakeman v. Grinnell, 920, 924.
Lake Erie & W. Ry. Co. v. Fix, 940, 942, 943, 953.

References are to sections.

Lake Shore, etc., Ry. Co. v. Bennett, 903.
v. Chicago, 1078.
v. Rosenzweig, 938, 950, 953.
v. Scofield, 884.
Lake Superior, etc., R. Co. v. Greve, 1067, 1082.
Lamb v. Camden, etc., R. Co., 917.
v. Day, 1141.
v. Gulland, 1240.
v. Stone, 1176.
v. Walker, 1017, 1053.
Lambert v. Craig, 953.
v. Haskell, 866.
v. McFarland, 1148.
v. Pharis, 1212, 1226, 1227.
Lambkin v. Southeastern Ry. Co., 1256.
L'Amistad de Rues, 773.
Lamm v. Chicago, etc., Ry. Co., 1016.
Lamos v. Snell, 1212, 1226.
Lancashire & Y. Ry. Co. v. Gidlow, 901.
Lancaster Mills v. Merchants', etc., Co., 772.
Lander v. Castro, 797.
Landes v. Eichelberger, 1101.
Landis v. Shanklin, 1224.
Landsberger v. Magnetic T. Co., 968.
Lane v. Atlantic Works, 1244.
v. Holman, 1256.
v. Montreal T. Co., 972.
v. Thompson, 1012.
v. Wilcox, 1178.
Lang v. New York, etc., R. Co., 952, 953, 1252.
Langdon v. Sherrod, 1165.
Langfeldt v. McGrath, 1047.
Langley v. Warner, 799.
Langton v. Hagerty, 1205.
Lanigan v. Kille, 864, 866.
Lanius v. Druggist Pub. Co., 1206, 1216, 1217.
Lanquest v. Ten Eyck, 999.
Lansing v. Carpenter, 1204.
v. Smith, 1058.
v. Van Alstyne, 848, 876.
Larios v. Bonany y Gurety, 770.
Larkin v. Misland, 864.
Larkins v. Tarter, 1233.
Larminie v. Carley, 786.
Larned v. Buffinton, 1210, 1211, 1224, 1231.
v. Hudson, 1000.
La Roe v. Roeser, 1258.
Larrabee v. Minnesota Tribune Co., 1204, 1206, 1231.
Larrowe v. Beam, 1002.
Larsen v. Groeschel, 1179.
v. Oregon Ry. & N. Co., 1016.
Larson v. Chase, 979, 1095.
Larwell v. Stevens, 994.
La Salle v. Thorndike, 1254, 1255.
Lasch's Appeal, 1082.
Lassiter v. Western U. T. Co., 958.
Latham v. Brown, 1132.
Lathers v. Wyman, 1113.
Lattomus v. Farmers' Mut. F. Ins. Co., 821.
Laugerenne v. Dougherty, 842.
Laurent v. Chatham Ins. Co., 821.
v. Vaughn, 911, 918.
Lavender v. Hudgens, 1234.
Laverty v. Snethen, 774.
Lavery v. Crooke, 1283.
Law v. Davy, 890.
v. London, etc., Ass. Co., 832.
Lawler v. Earle, 1227.
Lawrence v. Boston, 1081, 1089.
v. Cooke, 986, 988.
v. French, 848.
v. Great Northern Ry. Co., 1090.
v. Hagerman, 1235, 1238.
v. Housatonic R. Co., 942, 1214, 1243.
v. Latimer, 943.
v. Maxwell, 1120.
v. New York, etc., R. Co., 917.
v. Rector, 994.
v. Van Horn, 814.
Lawrence, etc., R. Co. v. Cobb, 1026.
Lawson v. Chicago, etc., R. Co., 1265.
v. Morton, 1002.
v. Worms, 896.
Lawyer v. Fritcher, 1282, 1283.
v. Loomis, 1235, 1239.
Layton v. Butler, 1003.
Lea v. Henderson, 1284.
v. Robertson, 1224.
Leadbeater v. Roth, 847, 848, 876.
Learned v. Castle, 1059.
Leather Cloth Co. v. Hirschfield, 1201.
Leavenworth v. Croney, 1006.
Leavenworth, etc., Ry. Co. v. Usher, 1090.
Leavitt v. Cutler, 984, 986, 987.
v. Fletcher, 855.
v. Lamprey, 1006.
Lebanon Mut. Ins. Co. v. Kepler, 811.
Le Blanche v. London & N. W. Ry. Co., 899, 938, 939.
Le Cheminant v. Pearson, 815, 817.
Leckie v. Sears, 887.
Ledoux v. Anderson, 769.
v. Cooper, 769.
Lee v. Barreda, 896.
v. Grand Trunk Ry. Co., 954.
v. Grinnell, 814, 819.
v. Haley, 1200.
v. Helley, 1283.
v. Hodges, 1282.
v. Mathews, 1109.
v. Payne, 859.
v. Raleigh, etc., R. Co., 904.

References are to sections.

Lee v. Tebo R. Co., 1084.
v. Woolsey, 1255.
Leech v. Baldwin, 896.
Leeds v. Cheetham, 858.
v. Cook, 989, 990.
v. Metropolitan Gas L. Co., 1248.
Leffingwell v. Elliott, 865.
v. Gilchrist, 1117.
Leggett v. Steele, 1002.
Leggott v. Great Northern Ry. Co., 1260.
Le Guen v. Gouverneur, 774.
Lehigh Iron Co. v. Rupp, 1273.
Lehigh, etc., R. Co. v. Lazarus, 1066.
Lehman v. Louisiana W. Ry. Co., 953, 1256.
Lehmicke v. St. Paul, etc., R. Co., 1089.
Leishman v. White, 847, 848.
Leiter v. Pike, 848, 853.
Lekeug v. Nash, 850.
Leland v. Tousey, 992.
Lemoine v. Cook, 1251.
Lemont v. Lord, 891.
Lenox v. United Ins. Co., 818, 819.
Lentz v. Carnegie, 1018.
Leonard v. Allen, 1212, 1226.
v. Columbia St. Nav. Co., 1280.
v. Hair, 1141.
v. Miginnis, 1144.
v. New York, etc., T. Co., 957, 963.
v. Pope, 1206, 1207.
v. Whitwill, 1293.
Leoncini v. Post, 1117, 1136.
Leopold v. Judson, 846.
Leostzky v. Canning, 848.
Leppard v. Railroad Co., 903.
Le Roy v. United Ins. Co., 813, 814.
Leroy & N. Ry. Co. v. Hawk, 1089.
Leroy & W. R. Co. v. Ross, 1066, 1089.
Lett v. St. Lawrence, etc., Ry. Co., 1262.
Letton v. Young, 1206.
Leucker v. Steileu, 1283.
Leverick v. Meigs, 774, 777, 783.
Levey v. Dyess, 855.
Levitsky v. Canning, 863, 865.
Levois v. Gale, 885.
Levy v. Brannan, 1239.
v. Peabody Ins. Co., 811.
v. Walker, 1200.
Lewis v. Atlanta, 1250.
v. Brehme, 783.
v. Burlington Ins. Co., 814.
v. Chapman, 1210.
v. Chisholm, 872.
v. Courtright, 1020.
v. Hawley, 1204, 1213.
v. James, 1006.
v. Lochiel Iron & S. Works, 1159.
Lewis v. Manufacturers' F. & M. Ins. Co., 806.
v. Mobley, 1108.
v. Payn, 847, 848.
v. Peake, 857, 865.
v. Phœnix Mut. L. Ins. Co., 833.
v. Rucker, 806.
v. Ship Success, 918.
v. Springfield F. & M. Ins. Co., 821.
v. Steamboat Buckeye, 932.
v. Walter, 1231, 1233.
Libbey v. Tolford, 848.
Liddard v. Lopes, 887, 890.
Liddle v. Market F. Ins. Co., 827.
Lidgett v. Secretam, 815.
Lieberman v. Chicago, etc., R. Co., 1083.
Lienkauf v. Morris, 1095, 1096, 1104.
Lienow v. Ritchie, 1009.
Like v. McKinstry, 1223.
Lillard v. Whittaker, 1096, 1109.
Lillie v. Dunbar, 1160.
v. McMillan, 1152.
Linan v. Reeves, 1109.
Lincoln v. Chrisman, 1206.
v. Hope Ins. Co., 817.
v. Saratoga, etc., R. Co., 942, 945, 1246, 1248, 1251.
Linden v. Graham, 1223.
Lindley v. Horton, 1204.
v. Miller, 876, 1161.
v. Richmond & D. R. Co., 913, 918.
Lindsay v. Cusimano, 897.
v. Larned, 1235.
v. Mulqueen, 1169.
Lindsey v. Danville, 1252.
v. Smith, 1204.
Line v. Stephenson, 863.
Linford v. Lake, 1255.
Linn v. New Jersey, etc., Co., 910.
Linsley v. Bushnell, 942, 1095.
v. Carpenter, 777.
Linton v. Hart, 849.
Linville v. Black, 1109.
Lipe v. Eisenlerd, 1282, 1283.
Lippett v. Kelly, 994.
Liscom v. Boston Mut. F. Ins. Co., 821, 826.
Lister v. Perryman, 1240.
v. Wright, 1232.
Litchfield v. Hutchinson, 1167, 1169.
Little v. Boston, etc., R. Co., 885, 904, 918, 925, 1244.
v. Hall, 1198.
v. Martin, 842.
v. Palister, 1009.
v. Phœnix Bank, 776.
Littlefield v. Perry, 1187, 1189, 1193, 1197.
Littlejohn v. Greeley, 1206, 1208.
Little Rock, etc., Ry. Co. v. Allen, 1064, 1065, 1066.

References are to sections.

Little Rock, etc., Ry. Co. v. Barker, 1266.
v. McGehee, 1074.
Little Rock, etc., T. Co. v. Davis, 957.
Little Schuylkill, etc., Co. v. Richards, 1059.
Littlewood v. Mayor, 1260.
Livermore v. Jamaica, 1063.
Liverpool, etc., Ins. Co. v. Verdier, 822.
Liverpool, etc., Steam Co. v. Phœnix Ins. Co., 904.
Livie v. Janson, 815, 817.
Livingston v. Burroughs, 1217.
v. Jones, 1183.
v. Miller, 854.
v. Rawyards Coal Co., 1020.
v. Tanner, 1000.
v. Woodworth, 1189, 1190.
Lloyd v. Sadlier, 1134.
Llynvi Co. v. Brogden, 1020.
Loader v. Kemp, 872.
Lobdell v. Baker, 1166.
v. Stowell, 1120.
Lock v. Furze, 864.
Locke v. Garrett, 1139.
Lockenour v. Sides, 1235.
Lockett v. Fort Worth, etc., Ry. Co., 1051.
Lockridge v. Foster, 1169.
Lockwood v. New York, etc., R. Co., 1273, 1275, 1280.
v. Twenty-third St. Ry. Co., 1242, 1256.
Locomotive Safety T. Co. v. Pennsylvania R. Co., 1183, 1187.
Loder v. Kekule, 1118, 1172.
Loeb v. Flash, 1118.
Lofft v. Davis, 858.
Logan v. Lewis, 841.
v. Murray, 1282.
v. Western U. T. Co., 975.
Logansport, etc., R. Co. v. Buchanan, 1083.
Lombard v. Chicago, 1249.
v. Chicago, etc., R. Co., 953.
v. Kennedy, 856.
v. Lennox, 1214.
Lommeland v. St. Paul, etc., Ry. Co., 1023.
London, etc., Ry. Co. v. Evershed, 884.
Long v. Harrisburg, etc., R. Co., 1083.
v. Morrison, 1252, 1259, 1263.
v. Rogers, 1234.
v. Woodman, 1167.
Longfellow v. Quimby, 1019, 1020, 1023.
Looff v. Lawton, 1171.
Loomis v. Eagle Ins. Co., 833.
Looney v. McLean, 872.
Loosemore v. Radford, 1134.
Loper v. Western U. T. Co., 968, 975, 978.
Loraine v. Cartwright, 778.
Lord v. Dall, 833.
v. Neptune Ins. Co., 813, 887.
v. Strong, 899.
Lord Derby, The, 1243.
Lorillard v. Palmer, 887.
Loring v. Brodie, 1132.
Loud v. Campbell, 878.
Loughran v. Des Moines, 1047, 1051, 1059.
Louis v. S. B. Buckeye, 918.
Louisville, etc., Ins. Co. v. Bland, 814, 818.
Louisville, etc., Ry. Co. v. Ballard, 941, 950.
v. Buck, 1267.
v. Burke, 1260.
v. Case, 1265.
v. Dickson, 1076.
v. Falvey, 938, 1244, 1246, 1251, 1255.
v. Flanagan, 898, 899.
v. Fleming, 940.
v. Garrett, 950, 953.
v. Gilmer, 918.
v. Glazebrook, 1072, 1087.
v. Gower, 1254.
v. Guinan, 950.
v. Hodges, 804.
v. Jones, 1244.
v. Kelsey, 918.
v. Mask, 938, 940, 953.
v. Mason, 918, 933.
v. Maybin, 950.
v. Mitchell, 1256.
v. Moore, 1256.
v. Orr, 1263.
v. Ryan, 1074.
v. Snyder, 938.
v. Stacker, 1265, 1268.
v. Sullivan, 938.
v. Thompson, 1087.
v. Trent, 907.
v. Whitman, 942, 950, 951.
v. Wilson, 884.
v. Wolfe, 949.
Lounsberry v. Snyder, 848.
Love v. Masoner, 1284.
v. Moynehan, 1032.
v. Shartzer, 993, 999.
Lovejoy v. Murray, 1095.
Lovell v. St. Louis Mut. L. Ins. Co., 838.
Low v. Purdy, 997.
Lowe v. Herald Co., 1212, 1217, 1224.
Lowenburg v. Jones, 896.
Lowenstein v. Monroe, 1102.
Lowery v. Western U. T. Co., 968.
Loweth v. Smith, 1036.
Lowry v. Inman, 1280.
L. R. Junction Ry. v. Woodruff, 1074, 1089.

References are to sections.

Lubert v. Chauviteau, 782.
Lucas v. Flinn, 1242.
v. Groning, 783.
v. Trumbull, 1104, 1105, 1139.
Luce v. Hoisington, 1097, 1100, 1104.
Luck v. Ripon, 1248.
Luckey v. Frantzkee, 848, 876.
Ludden v. Buffalo B. Co., 1137.
Ludwig v. Meyre, 920.
Lugenbeal v. Lamert, 1136.
Luke v. Lyde, 890, 893.
Lukin v. Goodsall, 1033.
Lull v. Fox & W. Imp. Co., 1059.
Lumley v. Gye, 1222.
Lumm v. Port Deposit, etc., Ass'n, 1168.
v. Gage, 848, 876.
v. Shermer, 1171, 1172.
Lunsford v. Dietrich, 1237, 1238.
Lunt v. Philbrick, 1283.
Lupe v. Atlantic, etc., R. Co., 904.
Luse v. Jones, 1097, 1098, 1100.
Lush v. Druse, 854.
Luther v. Winnisimmet Co., 1056.
Luxmore v. Robson, 856.
Lycoming Gas & W. Co. v. Moyer, 1061.
Lycoming Ins. Co. v. Jackson, 825.
v. Mitchell, 806, 822.
v. Schollenberger, 810.
Lydian Monarch, The, 927.
Lyford v. Toothaker, 1009.
Lyle v. Barker, 1097.
v. Murray, 769, 776.
Lynch v. Baldwin, 847, 848, 876.
v. Knight, 977, 978, 1218, 1221.
v. Speed, 872.
Lyon v. Alvord, 819.
v. Donaldson, 1186, 1188.
v. Fishmongers' Co., 1054.
v. Gormley, 1109, 1127.
v. Green Bay, etc., Ry. Co., 1068, 1072, 1076, 1083.
v. Miller, 845.
v. Yates, 1105.
Lyons v. Cleveland, etc., R. Co., 1264.
Lytton v. Baird, 1237, 1238.

Mabin v. Webster, 990.
Maccubbin v. Cromwell, 1004.
Macdonald v. Macdonald, 1285.
MacDonnell v. Harding, 776.
MacDougall v. Maguire, 1232.
Mace v. Ramsey, 900, 913.
Macer v. Third Ave. R. Co., 1251.
Machette v. Wanless, 1144.
Mack v. Burt, 842.
v. Patchin, 864, 876.
Mackay v. Central P. R. Co., 1280.
v. Western U. T. Co., 959.
Mackellar v. Sigler, 847.
Macky v. Dillinger, 1161.
Macon, etc., R. Co. v. Johnson, 1268.
MacVeagh v. Bailey, 1100.
Madison Avenue Baptist Church, In re, 1223.
Magaw v. Lambert, 858.
Magdeburg General Ins. Co. v. Paulson, 918, 933.
Magee v. Holland, 1252.
Maggort v. Hansbarger, 855.
Maggrath v. Church, 814.
Maghee v. Camden, etc., R. Co., 931.
Magmer v. Renk, 1235, 1238.
Magnin v. Dinsmore, 770, 781, 885, 904, 920, 922, 923, 925.
Magninay v. Saudek, 1281, 1282, 1283.
Magoun v. New England Ins. Co., 803.
Mahon v. New York, etc., R. Co., 1038, 1040.
Mahoney v. Belford, 1226.
Mainwaring v. Brandon, 787, 865.
Maitland v. Martin, 792.
Major v. Pulliam, 1031.
Malachy v. Soper, 1223.
Mallough v. Barber, 772.
Malloy v. Bennett, 1209, 1214, 1216, 1217.
Malone v. Stewart, 1204.
Man v. Drexel, 992.
Mangalore, The, 918.
Mangum v. Ball, 774.
Manhattan S. Works v. Koehler, 872, 874.
Manitoba, The, 1294.
Mann v. Grove, 1147.
v. Nunn, 872.
Manning v. Albee, 1166.
v. Laboree, 1002, 1006.
Mansfield, etc., Co. v. McEnery, 1265, 1267, 1268.
Mantz v. Buchanan, 1006.
v. Goring, 855.
Manville v. Western U. T. Co., 958, 961, 963, 964, 969, 1054.
Manville Co. v. Worcester, 1056.
Manwell v. Thompson, 1282.
Mapes v. Weeks, 1224, 1227, 1233.
Marble v. Lewis, 1002.
Marbourg v. Smith, 1234, 1235.
March v. Portsmouth, etc., R. Co., 1072.
Marcy v. Fries, 1055.
Marfield v. Douglass, 779.
v. Goodhue, 779.
Margaret J. Sanford, The, 1292.
Marin v. St. Paul, etc., Ry. Co., 1081.
Marine Bank v. Fulton Bank, 776.
Marine Ins. Co. v. Tucker, 807.
v. United Ins. Co., 890.
Marini v. Graham, 1058.
Marinin S., The, 933.
Markel v. Moudy, 1167, 1172.

References are to sections.

Marker v. Miller, 1255.
Markham v. Jaudon, 786, 1119, 1120.
v. Merrett, 1002.
v. Russell, 1206, 1231.
Marks v. Culmer, 1015, 1032.
v. Long Island R. Co., 1246.
Marmaud v. Melledge, 807.
Marquart v. La Farge, 868.
Marquette, etc., R. Co. v. Langton, 918.
Marquis of Bute v. Thompson, 845.
Marr v. Barrett, 774.
v. Western U. T. Co., 957, 958, 961, 973.
Marrin v. Graver, 864, 869.
Marsden v. Cambridge, 1070.
Marsh v. Billings, 1200, 1202.
v. Butterworth, 847.
v. Falker, 1169.
v. Seymour, 1196.
v. Smith, 1258.
v. Webber, 1165, 1173.
Marshall v. Anderson, 1003.
v. Berridge, 869.
v. Bitner, 1101.
v. Buchanan, 1176.
v. Cohen, 1035.
v. Dupey, 992.
v. Garver, 819.
v. Moseley, 849, 853.
v. New York C. R. Co., 918, 932.
v. Pinkham, 1200.
Martin v. Columbia & G. R. Co., 937.
v. Goble, 1047.
v. Hardesty, 1240.
v. Hill, 873.
v. Martin, 1003.
v. Payne, 1281, 1282.
v. Porter, 1020, 1127.
Martinez v. Thompson, 858.
Marvin v. Pardee, 1015.
v. Prentice, 1171.
Mary Belle Roberts, The, 928.
Mary Eveline, The, 1291.
Mary Steele, The, 1290.
Marys' Case, 952.
Marzetti v. Williams, 770.
Mashiter v. Buller, 896.
Mason v. Citizens' M. & F. Ins. Co., 811.
v. Ellsworth, 1243.
v. Franklin, 775.
v. Graham, 1191, 1193, 1194.
v. Harper's Ferry Bridge Co., 1079.
v. Kennebec, etc., R. Co., 1090.
v. Mason, 1208.
v. Moyers, 876.
v. Raplee, 1166, 1171.
Massachusetts, etc., Ins. Co. v. Carpenter, 776.
Massachusetts, etc., R. Co. v. Boston, etc., R. Co., 1078.
Masters v. Warren, 942, 977, 978, 1243.
Masterson v. Hagan, 992, 994.
Masterton v. Mayor, 773, 874.
v. Mount Vernon, 1102, 1246.
Mather v. American Exp. Co., 913, 919.
Matheson v. Equitable Marine Ins. Co., 815.
Mathew v. Sherwell, 1132.
Mathews v. Cribbett, 984.
v. Howard Ins. Co., 803.
Matlock v. Reppy, 1166, 1167, 1171.
Matson v. Buck, 1227, 1228.
Matteson v. New York, etc., R. Co., 944, 1251, 1252.
Matthews v. Coe, 781, 1118, 1120.
v. Cross, 1219.
v. Duryee, 1007.
v. Missouri P. Ry. Co., 1252.
v. Warner, 1271.
Matthewson v. Perry, 1282.
Mattoon v. Pearce, 1152.
Maule v. Ashmead, 863.
Mauerman v. St. Louis, etc., Ry. Co., 1246, 1252.
Mauran v. Warren, 768.
Mauritz v. New York, etc., R. Co., 954, 955.
Maverick v. Lewis, 847.
Maxwell v. Kennedy, 1211.
May v. Brown, 1232.
v. Jameson, 1159.
v. New York, etc., Society, 1174.
v. Rice, 847.
Mayberry v. Cliffe, 1144, 1150, 1152.
Maye v. Tappan, 994, 1020, 1127.
Mayer v. Walter, 1235.
Maynard v. Beardsley, 1212, 1232.
v. Berkeley, 1255.
v. Pease, 778, 1122.
Mayo v. Springfield, 1017.
Mayor v. Mabie, 863, 876.
v. Ransom, 1185.
Mays v. Railroad Co., 951.
McAfee v. Crofford, 1101, 1102.
McAleer v. Horsey, 1167.
McAlester v. Andrews, 863, 865, 876.
McAlexander v. Harris, 1212.
McAllen v. Western U. T. Co., 959, 978, 981.
McAllister v. Kuhn, 1108.
McAlmont v. McClelland, 1206, 1210.
McAlpin v. Woodruff, 864, 865.
McAndrews v. Thatcher, 819.
McArthur v. Franklin, 1007.
v. Howett, 1144, 1159.
v. Seaforth, 1118, 1123.
McAuley v. Birkhead, 1283, 1284.
McBride v. McLaughlin, 1255.
v. Marine Ins. Co., 814.
McCabe v. Morehead, 1152, 1157, 1158.
McCall v. McDowell, 1258.

References are to sections.

McCall v. Sun Mut. Ins. Co., 807.
McCalla v. Clark, 1137.
McCampbell v. Thornburgh, 1228, 1233.
McCardle v. McGinley, 1235.
McCarthy v. Chicago, etc., R. Co., 1280.
v. Niskern, 1092.
v. Railroad Co., 1260.
McCarty v. Ely, 842.
v. Quimby, 1157.
McClannahan v. Porter, 1003.
McCloskey v. Kieling, 1058.
McClowry v. Cloghan, 864.
McClure v. Hill, 1097.
v. Thorpe, 865.
McClurg v. Price, 847, 848.
McColl v. Western U. T. Co., 968.
McCombie v. Davies, 1107.
McConnell v. Hampton, 1257.
McCord v. The Tiber, 1288.
McCormick v. Kansas City, etc., Ry. Co., 1090.
v. Pennsylvania C. R. Co., 920, 954, 1115.
v. Stowell, 872.
McCoy v. Cornell, 1144.
v. Trucks, 1283.
McCreary v. Cloud, 1002, 1003.
v. Pennsylvania Canal Co., 1191, 1193.
McCrubb v. Bray, 993, 999.
McCuaig v. Quaker City Ins. Co., 814.
McCue v. Klein, 1260.
McCuen v. Ludlum, 1204.
McCulloch v. McDonald, 931.
McCullough v. Grishobber, 1235.
McCurdy v. Rogers, 796.
McDermott v. Lycoming F. Ins. Co., 809.
McDonald v. Chicago, etc., R. Co., 1251.
v. North, 1141, 1144.
v. Norton, 1145.
v. Scaife, 1144, 1145.
v. Whitney, 1183.
v. Woodruff, 1208.
McDonough v. Gilman, 1035.
McDougald v. Coward, 1232.
McDuff v. Detroit Evening Journal Co., 1215.
McDuffee v. Portland R. Co., 886.
McElderry v. Flanagan, 849, 850.
McElroy v. Nashua, etc., R. Co., 941.
v. Wathen, 1003.
McEwan v. McLeod, 899.
v. Western Ins. Co., 829.
McEwen v. Dillon, 872.
McFadden v. Missouri P. Ry. Co., 904.
v. Santa Anna, etc., Ry. Co., 1252.
McFadin v. Rippey, 848, 876.
McFarland v. McClees, 786.
McGann v. Hamilton, 1018.
McGarrity v. Byington, 999.
McGarry v. Missouri P. Ry. Co., 1238, 1239, 1240.
McGavock v. Chamberlain, 1144.
McGaw v. Ocean Ins. Co., 887, 888, 890.
McGinnis v. Missouri P. Ry. Co., 942.
v. Savage, 1144.
McGivern v. Stymest, 818.
McGlashen v. Tallmadge, 848, 851.
McGlemery v. Keeler, 1206.
McGowen v. Young, 1136, 1138.
McGregor v. Board of Education, 855.
v. Kilgore, 918.
v. Thwaites, 1253.
McGrew v. Stone, 1244.
McGuire v. Galligan, 1115, 1129.
v. Grant, 1017, 1053.
McGunnagle v. Thornton, 842.
McHenry v. Marr, 874.
McHoy v. Ryan, 848.
McIntire v. Bransford, 1227.
v. State, 1063.
v. Young, 1206.
McIntosh v. McLawn, 855.
McIntyre v. Giblin, 1243.
v. New York C. R. Co., 1246, 1263, 1265, 1266, 1268.
McInvoy v. Dyer, 1095, 1104, 1141.
McKee v. Phœnix Ins. Co., 838.
McKeever v. United States, 1184.
McKeigue v. Janesville, 1263, 1267.
McKellar v. Couch, 1235.
McKenney v. Haines, 1112, 1118.
McKenty v. Universal L. Ins. Co., 832.
McKenzie v. Allen, 1253, 1254, 1255.
v. Farrell, 876.
v. Scott, 783.
McKeon v. Citizens' R. Co., 950.
v. See, 1035.
v. Whitney, 848, 850.
McKern v. Calvert, 1284.
McKibbin v. Peck, 887, 892.
McKinley v. Chicago, etc., R. Co., 942, 946, 1243, 1256.
v. Irvine, 768.
McKinney v. Western Stage Co., 1252.
McKinster v. Bank of Utica, 775, 776.
McKown v. Furgason, 1169.
McKyring v. Bull, 1230.
McLarren v. Thompson, 1162.
McLaughlin v. Bangor, 1101.
v. Corry, 1242, 1249, 1251.
v. Cowley, 1226.
v. McLaughlin, 1004, 1005.
v. Piatti, 1143.
McLean v. Chicago, etc., Ry. Co., 953.
v. Fleming, 1200.

References are to sections.

McLean Coal Co. v. Long, 1020, 1127.
McLenahan v. McLenahan, 1007.
McLimans v. Lancaster, 1256.
McMahan v. Bowe, 994.
McMahon v. Field, 1244.
v. McGraw, 768.
v. Kimball, 1006.
v. Northern C. R. Co., 1243, 1248.
v. St. Louis, etc., R. Co., 1062.
McManus v. Crickett, 951.
McMartin v. Insurance Co. of N. A., 811.
McMasters v. Commonwealth, 1063.
McMillan v. Arthur, 774.
v. Birch, 1204.
v. Michigan, etc., R. Co., 926.
v. Solomon, 852.
v. Union P. B. W., 1243.
McMillen v. Birch, 1213.
McMorris v. Simpson, 774.
McMurphy v. Minot, 859.
McMurray v. Day, 999.
McNair v. Compton, 864.
McNamara v. Clintonville, 1244, 1247.
v. King, 1254.
McNamee v. Minke, 1235.
McNutt v. Dix, 768.
v. Young, 1226.
McPeters v. Phillips, 1132.
McPherson v. Daniels, 1221, 1233.
v. Ryan, 988.
McPheters v. Page, 800.
McReynolds v. Burlington, etc., R. Co., 1066, 1071.
McQueen v. Fulghan, 1218.
McQuesney v. Hiester, 854.
McTavish v. Carroll, 1028.
McWilliams v. Bragg, 1253.
v. Hoban, 1237, 1238.
v. Morgan, 1014.
Meacham v. Fitchburg R. Co., 1063, 1084, 1088.
Mead v. Mali, 1170.
Meade v. Brothers, 774.
v. St. Louis Mut. L. Ins. Co., 838.
Meader v. Stone, 1009.
Meaghers v. Driscoll, 942, 979, 1009, 1029.
Meaher v. Pomeroy, 842.
Mears v. Cornwall, 1139.
Mechanics', etc., Bank v. Farmers', etc., Bank, 1119, 1136.
Mechanics' F. Ins. Co. v. Nichols, 811.
Medaugh v. Wright, 1208.
Medbury v. New York & E. R. Co., 906.
v. Watson, 1165, 1166, 1167, 1179, 1235.
Meech v. Smith, 798.
Meehan v. Forrester, 1113.
Meek v. Wendt, 798.
Meeker v. Gardella, 843.
Meeks v. Bowerman, 876.
Meidel v. Anthis, 977.
Meigs v. Lister, 1035.
Meixell v. Kirkpatrick, 1132, 1137.
Melcher v. Merryman, 1009.
Mellor v. Pilgrim, 1046.
Melvin v. Winslow, 1152.
Melvina, The, 1293.
Memphis v. Bolton, 1087.
Memphis, etc., Packet Co. v. The H. C. Yaeger, 1292.
Memphis, etc., R. Co. v. Hicks, 1058.
v. Whitfield, 941, 944.
Mendelsohn v. Anaheim L. Co., 951.
Menkens v. Menkens, 1132.
Menot v. Cumberland Co. Com., 1082.
Mercantile Ins. Co. v. Holthaus, 810.
Mercantile Steamship Co. v. Tyser, 803.
Mercer v. Jones, 1118, 1132.
v. Walmsley, 1030, 1281.
Merceron v. Dowson, 849.
Merchants' Bank v. Rawls, 776.
Merchants' & P.'s Nat. Bank v. Trustees Masonic Hall, 1132.
Merchants' & T. Bank v. Farmers' & M. Bank, 781.
Merchants' Dispatch & T. Co. v. Bloch, 904, 917.
v. Merriam, 931.
Merchants' Mut. Ins. Co. v. Butler, 803, 888.
Merchants' Shipping Co. v. Armitage, 887.
Merest v. Harvey, 1031.
Merrell v. Tice, 1199.
Merrick v. Brainard, 929.
v. Gordon, 896.
v. Webster, 931.
Merrill v. Frame, 863.
v. Grinnell, 954.
v. Nightingale, 1168.
v. St. Louis, 1242.
v. Wedgewood, 1160.
v. Western U. T. Co., 967.
Merritt v. Closson, 848.
Messenger v. Manhattan Ry. Co., 1080.
v. Pennsylvania R. Co., 886.
Messer v. Bailey, 1157.
Metallic, etc., Co. v. Fitchburg R. Co., 1101, 1244.
Metler v. Easton, etc., R. Co., 1091.
Metropolitan E. Ry. Co. v. Kneeland, 1132, 1175.
Mewhirter v. Hatten, 1252.
Meyer v. Bohlfing, 1206.
v. Camden, 1169.
v. Press Publishing Co., 1206.
Meyers v. Macolm, 1233.
Michael v. Jones, 797.
Michel v. Supervisors, 1047.

References are to sections.

Michigan C. R. Co. v. Campau, 1260.
v. Coleman, 1252.
Michigan, etc., R. Co. v. Caster, 918.
v. Heaton, 904.
v. Oehm, 954.
Mickie v. Lawrence, 854.
Mikesill v. Chaney, 1156.
Mickles v. Miles, 1106.
Middlekauff v. Smith, 874.
Middleton v. Bryan, 1152, 1157.
Milburn v. Beach, 1098.
Milburn Wagon Co. v. Evans, 772.
Miles v. Harrington, 1206.
v. Van Horn, 1212.
Milford v. Holbrook, 872.
Millar v. Humphries, 1126.
v. Taylor, 1198.
v. Thompson, 1282.
Millard v. Missouri, etc., R. Co., 954.
Miller v. Aris, 799.
v. Barber, 1168, 1171.
v. Bryden, 1148, 1151.
v. Butler, 1222.
v. Eagle Ins. Co., 833.
v. Easton, etc., R. Co., 1083.
v. Fulton, 1009.
v. Garling, 1146.
v. Georgia R. & B. Co., 897.
v. Hayes, 990.
v. Henry, 993.
v. Jannett, 1102, 1109, 1113, 1129.
v. Kerr, 1233.
v. Letherington, 819.
v. Mansfield, 897.
v. Mariners' Church, 873.
v. Melchor, 992.
v. Milligan, 1240.
v. Morris, 855.
v. Myers, 992.
v. Newark, 1081.
v. Parish, 1204.
v. Rosier, 986, 988, 990.
v. The W. G. Hewes, 1256.
v. Wellman, 1009, 1019.
v. Whitson, 1157.
v. Wilson, 771.
v. Windsor Water Co., 1068.
v. Zeimer, 1171.
Millett v. Fowle, 1074.
Milliken v. Thorndike, 1169.
Mills v. East London Union, 856.
v. Hall, 1058.
v. Spencer, 1227.
v. Van Voorhees, 1006.
Milward v. Hibbert, 819.
Milwaukee, etc., R. Co. v. Arms, 950.
v. Eble, 1072, 1083, 1085.
v. Finney, 951.
Miner v. Tagert, 772.
Minesinger v. Kerr, 1228.
Minick v. Troy, 1249, 1252.
Minkwitz v. Steen, 1144.
Minneapolis & N. R. Co. v. Woodworth, 1073.
Minnesota Linseed Oil Co. v. Montague, 771.
Minnesota, etc., R. Co. v. Doran, 1071, 1088.
Minnie, The, 1290, 1293.
Minor v. Sharon, 876.
Minter v. Pacific R. Co., 954.
Minturn v. Columbian Ins. Co., 806, 814.
Mirick v. Hoppin, 847.
Mississippi Mills v. Meyer, 1105, 1136, 1141.
Mississippi River B. Co. v. Ring, 1074, 1084.
Mississippi Mut. F. Ins. Co. v. Ingram, 821.
Mississippi C. R. Co. v. Kennedy, 911, 954, 955.
Mississippi & T. R. Co. v. Archibald, 1055.
Missouri, etc., R. Co. v. Haines, 1068.
v. Owen, 1082.
Missouri P. Ry. Co. v. Aiken, 1242.
v. Dwyer, 1256.
v. Fagan, 918.
v. Hays, 1066, 1083.
v. Henry, 1272.
v. Jones, 1256.
v. Kaiser, 942, 943.
v. Lee, 1272.
v. Lehmberg, 1269.
v. Lewis, 1280.
v. Mackey, 1256.
v. Nevin, 918.
v. Richmond, 1213, 1218.
v. Ricketts, 1023.
v. Texas P. Ry. Co., 1242.
Missouri River P. Co. v. Hannibal, etc., R. Co., 1054.
Missouri Valley L. Ins. Co. v. Kelso, 839.
Mitchell v. Billingsley, 1019.
v. Burch, 1146.
v. Corbin, 1104.
v. Darley Main Colliery Co., 1017.
v. Freedley, 993.
v. Malone, 1258.
v. Mitchell, 992.
v. Thornton, 1084, 1087.
v. Union L. Ins. Co., 833.
v. United States Exp. Co., 917.
Mix v. Kepner, 1101, 1148, 1157.
v. Lafayette, etc., R. Co., 1164. 1088.
Mixon v. Coffield, 849.
Moale v. Baltimore, 1082.
Moberly v. Alexander, 876, 1174.
v. Preston, 1227.
Mobile & M. Ry. Co. v. Jurey, 918. 920, 929.

References are to sections.

Moellering v. Evans, 1017, 1053.
Moffat v. Strong, 848.
Moffatt v. Fisher, 1238.
Mohawk, The, 890, 893.
Mohry v. Hoffman, 1282.
Mollie Mohler, The, 917.
Monell v. Colden, 1171.
Monk v. Cooper, 851.
v. Packard, 1037.
Monnet v. Merz, 785, 789.
Monroe v. Atlanta, 1084.
Montana Ry. Co. v. Warren, 1074, 1089.
Montclair R. Co. v. Benson, 1083.
Monteith v. Merchants' Despatch Co., 902, 907, 909.
Montgomery v. Deeley, 1204.
v. Knox, 1204, 1216, 1227.
v. Locke, 1019.
v. Scott, 1251.
v. Townsend, 1062.
v. Wilson, 1105.
Montgomery Co. v. Schuylkill Bridge Co., 1079.
Montgomery Co. Bank v. Albany City Bank, 775.
Montgomery & E. Ry. Co. v. Culver, 954.
v. Mallette, 1242, 1244, 1249.
Montgomery, etc., Society v. Harwood, 867.
Montgomorie v. Ivers, 790.
Monticello, The, v. Mollison, 1295.
Montmorency Road v. Rock, 1072.
Moody v. Baker, 1221.
v. Caulk, 1118.
v. Drown, 1132.
v. McClelland, 1053.
v. Osgood, 1250, 1254.
v. Whitney, 1020, 1127, 1128, 1158.
Moon v. Raphael, 1129.
Mooney v. Union P. R. Co., 1280.
Moore v. Aldrich, 1109.
v. Baylis, 1030.
v. Central R., 1248.
v. Crose, 1031.
v. Drinkwater, 1094.
v. Fitchburg R. Co., 951.
v. Hall, 1047.
v. Harvey, 843.
v. Hopkins, 987.
v. Kopner, 1157.
v. Mandlebaum, 768.
v. Meagher, 1218, 1219.
v. Moore, 768.
v. New York, 1001.
v. New York E. R. Co., 1080.
v. Remington, 789.
v. Schultz, 1092.
v. Wood, 1114.
Moorsom v. Bell, 897.
Moran v. Dawes, 1176.
Moreley v. Dunbar, 1255.
v. Jamison, 1256.
Morey v. Morning Journal Ass'n, 1205, 1231.
Morgan's Appeal, 1076.
Morgan v. Curley, 1243, 1246.
v. Gilbert, 1034.
v. Hardy, 858.
v. Insurance Co., 894.
v. Kendall, 1243, 1244, 1251.
v. Lingen, 1213.
v. Powell, 1020, 1127.
v. Price, 806.
v. Reynolds, 1143, 1144.
v. Ross, 1283, 1284.
v. Smith, 876.
v. United States Ins. Co., 813.
v. Varick, 992, 993.
v. Yarborough, 990.
Morin v. St. Paul, etc., R. Co., 1083.
Morison v. Salmon, 1200.
Morley v. Gaisford, 951.
Morning Journal Ass'n v. Rutherford, 1216.
Morrell v. Irving F. Ins. Co., 830.
v. Trenton F. & L. Ins. Co., 833.
Morrill v. Blackman, 1167.
Morris v. Baker, 1158.
v. Barker, 1210, 1227.
v. Chicago, etc., R. Co., 836, 1243, 1246, 1249, 1277, 1280.
v. Cleasby, 783.
v. Duane, 1233.
v. Lachman, 1224, 1231.
v. Robinson, 1108.
v. Shew, 1092.
v. Summerl, 772, 775.
v. Tillson, 848.
v. Tinker, 996, 999.
Morris Canal, etc., Co. v. Ryerson, 1035.
Morrison v. Cole, 782.
v. Crawford, 1141.
v. I. & V. Florio S. S. Co., 906, 918.
v. Ogdensburgh, etc., R. Co., 768.
v. Robinson, 999.
v. Thompson, 768.
Morse v. Auburn, etc., R. Co., 942, 1246, 1250.
v. Goddard, 847, 848.
v. Hutchins, 1171, 1172.
v. Pesant, 897.
v. Shaw, 1167.
Mors le Blanch v. Wilson, 787.
Morss v. Stone, 1160.
v. Union Form Co., 1188, 1193.
Mortimer v. Brunner, 848.
v. Marder, 1113.
Mosher v. Mosher, 1002.
v. Russell, 1251.
Mosely v. Miller, 1174.
Moses v. Boston, etc., R. Co., 904, 926.

References are to sections.

Moses v. Pardridge, 1255.
v. Sanford, 1071, 1079.
Mosier v. Stoll, 1228, 1229.
Moss v. Smith, 817.
Mote v. Chicago, etc., R. Co., 920, 955.
Mould v. The New York, 1289.
Moulton v. Newburyport Water Co., 1074, 1089.
v. St. Paul, etc., R. Co., 925.
Mowatt v. McClelan, 799.
Mowry v. Cheney, 1252.
v. Home L. Ins. Co., 833.
v. Smith, 1255.
v. Western U. T. Co., 958, 961, 969.
v. Whipple, 1239.
v. Whitney, 1187, 1190, 1193, 1197.
v. Wood, 1131, 1134.
Moyer v. Gordon, 865, 866.
v. Moyer, 1211, 1212, 1226.
Mt. Sterling v. Givens, 1082.
Mudgett v. Day, 776.
Mueller v. St. Louis, etc., R. Co., 1017.
Muggridge v. Eveleth, 1097.
Mulcairns v. Janesville, 1265.
Muldoon v. Rickey, 1235.
Muldowney v. Illinois C. R. Co., 942, 1243.
Mulford v. Hiers, 1004.
v. Pearce, 1194.
Mullen v. Ensley, 1139.
v. Old Colony R. Co., 1168.
Muller v. Bohlens, 783.
v. Eno, 1172.
v. Southern, etc., Ry. Co., 1074, 1082, 1089.
Mullett v. Mason, 1165.
Mulliday v. Machir, 854.
Mulligan v. Elias, 1035.
Mulloy v. Backer, 890.
Mulvehall v. Millward, 1282.
Munger v. Baker, 1029.
Munkwitz v. Chicago, etc., Ry. Co., 1074.
Munro v. Dredging Co., 1263, 1266, 1273, 1274.
Munroe v. Pritchett, 1169.
Murdoch v. Milner, 768.
Murphy v. Central Park, etc., R. Co., 951.
v. Fond du Lac, 1010.
v. Hobbs, 1139.
v. Larson, 1240.
v. New York, etc., R. Co., 1263.
v. Western & A. R. Co., 941, 942, 949, 950.
Murray v. Ætna Ins. Co., 888.
v. Burling, 1103, 1132, 1141.
v. Carothers, 796.
v. Gouverneur, 999.
v. Hudson R. Co., 953, 1251.
v. Insurance Co., 806.
Murray v. Judah, 775.
v. Kennedy, 796.
v. Pennington, 876.
v. Usher, 1272.
Murrill v. Pacific Exp. Co., 905, 911, 913.
v. Whiting, 880, 882.
Murtaugh v. New York, etc., R. Co., 1242.
Muser v. Holland, 925.
v. Lewis, 1139.
Musgrave v. Beckendorff, 1121.
Musselman v. Barker, 984, 986, 988.
v. Gallagher, 1252.
Mutual Safety Ins. Co. v. Cohen, 807.
Myers v. Burns, 858, 864, 872, 873, 874, 876.
v. Curry, 1226.
v. Malcolm, 1058, 1210.
v. Sanders, 992.
v. San Francisco, 1256.
Mynard v. Syracuse, etc., R. Co., 904.

Nachbour v. Wilner, 841.
Nadua v. White River L. Co., 1256.
Nagel v. Missouri P. R. Co., 1275.
v. Railway Co., 977.
Naglee v. Ingersoll, 854.
Nance v. Metcalf, 1109.
Narragansett, The, 1292.
Nash v. Benedict, 1233.
Nashville v. Comar, 1043, 1046.
Nashville Ins. & T. Co. v. Alexander, 1148.
Nashville L. Ins. Co. v. Mathews, 839.
Nashville, etc., R. Co. v. Eakin, 1280.
v. Jackson, 903.
v. Prince, 1260, 1265, 1268.
v. Smith, 953, 1255, 1256.
v. Sprayberry, 1280.
v. Stevens, 1263.
Natchez Ins. Co. v. Buckner, 806.
Natchez, etc., R. Co. v. Currie, 1009, 1016.
National Bank of Augusta v. Cunningham, 794.
National Car Brake Shoe Co. v. Terre Haute Car & Manuf. Co., 1191.
National Coffee Palace Co., In re, 797, 798.
National Docks, etc., Co. v. United Cos., 1078.
National Filtering Oil Co. v. Citizens' Ins. Co., 827.
Nave v. Berry, 855.
v. Home Mut. Ins. Co., 807.
Naye v. Noezel, 855.
Neal v. Knox, etc., R. Co., 1082.
Neale v. Wyllie, 857.
Nebraska, The, 1291.
Nebraska City v. Campbell, 946, 1246.

References are to sections.

Neeb v. Hope, 1208.
Needham v. Grand Trunk Ry. Co., 1260, 1280.
Neely v. McCormick, 1097.
Neff v. Clute, 1171.
v. Pennoyer, 1000.
Negley v. Farrow, 1206, 1208, 1231.
v. Morgan, 850.
Negley Avenue, Opening of, 1066.
Nehrbas v. Central P. R. Co., 1263.
Neiler v. Kelley, 786, 1108, 1121, 1131.
Neilon v. Marinette & M. P. Co., 1256.
Neilson v. Betts, 1196.
v. Chicago, etc., Ry. Co., 1065, 1068.
v. Commercial Ins. Co., 803.
Neiswagner v. Squier, 875, 1109, 1110.
Nelson v. Belmont, 819.
v. Danielson, 1235.
v. Evans, 1227.
v. King, 1134.
v. Lichtenmeyer, 1160.
v. Plimpton Fire P. E. Co., 899.
v. Staff, 1219.
v. Stevenson, 887, 888.
v. Suffolk Ins. Co., 803.
v. Woodruff, 887.
Nesbitt v. Helser, 787.
v. St. Paul Lumber Co., 1020, 1126.
Nettles v. Harrison, 953.
v. Railroad Co., 905.
Neville Road Case, 1082.
Nevins v. Bay State Steamboat Co., 954.
v. Peoria, 1051, 1061.
Newark Coal Co. v. Upson, 1238.
Newberry v. Connecticut, etc., R. Co., 952.
Newbold v. Wright, 1138.
New Brighton v. Peirsol, 1082.
Newbrough v. Walker, 864, 869.
New Brunswick St. Nav. Co. v. Tiers, 917.
Newby v. Platte Co., 1087.
New Castle R. Co. v. Brumback, 1087.
Newell v. Roake, 993.
v. Smith, 906.
New England Exp. Co. v. Maine C. R. Co., 886.
Newfield v. Copperman, 1235.
Newgass v. Railway Co., 1065, 1068, 1072, 1076, 1083.
New Haven, etc., Co. v. Hayden, 865.
New Haven Steamboat Co. v. Mayor, 1292, 1293.
v. Vanderbilt, 1101.
New Jersey Exp. Co. v. Nichols, 945, 1246, 1248.
Newman v. Alvord, 1200.
v. Kane, 1110.
v. Metropolitan E. R. Co., 1061, 1064, 1080, 1084.
Newman v. Stein, 1206, 1216, 1232.
v. Sylvester, 796.
New Orleans v. Gaines, 994, 997, 999.
New Orleans, etc., R. Co. v. Albritton, 941, 951, 1101.
v. Bailey, 950.
v. Hurst, 938, 950.
v. Moore, 955.
v. Statham, 950.
v. Tyson, 906, 910.
New Reservoir, Matter of, 1081.
Newton v. Locklin, 1258.
v. Sly, 1007.
v. Wilson, 854.
New York Academy of Music v. Hackett, 847, 848, 867, 872, 874.
New York & C. S. S. Co. v. Harrison, 796.
New York, etc., Exp. Co. v. Traders' Ins. Co., 803.
New York Central Ins. Co. v. National Protection Ins. Co., 840.
New York Guaranty, etc., Co. v. Flynn, 1109, 1144.
New York L. Ins. Co. v. Statham, 839.
New York State Marine Ins. Co. v. Protection Ins. Co., 840.
New York C. R. Co., In re, 853, 1071, 1074, 1075, 1077, 1080, 1084, 1088.
New York, etc., R. Co. v. Arnot, 1074.
v. Fraloff, 954.
v. Randall, 842.
v. Young, 1066.
New York, etc., T. Co. v. Dryburg, 957, 958, 963, 972.
Niblo v. North American Ins. Co., 821, 824.
Nichols v. Bridgeport, 1063.
v. Bronson, 1095.
v. Brunswick, 1249.
v. Dusenbury, 876, 1161.
v. Guy, 1204.
v. Pinner, 1167.
v. Tremlett, 896.
Nicholson v. Gouthit, 775.
v. Munigle, 873.
v. New York, etc., R. Co., 1063.
Nickerson v. California Stage Co., 1157.
v. Harriman, 1259.
Nickleson v. Stryker, 1282.
Nickley v. Thomas, 1166.
Nicklin v. Williams, 1017.
Nicolet v. Insurance Co., 827.
Nicoll v. Miller, 1006.
v. Ogden, 1006.
v. Todd, 1006.
Nier v. Missouri P. Ry. Co., 1252.
Nieto v. Clark, 941.

References are to sections.

Night v. Wilcox, 1283.
Nightingale v. Scannell, 1098, 1113.
Nimick v. Holmes, 819.
Nims v. Troy, 1012, 1015.
Nine Thousand, etc., Dry Hides, 887.
Nith, The, 906, 920.
Nitz v. Balton, 1157.
Nixon v. Denham, 856.
v. Porter, 996.
v. Stillwell, 1019.
Noble v. Kelly, 1097.
Nœtling v. Wright, 1166.
Noice v. Brown, 1282.
Noland v. Johnson, 1138.
Nolte v. Reichelm, 1168.
Nones v. Northouse, 942, 1246.
Noon v. Finnegan, 1013.
Noonan v. Ilsley, 1118.
Norfleet v. Cromwell, 873.
Norman v. Cunningham, 1113.
v. Mancietti, 1257.
v. Rogers, 1139.
Norris v. Elliott, 1206.
v. Hero, 776.
v. McCanna, 1129, 1136.
v. Morrison, 1007.
v. Philadelphia, 1091.
Norristown T. Co. v. Burket, 1082.
North v. Phillips, 1121.
North E. R. Co. v. Smeath, 1072.
Northern C. Ry. Co. v. O'Connor, 942.
Northern Pacific, etc., R. Co. v. Coleman, 1087, 1088.
v. Lewis, 1097.
Northern T. Co. v. McClary, 918.
v. Sellick, 1110, 1115.
North-German Lloyd v. Heule, 885.
North Missouri R. Co. v. Akers, 921.
North P. R. Co. v. Davis, 1081.
North Pennsylvania Ry. Co. v. Kirk, 1264, 1273.
Northrup v. Cross, 1144.
v. McGill, 1140.
North Star, The, 1287, 1290, 1294.
North Vernon v. Voegler, 1044.
Norton v. Rensselaer Ins. Co., 810.
v. Scholefield, 1035.
v. Warner, 1285.
Norwich, etc., T. Co. v. Western Mass. Ins. Co., 803.
Nossaman v. Rickert, 1243.
Notting Hill, The, 909.
Nounnan v. Sutter County Land Co., 1167.
Nourse v. Snow, 918.
Nowlan v. Cain, 1168.
Nowlin v. Snow, 1167.
Noyes v. Anderson, 853, 834.
v. Blodgett, 1171.
Nunnemaker v. Lanier, 774.
Nurse v. Barns, 868.
Nutting v. Thomasson, 1132.
N. & W. R. Co. v. Bohannon, 1019.
v. Wysor, 949.
Nye v. Merriam, 1178.
v. Thompson, 1227.

Oakley v. Crenshaw, 784.
Oakley Mills, etc., Co. v. Neese, 1037.
Oak Ridge Coal Co. v. Rogers, 1020.
Oates v. Union Pacific R. Co., 1280.
Ober v. Indianapolis, etc., R. Co., 905.
Oberlander v. Spiers, 1169.
O'Brien v. Commercial F. Ins. Co., 810.
v. Phœnix F. Ins. Co., 811.
Ocean Steamship Co. v. Williams, 1257, 1258.
O'Conner v. Hartford F. Ins. Co., 811.
v. Parrott, 1031.
O'Connor v. Foster, 900.
v. O'Connor, 1230.
v. St. Louis, etc., R. Co., 1043.
Ode v. Manhattan Rv. Co., 1080.
Odell v. Hole, 1144, 1150.
v. New York E. R. Co., 1064, 1080.
v. Stephens, 1283.
O'Donnell v. O'Donnell, 1004.
O'Donoghue v. Corby, 1132.
Oettinger v. Levy, 873.
O'Ferrall v. Simplot, 1003.
O'Flaherty v. Sutton, 1003.
Ogden v. East River Ins. Co., 822.
v. General Mut. Ins. Co., 813, 887.
v. Lucas, 1093.
v. Marshall, 899.
v. Raymond, 796, 797.
v. Sanderson, 848.
Ogg v. Murdock, 1257.
Ogilvie v. Hull, 876.
Ogle v. Atkinson, 1136.
O'Hanlan v. Great Western Ry. Co., 906, 919, 933.
Ohio & M. Ry. Co. v. Collarn, 1256.
v. Cosby, 1252.
Ohio, etc., R. Co. v. Dickerson, 942, 949.
v. Hecht, 1244, 1246.
v. Judy, 953.
v. Veight, 1265.
Ohio Valley Ry. & T. Co. v. Kerth, 1074.
Old Colony, etc., R. Co. v. Plymouth, 1077, 1078.
Oldfield v. New York, etc., R. Co., 1275.
Oldham v. Bentley, 1167.
Old Saucelito Land & Dry Dock Co. v. Commercial Union Ass. Co., 808.
Olds v. Chicago Open Board of Trade, 1135.
Olean, In re, 1082.
O'Leary v. Stymest, 807.

References are to sections.

Oleson v. Brown, 1101.
Olivant v. Perineau, 1140.
Oliver v. Chapman, 1178.
v. La Valle, 1244.
v. Moore, 854, 876.
v. Mutual Com. Ins. Co., 805.
v. North Pacific T. Co., 1242.
v. Oliver, 1198.
v. Pate, 1240.
Olmstead v. Burke, 868.
Olmsted v. Brown, 1218, 1221.
v. Miller, 1218.
Olson v. Solveson, 988.
Oluf, The, 897.
Omaha v. Kramer, 1089.
v. Schaller, 1084.
Omaha Belt Ry. Co. v. McDermott, 1062.
Omaha & Grant S. & R. Co. v. Tabor, 1020 1115, 1127.
O'Mara v. Hudson River R. Co., 1275.
O'Meara v. North Am. M. Co., 1109, 1110, 1118, 1148, 1158.
O'Neil v. Buffalo Ins. Co., 810.
Opdike v. Bartels, 1006.
Oppenheimer v. Halff, 1174.
v. United States Exp. Co., 926.
Opsahl v. Judd, 1265, 1274, 1275, 1276.
Oram v. Franklin, 1204.
Orange Co. Bank v. Brown, 885, 925, 954.
O'Reilly v. New York, etc., R. Co., 1280.
Oregon & C. R. Co. v. Jackson, 1018.
Oregon Ry. & N. Co. v. Mosier, 1076.
Organ v. Memphis, etc., R. Co., 1067, 1071.
Orient Mut. Ins. Co. v. Adams, 803.
Oriflamme, The, 945, 947, 1242, 1243, 1255.
O'Riley v. McChesney, 1041, 1042, 1047, 1055.
Ormsbee v. Davis, 1157.
Ormsby v. Vermont Copper M. Co., 781, 1109, 1119.
Orr v. Seiler, 1238.
v. Skofield, 1204.
Orrok v. Commonwealth Ins. Co., 807, 817.
Orth v. Featherly, 1216.
Osborne v. Chicago, etc., Ry. Co., 884.
Osbourn v. Osbourn, 992.
Osgood v. Carver, 1107.
v. Dewey, 841, 842.
v. Nichols, 769.
Oshkosh Gas Light Co. v. Germania F. Ins. Co., 806.
Oshkosh Packing & P. Co. v. Mercantile Ins. Co., 807.
Osterhout v. Roberts, 1108.
Otis v. Jones, 1105.
Ottumwa v. Parks, 865.
Oursler v. Baltimore & O. R. Co., 1052.
Outcalt v. Durling, 1097.
Overholt v. Veiths, 1254.
Overseers of Poor v. Bank of Va., 769.
Oviatt v. Pond, 1098, 1102, 1144.
Owen v. Brockschmidt, 1256, 1263, 1275.
v. McKean, 1231.
v. Routh, 1118, 1123.
Owings v. Gibson, 1009.
v. Ulory, 1031.

Pacific, The, 904.
Pacific Exp. Co. v. Darnell, 913.
Pacific Ins. Co. v. Conard, 1092, 1095, 1096, 1104.
Pacific R. Co. v. Chrystal, 1084.
Packard v. Lienow, 789.
Packet Co. v. Sickles, 1183, 1184, 1185, 1189, 1190.
Pacquette v. Pickness, 994, 996.
Paddock v. Atchison, etc., R. Co., 938.
v. Commercial Ins. Co., 817.
v. Salisbury, 1226.
v. Somes, 1055.
v. Strobridge, 1166.
v. Watts, 1239, 1240.
Page v. Bent, 1169.
v. Burnstine, 834.
v. Chicago, etc., R. Co., 1064, 1088.
v. Cushing, 1234.
v. Fowler, 1109, 1118, 1119, 1157.
v. Parker, 1171, 1172.
v. Wells, 1171, 1174.
Paige v. Banks, 1198.
Paine v. Chicago, etc., R. Co., 950.
v. Sherwood, 914.
v. Woods, 1084, 1085.
Painter v. Ives, 1257, 1258.
Pallet v. Sargent, 1224, 1227, 1228.
Palmer v. Andrews, 990.
v. Blackburn, 817.
v. Dewitt, 1198.
v. Grand Junction Ry., 886.
v. Haskins, 1210, 1233.
v. Holland, 776.
v. Lorillard, 888.
v. St. Paul F. & M. Ins. Co., 811.
v. Stephens, 798.
Palmer Co. v. Ferrill, 1056, 1084.
Pancoast v. Bumell, 1252.
Panton v. Holland, 1053.
v. Isham, 1033.
Papineau v. Taylor, 1245.
Paradine v. Jane, 830, 851, 855.
Parana, The, 909.
Pardee v. Drew, 925, 954.
Partridge v. Brady, 1095.
Parham v. Randolph, 1169.

References are to sections.

Parish v. Wheeler, 1097, 1137.
Park v. C. & S. W. R. Co., 867, 1054, 1058.
v. Hammond, 771, 772.
v. McDaniels, 1101.
v. Washington Ice Co., 1074.
Parke v. Blackiston, 1224, 1228.
Parker v. Coture, 1255, 1284.
v. Eagle F. Ins. Co., 821, 830.
v. Elliott, 1284.
v. Great Western Ry. Co., 886.
v. Griswold, 1010.
v. Hollis, 841, 842.
v. Hulme, 1202.
v. James, 770.
v. Lowell, 1060.
v. McQueen, 1233.
v. Meadows, 872, 873.
v. Meek, 1281.
v. Mellor, 1155.
v. Mise, 1095.
v. Monteith, 1283.
v. Moulton, 1167.
v. Nickerson, 768.
v. Shackelford, 1031.
v. Simonds, 1152, 1153, 1157.
v. Tiers, 879.
v. Walker, 1171.
v. Waycross, 1020.
Parkham v. McMurray, 1104.
Parkhurst v. Gloucester Mut. F. Ins. Co., 805.
v. Ketchum, 1212, 1226, 1227.
v. Mastellar, 1237, 1238.
Parkins v. Scott, 1218.
Parkist v. Alexander, 768.
Parks v. Alta Cal. T. Co., 914, 965, 1176.
v. Booth, 1187, 1197.
v. Boston, 853, 1081.
v. General Interest Ass. Co., 828.
v. Ross, 796.
v. Wisconsin C. R. Co., 1064, 1089.
Parmer v. Anderson, 1206.
Parnell v. Hampton, 1155.
Parroski v. Goldberg, 1139, 1141.
Parrott v. Barney, 855.
v. Housatonic R. Co., 1095, 1096.
Parry v. Frame, 1134.
Parsell v. Circuit Judge, 1156.
Parshall v. Minneapolis, etc., Ry. Co., 1246.
Parsons v. Hardy, 890, 903.
v. Harper, 1257, 1258.
v. Lloyd, 1258.
v. Martin, 774, 786.
v. Missouri P. R. Co., 1274.
v. Pettingill, 1015.
Parton v. Prang, 1198.
Partridge v. Menck, 1200.
v. Scott, 1053.
Pasley v. Freeman, 1166.
Passman v. Fletcher, 1218.
Passmore v. Western U. T. Co., 957, 958.
Patapsco Guano Co. v. Magee, 1144.
Patapsco Ins. Co. v. Biscoe, 805.
Patchen v. Keeley, 1028.
Partenheimer v. Van Order, 1059.
Paterson v. Wilcox, 1281, 1282.
Patrick v. Farmers' Ins. Co., 810, 811.
Patry v. Chicago, etc., R. Co., 1256.
Patten v. Belo, 1227.
v. Chicago, etc., R. Co., 953, 1244.
v. Gurney, 1166, 1179, 1235.
v. Northern C. R. Co., 1066.
v. Union P. Ry. Co., 884.
Patterson v. Ackerson, 851.
v. Boom Co., 1065, 1066, 1083.
v. Boston, 1068, 1071.
v. Detroit, etc., Ry. Co., 938.
v. Gresham, 1112.
v. Thompson, 1281, 1282.
Pattison v. Adams, 1136.
Patton v. Garrett, 846.
v. Pittsburgh, etc., R. Co., 1280.
Patzack v. Von Gerichten, 1258.
Paul v. Frazier, 1282.
v. Hadley, 1166.
v. Nurse, 850.
v. Slason, 1106.
Paull v. Halferty, 1223.
Paulmier v. Erie R. Co., 1263, 1273, 1274.
Payne v. Elliot, 1108.
v. Graves, 854.
v. Haine, 855.
Peak v. Lemon, 1105.
Peaks v. Oldham, 1219.
Pearsall v. Western U. T. Co., 957, 958, 961.
Pearse v. Coaker, 993.
v. Quebec Steamship Co., 927.
Pearson v. Carr, 993.
v. Duane, 938.
v. Inlow, 1019.
Pease v. Shippen, 1226.
Peck v. Brewer, 1161.
v. Chicago, etc., R. Co., 953.
v. Hiles, 847, 848.
v. Small, 1227, 1238.
v. Superior, etc., Ry. Co., 1088.
Peckham v. Hawden, 1007.
Peckham Iron Co. v. Harper, 1130, 1131.
Peden v. Mail, 1238.
Peebles v. Boston, etc., R. Co., 1136, 1138.
Peek v. Derry, 1170.
Peele v. Northcote, 783.
Peet v. Chicago, etc., R. Co., 906, 909.
Pegram v. Western U. T. Co., 973.
Peisch v. Dickson, 790.
Pelley v. Walker, 1132.

References are to sections.

Peltier v. Mict, 1210.
Peltz v. Eichele, 1200, 1201.
Pendergast v. McCaslin, 993.
Penley v. Watts, 857, 858.
Pennell v. Woodburn, 857, 865.
Pennington v. Western U. T. Co., 961.
Penniston v. Chicago, etc., R. Co., 1256.
Pennoyer v. Allen, 1037.
v. Hallett, 890.
Pennsylvania Co. v. Lilly, 1273.
v. Roy, 1254.
Pennsylvania & O. Canal Co. v. Graham, 942, 945.
Pennsylvania R. Co. v. Adams, 1259, 1273.
v. Allen, 942, 1242.
v. Bantom, 1263.
v. Books, 936, 942, 944, 946, 950.
v. Bunnell, 1064, 1072, 1083, 1089.
v. Butler, 1263.
v. Connell, 938, 942, 949.
v. Cooper, 1039.
v. Dale, 1249.
v. Eby, 1029.
v. Goodman, 1266.
v. Keller, 1263, 1264.
v. Kelly, 942, 1252.
v. McCloskey, 1263.
v. Marchant, 1062.
v. Patterson, 858, 860.
v. Spicker, 938.
v. Titusville, etc., Co., 900.
v. Walsh, 1062.
v. Ziemer, 1062, 1083, 1091.
Pennybecker v. McDougal, 1144.
People v. Abbot, 1255.
v. Albany, 1055.
v. Benson, 1255.
v. Canal Comm'rs, 1091.
v. Jackson, 1255.
v. Kelsey, 848.
v. Kenyon, 1255.
v. McArdle, 1255.
v. Mayor, 1063.
v. Security L. Ins. & Annuity Co., 838.
v. Supervisors, 1061, 1090.
v. Williams, 1083.
People's Ice Co. v. Davenport, 1022.
v. Steamer Excelsior, 1022, 1023.
People's P. Ry. Co. v. Lauderbach, 1246.
Peoria Bridge Ass'n v. Loomis, 1250.
Peoria Marine & F. Ins. Co. v. Lewis, 811.
v. Whitehill, 811.
Peoria, etc., R. Co. v. Bryant, 1067, 1077, 1082.
v. Laurie, 1082.
v. Peoria & F. Ry. Co., 1065, 1078.
v. Sawyer, 1064, 1066, 1072.
Pepper v. Rowley, 848.
Pepper v. Telegraph Co., 958, 962, 970, 973.
Pereire, The, 917.
Perham v. Coney, 1104, 1105, 1139.
Perkins v. Freeman, 1105.
v. Marrs, 1109.
v. Railroad, 951.
v. Towle, 1031, 1032.
v. Vaughan, 1255.
v. Washington Ins. Co., 772, 820.
v. Wright, 954.
Perley v. Eastern R. Co., 1244.
Perrigo v. Spaulding, 1185.
Perrine v. Hankinson, 841, 843, 845.
v. Perrine, 1005.
v. Winter, 1210.
Perry v. Chandler, 1107.
v. Aldrich, 849.
v. Breed, 1206.
v. Hyde, 796.
Persse v. Cole, 931.
Peters v. Ballistier, 774.
v. Grubb, 848.
v. Mayor, 1116.
v. Railroad Co., 884.
v. Warren Ins. Co., 803.
Peters' Box & L. Co. v. Lesh, 1154.
Petersen, In re, 918, 931, 932.
Peterson v. Edmonson, 851.
v. Haight, 1161.
v. Morgan, 1227.
v. Poignard, 769.
v. Polk, 1154.
v. Toner, 1237, 1240.
Petition of Mt. W. Road Co., 1071, 1084.
Petrie v. Columbia & G. R. Co., 1268, 1270.
Pewtriss v. Austen, 1166.
Peyton v. Texas & P. R. Co., 1256.
Pezant v. National Ins. Co., 807.
Phelin v. Kenderdine, 1283.
Phelps v. Cogswell, 1238.
v. London, etc., R. Co., 954.
v. New Haven, etc., Co., 856, 858.
v. Williamson, 896.
v. Winona, etc., R. Co., 1275, 1276.
Phenix v. Clark, 1147.
Philadelphia v. Dyer, 1091.
v. Linnard, 1064, 1066, 1082.
Philadelphia, etc., R. Co. v. Derby, 951.
v. Getz, 1069, 1081.
v. Quigley, 951.
v. Rice, 942.
Philadelphia T. Co. v. Orbann, 950.
Philbrook v. Eaton, 1136.
Philippi v. Wolff, 1252.
Phillips v. Earle, 885, 925.
v. Homfray, 1020.
v. Hoyle, 1281, 1283.
v. Jones, 1169.
v. Kelly, 1253.

References are to sections.

Phillips v. London, etc., Ry. Co., 1242, 1244, 1246, 1247, 1250, 1256.
v. Moir, 774, 782.
v. Monges, 842, 1161.
v. Pease, 1091.
v. Phillips, 1037.
v. Scott, 779.
v. Southwestern Ry. Co., 1256.
v. Speyers, 1109.
v. Stevens, 855.
v. Storm, 830.
Philp v. Nock, 1183, 1185, 1186, 1188, 1193.
Philpot v. Taylor, 787.
Phinney v. Hubbard, 1171.
Phipps v. Tarpley, 865.
Phœnix Ins. Co. v. Allen, 776.
v. Cochran, 803, 821.
v. Frissell, 772.
v. Pratt, 772.
v. Taylor, 810.
Phœnix Mut. L. Ins. Co. v. Baker, 839.
Pick v. Rubicon Hydraulic Co., 1082.
Pickard v. Collins, 1035, 1036.
Pickering v. Truste, 1140.
Pickert v. Rugg, 1119.
Pickett v. Bridges, 1157.
Pickford v. Grand J. Ry. Co., 898.
Piedmont & L. Ins. Co. v. Fitzgerald, 838.
Pierce v. Benjamin, 1105, 1138, 1141.
v. Dart, 1055.
v. Millay, 1242.
v. Pierce, 841, 1285.
v. Thompson, 1235.
v. Tiersch, 1171.
v. Van Dyke, 1155, 1157.
v. Wagner, 1051.
v. Worcester, etc., R. Co., 1066.
Pierson v. Steortz, 1232.
Pietro, The, 897.
Pike v. Nicholas, 1199.
Pillsbury v. Moore, 1035, 1040.
Pinckney v. Dunn, 776.
Pine v. Reid, 811.
Pineo v. New York, etc., R. Co., 1274.
Pinero v. Judson, 842.
Pingrey v. Cherokee & D. Ry. Co., 1066.
Pink v. Catanich, 1226.
Pinkerton v. Boston, etc., R. Co., 1082.
v. Manchester R., 768, 781, 1118.
Pinkham v. Chelmsford, 1089.
v. Crocker, 782.
Pinney v. Andrus, 1173.
v. Berry, 1047.
Piper v. Brown, 1194.
v. Connelly, 1022.
v. Kingsbury, 990.
Pirie v. Steele, 817.
Pitcher v. Livingston, 1174.
v. Tovey, 849.
Pitman v. Hooper, 896.
v. Kintner, 798.
Pitt v. Donovan, 1223.
Pitts v. Hall, 1185, 1187.
Pittsburg Mining Co. v. Spooner, 1164.
Pittsburg, etc., R. Co. v. Andrews, 946.
v. Bentley, 1066, 1081.
v. Hazen, 903.
v. Hinds, 941.
v. Jones, 1079.
Pittsburgh, etc., R. Co. v. Lyon, 950.
v. McCloskey, 1066, 1070, 1072, 1084.
v. Morton, 902.
v. Nuzum, 938.
v. Patterson, 1074.
v. Powers, 1254.
v. Robinson, 1084, 1086, 1089.
v. Rose, 1066, 1089.
v. Slusser, 950.
v. Sponier, 1256.
v. Swinney, 1013, 1026.
v. Thompson, 949.
v. Vance, 1068, 1074.
v. Vining, 1260.
Placer Co. v. Astin, 769.
Planters' Mut. Ins. Co. v. Engle, 810.
Plath v. Braunsdorff, 953, 1237.
Platt v. Bright, 1081.
v. Brown, 1171, 1178.
Playford v. United Kingdom T. Co., 972.
Pleasants v. State, 1255.
Plevin v. Henshall, 1139.
Plimpton v. Gardiner, 1060.
Plumb v. Campbell, 786.
v. Ives, 1030.
Plummer v. Johnsen, 1209.
v. Pennobscot L. Ass'n, 906, 1048, 1054.
Poindexter v. King, 774.
Poingdestre v. Royal Exchange, 817.
Polack v. Pioche, 855.
Polhill v. Walter, 798.
Polk v. Allen, 1115.
Pollak v. Davidson, 1139.
Pollard v. Lyon, 1204 1218.
v. Underwood, 1002.
Pollitt v. Long, 1054.
Pomeroy v. Chicago, etc., R. Co., 1082.
v. Smith, 1136.
Pond v. Baker, 1112.
v. Metropolitan E. Ry. Co., 1047, 1080.
Pool v. Devers, 1206, 1224.
Poole v. Adkisson, 793.
Poor v. Woodburn, 1162.
Pope v. Barrett, 785.
v. Jenkins, 1148, 1153.
v. United States, 843.

References are to sections.

Pope v. Welsh, 1226.
v. Western U. T. Co., 971.
Poposkey v. Munkwitz, 864, 865, 869, 871.
Porter v. Botkins, 1228.
v. Bradley, 861.
v. Fletcher, 1168, 1179.
v. Froment, 1060.
v. Hanley, 999.
v. Hannibal, etc., R. Co., 1243, 1263.
v. Henderson, 1232.
v. Hildebrand, 954.
v. North Missouri R. Co., 1056.
v. Railway Co., 977.
v. Sweeney, 849.
v. The New England, 938.
v. Woodruff, 768.
v. Wormser, 778.
Porterfield v. Humphreys, 907.
Porter Needle Co. v. National Needle Co., 1183.
Port Huron, etc., Ry. Co. v. Voorheis, 1064.
Portland Bank v. Stubbs, 889.
Portland & R. R. Co. v. Deering, 1074, 1077.
Portsmouth Ins. Co. v. Brazee, 813.
v. Brinckly, 820.
Post v. Ætna Ins. Co., 810, 811.
v. Hampshire Mut. F. Ins. Co., 820, 827.
v. Munn, 1100, 1139.
v. Robertson, 890.
v. Vetter, 872.
Postal T. Co. v. Lathrop, 969.
Poston v. Jones, 847, 992.
Potter v. Chicago, etc., R. Co., 953, 1265.
v. Everitt, 1001.
v. Lansing, 775.
v. Mardre, 1127, 1128.
v. Merchants' Bank, 1132.
v. Metropolitan Ry. Co., 1246.
v. North, 1155.
v. Ocean Ins. Co., 803.
v. Providence W. Ins. Co., 815.
v. Taggart, 1166, 1174.
v. Truitt, 843.
v. Washburn, 1097.
Potomac, The, 1292.
Potts v. Railroad Co., 1088.
Pottstown Gas Co. v. Murphy, 1035.
Potulni v. Saunders, 1092.
Powell v. Aiken, 1020.
v. Glenn, 1138.
v. Hinsdale, 1162.
v. Monson, 1002.
v. Myers, 954.
v. Newburgh, 789, 793.
v. Penn. R. Co., 904.
Power v. Harlow, 1243.
Power v. Whitmore, 818.
Powers v. Council Bluffs, 1037, 1043, 1047.
v. Manhattan Ry. Co., 1080.
v. Presgroves, 1212, 1226, 1232.
v. Wheatly, 986.
Praed v. Graham, 1209, 1217.
Pratt v. New York C. Ins. Co., 810.
v. Paine, 865.
v. Pioneer Press Co., 1204, 1208, 1209, 1213, 1231.
Prebble v. Kent, 1131.
Prentiss v. Shaw, 1243.
Prescott v. Otterstatter, 872.
v. Tousey, 1206, 1210.
Preston v. Cooper, 1235.
v. Frey, 1206, 1227.
v. Prather, 1112.
Prestons v. McCall, 845.
Pretty v. Bickmore, 1035.
Prettyman v. Oregon Ry. & N. Co., 918, 919.
Price v. Denver, etc., Ry. Co., 884.
v. Grautz, 1037.
v. Hartshorn, 887.
v. Hobbs, 1003.
v. Milwaukee, etc., R. Co., 1067.
v. Oswego, etc., R. Co., 931.
v. Pickett, 849.
v. Severn, 953.
v. Weehawken Ferry Co., 1076.
v. Whitely, 1204, 1215.
Prickett v. Ritter, 842.
Pridgeon v. Excelsior Boat Club, 848.
Priest v. Nichols, 874.
Priestly v. Northern, etc., R. Co., 905.
Prince v. Eastwood, 1218, 1221.
v. Ocean Ins. Co., 807.
Prince Albert v. Strange, 1198.
Proctor v. Eastern R. Co., 902.
v. Houghtaling, 1227.
Proffitt v. Henderson, 1033.
Proprietors of Locks & Canals v. Nashua & L. R., 1078.
Propsom v. Leatham, 1251.
Proud v. Bates, 1074.
Proudlove v. Twemlow, 1107.
Provident L. Ins. Co. v. Baum, 832.
Pruitt v. Cox, 1283, 1284.
Pryor v. Foster, 1171, 1172, 1173, 1174.
Pugh v. McCarty, 1232.
Pullen v. Glidden, 1239, 1240.
Puller v. Stainforth, 881.
Pulling v. Great Eastern Ry. Co., 1250, 1278.
Pullman Palace Car Co. v. Barker, 938, 1244.
v. Matthews, 956.
v. Reed, 950.
Pumpelly v. Green Bay Co., 1061.
v. Phelps, 864.
Purcell v. St. Paul C. Ry. Co., 1244.

References are to sections.

Purple v. Horton, 1228, 1229.
Pusey v. Allegheny, 1090.
Putnam v. Broadway, etc., R. Co., 1244.
v. Home Ins. Co., 802.
Pym v. Great Northern Ry. Co., 1260, 1268, 1273, 1278.

Queen, The, 1288.
Queen v. Waterhouse, 1038.
Queen Ins. Co. v. Jefferson Ice Co., 806.
Querini Stamphalia, The, 884.
Quigley v. Central P. R. Co., 942, 950, 1243.
Quimby v. Carter, 1171.
Quin v. Moore, 1263, 1264.
Quincy v. Jones, 1053.
Quincy R. Co. v. Ridge, 1084.
Quinette v. Carpenter, 842.
Quinn v. Long Island R. Co., 1256.
v. Power, 1274.
v. South Carolina Ry. Co., 951.

Rafferty v. Buckman, 1265.
Railroad Co. v. Barron, 1264, 1265, 1276.
v. Fraloff, 925.
v. Gesner, 1039.
v. Greer, 771.
v. Hambleton, 1035.
v. Hutchins, 1020, 1109, 1110, 1127, 1128.
v. Lockwood, 904.
v. Pratt, 904.
v. Randall, 978.
v. Soutter, 1174.
v. Tyree, 1084, 1087.
Railway Co. v. Branch, 953.
v. Dean, 938, 942.
v. Donahoe, 951.
v. Morris, 1049.
v. Sharpe, 1077.
v. Snyder, 1260.
v. Stables, 977.
v. Woodruff, 1074.
Rains v. Herring, 1100.
v. St. Louis, etc., R. Co., 1266.
Raleigh R. Co. v. Wicker, 1087.
Ramsay v. Gardner, 789.
Ramsey v. Glenn, 1280.
v. Hurley, 1132.
v. Thomas, 1156.
Rand v. Harris, 890.
Randall v. Alburtis, 847.
v. Cleveland, 1033.
v. Lynch, 897.
v. Thompson, 847.
Randell v. Trimen, 797.
Randolf v. Bloomfield, 1051, 1055.
Randolph v. Hannibal, etc., Ry. Co., 943, 951, 1243.
Ranger v. Goodrich, 1204.
Ranger v. Harwood, 792.
Rank v. Rank, 1129, 1139.
Rankin v. Oliphant, 1003.
v. Pacific R. Co., 911.
v. Potter, 805.
Ranlet v. Concord R. Co., 1071.
Rannels v. Washington University, 1002.
Ransom v. Mayor, 1201, 1202.
v. New York & E. R. Co., 836, 942, 946, 952, 1242, 1243, 1255.
Ransone v. Christian, 1224, 1232.
Ratcliffe v. Evans, 1223.
Rauth v. Davenport, 873, 874.
Ravenga v. Mackintosh, 1240.
Rawdon v. Blatchford, 1167.
Rawlings v. Lowndes, 1006.
v. Morgan, 858.
Rawls v. American Ins. Co., 832.
Ray v. Light, 1132.
Rayburn v. Central Iowa Ry. Co., 1246.
Rayner v. Kinney, 1224.
Raynor v. Nims, 1031.
Razzo v. Varni, 1030.
Rea v. Harrington, 1204, 1206, 1210, 1214, 1218.
Read v. Great Eastern Ry. Co., 1260.
v. Kelly, 1253.
v. St. Louis, etc., R. Co., 917.
Readman v. Conway, 872.
Ream v. Rank, 1030.
Reardon v. San Francisco, 1062.
Rebecca, The, 1290.
Rector of Trinity Church v. Higgins, 846.
Redding v. Godwin, 1171, 1172.
Reddon v. Union P. Ry. Co., 1256.
Redfield v. Davis, 768.
v. Redfield, 1256.
Redington v. Numan, 1146.
Redman v. Wilson, 803.
Redmond v. American Manuf. Co., 1144, 1148.
Red River, etc., R. Co. v. Sture, 1081.
Redway v. Gray, 1213.
Reed's Petition, 1077.
Reed v. Chicago, etc., Ry. Co., 1256.
v. Clark, 986, 988.
v. Hanover B. R. Co., 1083, 1091.
v. Lawrence, 1193.
v. Price, 1009, 1012.
v. Rome, etc., R. Co., 933.
v. Wall, 1090.
v. Ward, 849.
v. Washington Ins. Co., 808.
v. Williams, 1255, 1284.
Reeder v. Purdy, 1009, 1012, 1032, 1252, 1253.
Reese v. Jared, 1144.
v. Western U. T. Co., 975, 976, 981.
Reeves v. Penrose, 1031.

References are to sections.

Reeves v. Winn, 1210, 1216.
Regan v. Chicago, etc., R. Co., 1263, 1264.
Reggio v. Braggiotti, 865, 1172.
Regina v. Brown, 1074.
v. Martin, 1255.
v. Mercer, 1255.
v. Robins, 1255.
v. Terrington, 1255.
Reid v. Fairbanks, 1128.
v. Rensselaer Glass Factory, 1091.
Reilley v. McMinn, 1129.
Reilly v. Franklin Ins. Co., 806.
Reily v. Lamar, 784.
Reina v. Cross, 896.
Reisan v. Mott, 1237.
Reisner v. Union Depot & R. Co., 1064, 1088, 1090, 1091.
Relf v. Rapp, 885, 925.
Relief Ins. Co. v. Shaw, 802, 820.
Relyea v. New Haven R. M. Co., 986.
Renfro v. Hughes, 1130, 1139, 1141.
Remington v. Foster, 1036.
Remington Sewing M. Co. v. Kezertee, 1176.
Remmler v. Shenuit, 1253.
Renihan v. Wright, 979.
Reno v. Hogan, 904.
v. Kingsbury, 1144.
Rensselaer Glass Factory v. Reid, 1109.
Renwick v. Morris, 1055.
Respass v. Morton, 787.
Restor v. Pomfreich, 1219.
Reuck v. McGregor, 1257.
Revere F. Ins. Co. v. Chamberlain, 802.
Rex v. Barker, 1255.
v. Clarke, 1255.
v. Hodgson, 1255.
v. Neil, 1035.
v. White, 1035.
Reynolds v. Braithwaite, 1018, 1031.
v. Burlington, etc., Ry. Co., 1089.
v. Cox, 1174.
v. Franklin, 1172.
v. Ocean Ins. Co., 819.
v. Robertson, 1249.
v. Shuler, 1103, 1139.
v. Tucker, 1229, 1231, 1233.
Rheem v. Naugatuck W. Co., 1171, 1174.
Rhoda v. Almeda Co., 1018, 1114.
Rhodes v. Baird, 868, 869.
v. Ijames, 1212.
v. Louisville, etc., R. Co., 904.
v. Roberts, 1095.
Rice v. Cottrel, 1204.
v. Hollenbeck, 1020, 1126, 1128.
v. Homer, 803.
v. Indiana & St. L. R. Co., 918.
v. Indianapolis, etc., R. Co., 925.
Rice v. Nickerson, 1252.
v. Ponder, 1239.
v. Turnpike Co., 1087.
v. White, 1171.
v. Whitmore, 870.
Rich v. New York E. R. Co., 1084.
v. Smith, 847.
Richards v. Fouts, 1284.
v. Richards, 1227.
v. Todd, 1171.
Richardson v. Dunn, 787.
v. Futrell, 774.
v. Milburn, 1024.
v. New York C. R., 1280.
v. Northrup, 1023, 1226, 1232.
v. Skolfield, 1006.
v. Vermont, etc., R. Co., 1053.
Richmond v. Bronson, 918, 920, 933.
v. Dubuque, etc., R. Co., 877.
v. Railroad Co., 901.
v. Roberts, 988, 990.
v. Union, etc., Co., 911.
Richmond & D. Ry. Co. v. Allison, 1246.
Richmond T. Co. v. Vanderbilt, 951.
Richmondville Union Seminary v. Hamilton Mut. Ins. Co., 814, 822.
Ricketts v. Chesapeake & O. Ry. Co., 942, 951.
v. Lastetter, 864, 866.
Riddle v. Driver, 1126.
v. McGinnis, 1282, 1283.
Riding v. Smith, 1219.
Ridley v. Perry, 1228.
Rigby v. Hewett, 968.
Riggs v. Bell, 855.
v. Lindsay, 789.
Rigney v. Chicago, 1062.
Riley v. Horne, 914.
v. Littlefield, 1146, 1151.
v. Martin, 1109.
v. Nugent, 1217.
Ringgold v. Haven, 918.
Ringhouse v. Keener, 999.
Ripey v. Miller, 1032.
Ripley v. Davis, 1109.
v. Gelston, 799.
v. Wightman, 852.
Ripon v. Bittel, 942, 945, 1246.
Rippe v. Chicago, etc., R. Co., 1082.
Ritchie v. Stenius, 1232.
Rittenhouse v. Independent L. T., 957, 963, 970.
Ritter v. Sieger, 1025.
Rivers v. Gregg, 832.
Rix v. Mutual Ins. Co., 827.
Robb v. Carnegie, 1048, 1049.
v. Maysville, etc., T. Co., 1064.
Robbins v. Fletcher, 1206.
v. Milwaukee, etc., R. Co., 1082.
v. Packard, 1132.

References are to sections.

Robbins v. Treadway, 1204.
Robel v. Chicago, etc., R. Co., 1273, 1274.
Roberts v. Berdell, 1132.
v. Connelly, 1282.
v. Mason, 1101.
v. Myers, 1199.
v. Plaisted, 1168.
v. Roberts, 1218, 1220.
v. Snell, 849.
v. Stuyvesant Safe Deposit Co., 1141.
v. Tennell, 841.
v. Thompson, 776.
Robertson v. Jackson, 897.
v. Jones, 1020.
v. Livingston, 784.
v. Wylde, 1216.
Robinett v. Lewis, 1003.
Robinson v. Ames, 775.
v. Barrows, 1109, 1110, 1144.
v. Boyd, 1176.
v. Burton, 1283, 1284.
v. Drummond, 1224.
v. Ferguson, 1132.
v. Goings, 1095.
v. Hartridge, 1109.
v. Harvey, 1233.
v. Hurley, 1132.
v. International L. Ins. Co., 774.
v. Kellum, 1235.
v. Keyser, 1232.
v. L' Engle, 851.
v. Marine Ins. Co., 893.
v. Marino, 1243.
v. Merchants' D. T. Co., 920.
v. Rupert, 1255.
Robrecht v. Marling, 864, 865.
Rochester v. Levering, 771, 786, 789.
Rockford, etc., R. Co. v. Delaney, 1264, 1273, 1274.
v. McKinley, 1089.
Rock Island, etc., R. Co. v. Lynch, 1072.
Rockwell v. Brown, 1207, 1235.
v. Third Ave. R. Co., 1246.
Rodgers v. Bass, 774.
v. Nowill, 1200.
Rodocanachi v. Milburn, 906, 918, 923, 933.
Rodrigues v. Tadmire, 1226, 1240.
Roemer v. Simon, 1193.
Roger Williams Ins. Co. v. Carrington, 802.
Rogers v. Crombie, 1140.
v. Henry, 1092.
v. Mechanics' Ins. Co., 814.
v. Ostram, 848.
v. Randall, 1015, 1094.
v. Smith, 1252.
Rohrschneider v. Knickerbocker L. Ins. Co., 1165.
Rokes v. Amazon Ins. Co., 811.
Rollins v. Clay, 1009.
v. Duffy, 778.
Rolph v. Crouch, 864, 865.
Romaine v. Van Allen, 1120.
Romberg v. Hughes, 1144, 1147, 1149.
Rome R. Co. v. Sloan, 933.
Romig v. Romig, 1132.
Rondout R. Co. v. Deyo, 1089.
Rooney v. Milwaukee Chair Co., 1254.
v. Sacramento R. Co., 1082.
Roose v. Perkins, 1265, 1268.
Root's Case, 1063.
Root v. King, 1224, 1226, 1228, 1231.
v. Lowndes, 1207, 1208.
v. New York, etc., Co., 956.
v. Railway Co., 1189.
v. Sturdivant, 1243, 1253.
Roper v. Wren, 854.
Rose v. Graves, 1054.
v. Groves, 1219.
v. Lewis, 1132.
v. Miles, 1058.
v. Pearson, 1151.
v. Story, 1092, 1137.
v. Wallace, 1173.
v. Wynn, 864, 855.
Rosenfeld v. Express Co., 931.
v. Peoria, etc., Ry. Co., 904, 925.
Rosenkrans v. Barker, 1237, 1240.
Rosenkranz v. Lindell Ry. Co., 1251.
Rosenthal v. Taylor, 1016.
Rosenzweig v. Frazer, 1137.
Rosewater v. Hoffman, 1207, 1210.
Ross v. Butler, 1035.
v. Dysart, 863.
v. Elizabethtown R. Co., 853, 1081.
v. Leggett, 1257, 1258.
v. Missouri, etc., R. Co., 954.
v. Ross, 1217.
v. Scott, 1019, 1020.
Rossend Castle, The, 898.
Rosser v. Bunn, 1031.
Rossiter v. Chester, 819, 890.
v. Cossitt, 1007.
Rounds v. Delaware, etc., R. Co., 951.
Rouse v. Metropolitan St. Ry. Co., 951.
Rowe v. Baber, 872.
v. Johnson, 1004.
v. Moses, 1253.
Rowell v. Western U. T. Co., 975, 977.
Rowlands v. Samuel, 1236, 1238.
Rowley v. Gibbs, 1151, 1152.
v. London, etc., R. Co., 1265, 1268, 1278.
v. Rice, 1107.
Rown v. Christopher, etc., R. Co., 1257.
Roy v. Goings, 1239, 1240.

References are to sections.

Royal v. Smith, 983, 988.
Royce v. Guggenheim, 847, 848.
Royer v. Schultz Belting Co., 1185.
Rubber Co. v. Goodyear, 1190, 1191, 1192.
Bucker v. McNeely, 1030.
Rudd v. Rounds, 1285.
Rude v. Westcott, 1183.
Ruffner v. Hewitt, 769, 789, 792.
Rumbold v. Penn Mut. L. Ins. Co., 839.
Rummell v. Otis, 1215.
Rumsey v. New York, etc., R. Co., 1016.
Rundle v. Moore, 774, 775.
Russ v. Ship Active, 818.
v. Steamboat War Eagle, 946.
Russel v. Langstaffe, 775.
Russell v. Blake, 999.
v. Bradley, 1237.
v. Brown, 1036, 1040.
v. Chambers, 1283, 1284.
v. Clark, 1166, 1171.
v. Dennison, 1237, 1238.
v. Giblin, 872.
v. Hankey, 774.
v. Palmer, 776.
v. St. Paul, etc., Ry. Co., 1074.
v. Smith, 1148, 1151.
v. Sunbury, 1274.
v. Tomlinson, 1059.
v. Turner, 775.
v. Western U. T. Co., 977.
Rust v. Victoria Graving Dock Co., 1048, 1057.
Rutland v. Dayton, 858.
Rutland, etc., R. Co. v. Bank, 1101, 1140.
Ryan v. Fitzgerald, 1147.
Ryburn v. Pryor, 1109.
Ryder v. Hathaway, 1128.
v. Mayor, 1256.
v. Phœnix Ins. Co., 806.
v. Thayer, 773.
Ryers v. Wheeler, 993.
Ryerson v. Chapman, 865.
v. Quackenbush, 849.

Sabine, etc., R. Co. v. Brousard, 1047.
v. Joachimi, 1049.
v. Johnson, 1047, 1049, 1051.
Sabioncello, The, 906.
Sackrider v. Beers, 1038.
Sacramento, etc., R. Co. v. Moffatt, 1082.
Sadler v. Bean, 1132.
Safely v. Gilmore, 846.
Safford v. Drew, 1260.
v. Grout, 1167.
v. Kinsley, 773.
Sager v. Portsmouth, etc., R. Co., 904.
Salida v. McKinna, 1252.
Salina v. Trosper, 1243.
Salisbury v. Herchenroder, 1244.
v. Western, etc., R. Co., 1012, 1013.
Salkold v. Skelton, 1155.
Sallund v. Johnson, 1168.
Salmon v. Smith, 848.
Sampson v. Henry, 1030, 1243, 1253.
Samuel v. Bond, 1228.
Samuels v. Evening Mail Ass'n, 1216, 1218.
Sanborn v. Firemen's Ins. Co., 802.
v. Neal, 796.
Sanback v. Quigley, 1004.
Sanders v. Johnson, 1117.
v. Kentish, 1123.
v. Stuart, 959.
v. Vance, 1109.
Sanderson v. Caldwell, 1204, 1208, 1213.
v. Marine Ins. Co., 817.
v. Pennsylvania Coal Co., 1054.
Sandford v. Catawissa, etc., R. Co., 886.
v. Dillaway, 775.
v. Eighth Ave. R. Co., 951.
San Diego Land & T. Co. v. Neale, 1071, 1075, 1089.
Sands v. Lilienthal, 906.
Sanford v. Augusta, 1252.
v. Handy, 1165.
San Francisco, etc., R. Co. v. Caldwell, 1061, 1063, 1064.
v. Mahoney, 1083.
Sangamon, etc., R. Co. v. Henry, 903, 907.
San Jose & A. R. Co. v. Mayne, 1072, 1083, 1087.
Sans v. Joerries, 1231, 1233.
Saratoga, The, 887.
Sargeant v. Downey, 776.
Sargent v. Ashe, 841, 842.
v. ———, 1281, 1283.
v. Machias, 1082.
v. Yale Lock Manuf. Co., 1184, 1194.
Sarquy v. Hobson, 803.
Sauer v. Schulenberg, 984.
Saunders v. Brosius, 1129.
v. Clark, 1113, 1128.
v. Mills, 1227, 1233.
Savage v. Brewer, 1235.
v. Corn Exchange Ins. Co., 813, 814.
v. New York Ins. Co., 817.
v. Savage, 768.
v. Stevens, 1168, 1169.
Savannah, etc., R. Co. v. Bourquin, 1016, 1038.
v. Collins, 925.
v. Pritchard, 911, 913, 921.
v. Shearer, 1263.

References are to sections.

Saveland v. Green, 793.
Saville v. Roberts, 1234, 1237.
Sawyer v. Hopkins, 1208.
v. Kellogg, 1201.
v. McGillicuddy, 872.
Sayers v. Holmes, 1157.
Sayre v. Sayre, 1226.
v. State, 1048.
Scammon v. Campbell, 1002.
v. Germania Ins. Co., 809.
v. Wells, 925.
Scanlan v. Cowley, 1239.
Scattergood v. Wood, 1146.
Schaack v. Northern T. Co., 917.
Schadewald v. Milwaukee, etc., R. Co., 1273, 1274.
Schalk v. Kingsley, 1034.
Schars v. Barnd, 1151.
Scheer v. Keown, 1240.
Scheffler v. Minneapolis, etc., R. Co., 1273, 1274.
Schenuit v. Brueggestradt, 1144.
Schettler v. Southern Oregon Co., 999.
Schieffelin v. Carpenter, 856.
Schilling v. Holmes, 842.
Schindel v. Schindel, 842.
Schippel v. Norton, 1238, 1240.
Schlater v. Gay, 1020.
Schlemmer v. North, 866.
Schley v. Lyon, 1115.
Schmertz v. Dwyer, 773, 774, 781.
Schmidt v. Durnham, 985, 990.
v. Milwaukee, etc., R. Co., 953.
v. The Pennsylvania, 913, 914.
Schmitz v. St. Louis, etc., Ry. Co., 1252.
Schofield v. Ferrers, 1144, 1145, 1148, 1149.
Scholl v. Albany & R. Iron & S. Co., 897.
School District v. Boston, etc., R. Co., 904.
v. Shoemaker, 1155.
Schrengast v. Ealy, 988.
Schrimper v. Heilman, 1206.
Schroeder v. De Graff, 1016.
Schufeldt v. Schintzler, 1167.
Schulenberg v. Harriman, 1226.
Schultz v. Third Ave. R. Co., 953.
Schulze v. Great Eastern Ry. Co., 908.
Schumacher v. St. Louis, etc., R. Co., 1256.
Schumaker v. St. Paul & D. R. Co., 938, 1244.
Schuylkill Nav. Co. v. Farr, 1047.
v. Freedley, 1071.
v. Thoburn, 1066, 1083.
Schwab v. Cleveland, 1047.
v. Owens, 1160.
Schwabacker v. Riddle, 1175.
Schwartz v. Atlantic, etc., T. Co., 958.
Schwarzel v. Holenshade, 1188.
Schweitzer v. Connor, 1126.
Schwinger v. Raymond, 896.
Scripps v. Reilly, 1216.
Scrugham v. Carter, 1160.
Scotland, The, 1296.
Scott v. Avery, 808.
v. Bay, 1035, 1051.
v. Boston, etc., Co., 906.
v. Bryson, 1096, 1097.
v. Dickson, 832.
v. Dixon, 1170.
v. Elliott, 1144.
v. Fletcher, 1240.
v. Hamilton, 1242.
v. Hughes, 1151.
v. Libby, 890, 894.
v. McKinnish, 1227.
v. Montgomery, 1243, 1246, 1250, 1251.
v. Newington, 1097.
v. Peebles, 1233.
v. Rogers, 774, 780, 1119, 1120.
v. Sampson, 1226, 1227.
v. Shepherd, 951, 1029.
Scovill v. Griffith, 905.
Screws v. Watson, 1095.
Scripps v. Foster, 1233.
v. Reilly, 1217, 1233.
Scudder v. Bradford, 818, 819.
Scull v. Briddle, 1109.
Seabrook v. A Raft of Railroad Cross-Ties, 1292.
v. Moyer, 848.
Seabury v. Ross, 1147.
Sea Gull, The, 1289.
Seals v. Cummings, 1132.
Seaman v. Adler, 887.
Seamans v. Smith, 1023.
Searl v. School District, 1076.
Searle v. Lackawanna, etc., R. Co., 1066, 1074, 1089.
v. Scovell, 891.
Sears v. Lyons, 1031.
v. Wingate, 896.
Seaton v. Jamison, 1003.
Seattle & M. R. Co. v. Scherke, 1081.
Seay v. Marks, 1139.
Second Street, Harrisburg, In re, 1091.
Secor v. Harris, 1204.
Security Ins. Co. v. Kentucky Ins. Co., 820.
Sedgwick v. Hollenback, 863.
Sedgworth v. Overend, 1097.
Seely v. Alden, 1038, 1042, 1057.
v. Cole, 1232.
Seeman v. Feeney, 1101.
Segar v. Edwards, 768.
Seger v. Barkhamsted, 942, 978, 1214, 1243.
Seifke v. Koch, 850.

References are to sections.

Selden v. Cushman, 1092.
Selkirk v. Cobb, 1109.
Sellar v. Clelland, 1171, 1173.
Sellars v. Kinder, 1284.
Seller v. Work, 772.
Sellick v. Hall, 1059.
Sellman v. Bowen, 1003.
Selma R. Co. v. Camp, 1082.
v. Lacey, 1259, 1280.
Semple v. Bank of British Columbia, 999.
Sentance v. Hawley, 789.
Senter v. Monroe, 798.
Serensen v. Northern P. R. Co., 1275.
Servatius v. Pickel, 1209, 1215, 1244.
Serwe v. Northern P. R. Co., 939, 940, 942.
Sessions v. Romadka, 1193.
Setzler v. Pennsylvania, etc., R. Co., 1066.
Severance v. Hilton, 1206, 1212.
Sewall v. Lancaster Bank, 1108.
Sexson v. Hoover, 1237, 1238.
Sexton v. Brock, 1209.
Seyfert v. Bean, 867.
Seyk v. Millers' Nat. Ins. Co., 807.
Seymour v. Billings, 1162.
v. Chicago, etc., R. Co., 950.
v. Greenwood, 951.
v. Ives, 1117.
v. McCormick, 1182, 1183, 1184, 1185, 1188, 1193, 1196, 1201.
v. Merrills, 1211.
Shaber v. St. Paul, etc., R. Co., 1265, 1268, 1273, 1274, 1275, 1276.
Shaddock v. Clifton, 1252.
Shadwell v. Henderson, 1023.
Shafer v. Smith, 1100.
v. Wilson, 869, 1054.
Shaffer v. Lee, 856.
Shallies v. Wilcox, 876.
Shand, The, 928.
Shand v. Grant, 887.
Shank v. Case, 1224.
Shannon v. Bruner, 1193.
v. Marmaduke, 768.
Sharon v. Mosher, 1165, 1173.
Sharp v. Powell, 1244.
Sharpe v. Graydon, 1139.
v. Johnston, 1239.
Sharrod v. London, etc., Ry. Co., 951.
Shartle v. Hutchinson, 1224.
v. Minneapolis, 1256.
Shatto v. Crocker, 1237.
Shattuc v. McArthur, 1214, 1216, 1217.
Shattuck v. Myers, 1284.
v. Stoneham Branch R., 1086, 1089.
v. Wilton R. Co., 1091.
Shaw v. Boston & W. R. Co., 1256.
v. Charlestown, 1063.
v. Cummiskey, 1048.
v. Hoffman, 869.
Shaw v. Holland, 1118, 1123.
v. Laughton, 1152.
v. Picton, 769.
v. Reed, 775.
v. S. C. R. Co., 918.
v. Stine, 1167.
v. White, 1002.
Shawbut v. St. Paul, etc., R. Co., 1058.
Shawe v. Felton, 806.
Shawneetown v. Mason, 1085.
Shea v. Potrere, etc., R. Co., 1254.
Sheafe v. O'Neil, 1001.
Sheahan v. Barry, 984, 989, 990.
v. Collins, 1211, 1212, 1226, 1227.
Sheanon v. Pacific Mut. L. Ins. Co., 807.
Shearer v. Shearer, 1007.
Shearman v. Akins, 789.
Shedd v. Moran, 1280.
Sheets v. Selden, 851, 858.
Sheffill v. Van Deusen, 1232, 1233.
Sheffield v. Linn, 782.
Shelbyville, etc., R. Co. v. Lewark, 1101.
Sheldon v. Carpenter, 1237.
v. Southern Exp. Co., 1136.
Shelton v. Simmons, 1224.
Shenandoah V. R. Co. v. Shepherd, 1068, 1071, 1074.
Shenango, etc., R. Co. v. Braham, 1064, 1074, 1083.
Shepard v. Chicago, etc., Ry. Co., 942, 943.
v. Merrill, 1228.
v. Pettit, 1126.
v. Milwaukee Gas L. Co., 869, 1054.
v. Pratt, 1109.
v. Wakeman, 1219.
Shepherd v. Johnson, 1118, 1123.
Sheppard v. Wardell, 1003.
Sheridan v. New Quay Co., 1136.
Sherley v. Billings, 950.
Sherman v. Clark, 1148, 1150, 1158.
v. Dutch, 1028, 1029.
v. Fall River Iron Works, 1048.
v. Hudson R. Co., 906.
v. Milwaukee, etc., R. Co., 1040.
v. Rawson, 984, 986.
v. Wells, 918, 920.
v. Williams, 848.
Sherrod v. Langdon, 1173.
Sherry v. Schuyler, 1105.
Shewalter v. Bergman, 1283, 1284.
Sherwood v. Lafayette, 1082.
v. Seaman, 872.
v. St. Paul, etc., R. Co., 1069, 1083, 1088.
v. Stone, 783.
v. Sutton, 1172.
v. Tetman, 1284.
Shields v. Batts, 1001.

References are to sections.

Shields v. Davis, 890.
v. Washington T. Co., 959, 971.
Shilling v. Carson, 1208, 1212, 1226, 1227.
Shinnabarger v. Shelton, 1171, 1172.
Ship Compta, The, 923.
Shipherd v. Field, 771, 786.
Ship Hooper, The, 887.
Shipley v. Baltimore, etc., R. Co., 1087.
v. Fifty Associates, 872.
Shipman v. Burrows, 1212, 1215, 1219.
Shipp v. McCraw, 1204.
Shippen's Appeal, 1004.
Shipton v. Thornton, 891.
Shirley v. Keathy, 1224, 1228, 1231.
Shively v. Cedar Rapids, etc., R. Co., 1047, 1055.
Shoenfeld v. Fleisher, 772.
Shores v. Brooks, 1032.
Short v. Kalloway, 857.
v. Skipwith, 771.
Shotwell v. Wendover, 1132, 1140.
Shoulty v. Miller, 1227.
Shrack v. McKnight, 792.
Shrieve v. Stokes, 1053.
Shumway v. Collins, 847, 848.
Sibley v. Hulbert, 1171.
v. Prescott, 811.
Sickles v. Borden, 1183, 1185.
Sigmund v. Howard Bank, 876.
Sikes v. Tippins, 1285.
Silsby v. Foote, 1187, 1197.
Silsbury v. McCoon, 1020, 1126, 1127, 1128.
Silver v. Kent, 913, 930.
Simmer v. St. Paul, 1102.
Simmes v. Marine Ins. Co., 884.
Simmons v. Brown, 1054.
v. London Joint Stock Bank, 1123.
v. McConnell, 1266.
Simoni v. New York, etc., R. Co., 1246.
Simons v. Busby, 1283.
v. Patchett, 798.
Simonton v. Gray, 1006.
Simpson v. Alexander, 1109.
v. Black, 986.
v. Grayson, 1282, 1284.
v. Keokuk, 1043, 1055.
v. London & N. Ry. Co., 911, 913.
v. McCaffrey, 1032.
v. Robinson, 1224.
Sinclair v. Eldred, 1235.
v. Jackson, 797.
Single v. Schneider, 1020, 1127, 1128, 1150, 1154, 1158.
Singleton v. Boone County Ins. Co., 824.
v. Boulton, 1200.
v. Southwestern R., 953.
Sioux City, etc., R. Co. v. Brown, 1091.
v. Finlayson, 1256.
Sisson v. Cleveland, etc., R. Co., 781, 906, 914, 918, 932.
Six Hundred & Thirty Casks, 917.
Skaggs v. Emerson, 847, 848.
Skally v. Shute, 848.
Skeen v. Springfield E. & T. Co., 1132.
Skinner v. Grant, 1233.
v. Pinney, 1109.
v. Powers, 1227, 1233.
Skoglund v. Minneapolis Street Ry. Co., 952.
Slater v. Hayward, 819.
v. Sherman, 1242.
Slatter v. Meek, 1003.
Sleight v. Ogle, 1257.
Slight v. Gutzlaff, 1038.
Slingerland v. Bennett, 1171, 1173.
Sloan v. Coburn, 1160.
v. Edwards, 1243, 1244, 1251, 1253, 1254.
v. Petrie, 1224.
Sloman v. Western R. Co., 954.
Smalley v. Appleton, 1256.
v. Smalley, 1031.
Smart v. Allegart, 848, 864.
v. Blanchard, 1204.
Smedes v. Bank of Utica, 775.
Smith v. Adams, 1235.
v. Addleman, 1002.
v. Ankrim, 851.
v. Bagwell, 1242.
v. Baker, 1116.
v. Bolles, 1171, 1172.
v. Braun, 984, 989.
v. Brinker, 850.
v. Charter Oak L. Ins. Co., 838.
v. Chicago, etc., R. Co., 1023.
v. Columbian Ins. Co., 821.
v. Commonwealth Ins. Co., 811.
v. Compton, 857.
v. Condry, 1102.
v. Dillingham, 1157.
v. Dinkelspiel, 1101.
v. Dodge, 1144.
v. Elliott, 1035, 1036.
v. Eubanks, 867.
v. Findley, 884.
v. Foster, 1137.
v. Gonder, 1126, 1127.
v. Green, 1165.
v. Griffith, 923, 933.
v. Haverhill Mut. F. Ins. Co., 809.
v. Hinstrager, 1235.
v. Holcomb, 1243.
v. Howell, 857.
v. Hyndman, 1236.
v. Independent L. T. Co., 964.
v. Ingram, 1008, 1009.
v. Insurance Co., 807.

References are to sections.

Smith v. Jackson, 1007.
v. Lovelace, 1210, 1211.
v. McGuire, 878.
v. Lascelles, 772.
v. McCarty, 1006.
v. McLean, 851.
v. Manufacturers' Ins. Co., 816.
v. Masten, 1284.
v. Milburn, 1255, 1284.
v. Morgan, 1126.
v. New Haven & N. R. Co., 906, 907, 908, 918.
v. Overby, 1243.
v. Peat, 856, 959.
v. Phillips, 1055, 1160.
v. Pittsburgh, etc., R. Co., 942, 1243.
v. Plomer, 1108.
v. Price, 772.
v. Pryor, 1196.
v. Railway Co., 1082.
v. Raleigh, 848.
v. Richards, 1282.
v. Richardson, 920.
v. Robey, 1157.
v. Scott, 1233.
v. Shepard, 847.
v. Sherman, 986.
v. Shumway, 1226.
v. Smith, 1019, 1238.
v. Snyder, 1156.
v. Spooner, 1223.
v. St. Joseph, 1252.
v. St. Louis Mut. L. Ins. Co., 838.
v. Stewart, 841, 1233.
v. Thackerah, 1053.
v. Thomas, 1215.
v. Thompson, 1009, 1031.
v. Western U. T. Co., 903, 965, 971.
v. Winston, 1156.
v. Wise, 847.
v. Woodfine, 988.
v. Wright, 818, 819.
v. Wunderlich, 867, 869, 1008, 1009.
v. Wyman, 1206.
v. Yaryan, 1284.
v. Zent, 1096.
Smiths v. McConathy, 1035.
Smout v. Ilbery, 796, 797.
Smyth v. Wright, 893.
Snarr v. Granite C. & S. Co., 1053.
Sneed v. Jenkins, 847.
Snell v. Delaware Ins. Co., 813.
Snively v. Fahnestock, 1095, 1100.
Snodgrass v. Reynolds, 864.
Snow v. Boston, etc., R. Co., 1089.
v. Carruth, 896, 928.
v. Judson, 1223.
v. Nowlin, 1171.
v. Union & Mut. Mar. Ins. Co., 807, 816.
Snowdon v. Davis, 799.
Snyder v. Findley, 1189.
v. Snyder, 1007.
v. Vaux, 1126.
v. Western U. R. Co., 1065, 1089.
Sobieski v. St. Paul & D. R. Co., 1256.
Societe Anonyme v. Western Distilling Co., 1201.
Solen v. Virginia City, etc., R. Co., 953.
Sollund v. Johnson, 1171.
Solms v. Lias, 1060.
Soltau v. De Held, 1035, 1037.
Somerville, etc., R. Co. v. Doughty, 1066, 1074, 1089.
Sonneborn v. Stewart, 1234, 1235, 1238.
So Relle v. Western U. T. Co., 975, 977, 978, 982.
South v. Denneston, 1282.
Southard v. Rexford, 986, 988, 990.
South Carolina R. Co. v. Nix, 1280.
South Covington, etc., Ry. Co. v. Ware, 1242.
South & North A. R. Co. v. Henlien, 925.
v. McLendon, 1243.
v. Wood, 917, 918, 933.
Southern v. How, 1200.
Southern Cotton Oil Co. v. Henshaw, 996.
Southern Exp. Co. v. Moon, 916, 925.
v. Newby, 917.
Southern K. Ry. Co. v. Hinsdale, 942, 943.
v. Rice, 938, 942.
Southern Oil Works v. Bickford, 1015.
Southern P. Ry. Co. v. Maddox, 904.
South Park Comm'rs v. Dunlevy, 1083.
Southold v. Daunston, 1219.
Southside R. Co. v. Daniel, 1072, 1090.
Southworth v. Packard, 1252.
Sowell v. Champion, 1106, 1140.
Sowers v. Sowers, 1216.
Spaids v. Barrett, 1235.
Sparhawk v. Union, etc., R. Co., 1035.
v. Walpole, 1090.
Sparks v. Bassett, 873.
v. Purdy, 1139.
Spaulding v. Page, 1185.
Spear v. Hiles, 1237, 1238, 1239, 1240.
Speckels v. Sax, 872.
Spedding v. Nevell, 797, 798.
Speer v. Phœnix Mut. L. Ins. Co., 838.
Spencer v. McMasters, 1224.
v. St. Paul, etc., R. Co., 1060.
v. Vance, 1109.
Spengler v. Davy, 1235.
Spicer v. Chicago, etc., R. Co., 953.
v. Waters, 1097, 1099, 1109, 1113, 1117.
Spiller v. Adams, 1003.
Spooner v. Keeler, 1230.
Spoor v. Holland, 1136.

References are to sections.

Sprague v. Atlee, 1256.
v. Brown, 1104, 1105, 1141.
v. Craig, 990.
v. McKinzie, 1139, 1141.
v. West, 897.
v. Western U. T. Co., 958, 966, 969.
Spring v. Haskell, 918.
Springer v. Chicago, 1062, 1089.
Springer T. Co. v. Smith, 950.
Springfield v. Schmook, 1089.
Springfield & M. Ry. v. Rhea, 1083, 1089.
Springfield & S. Ry. Co. v. Calkins, 1088, 1089.
Squier v. Gould, 1060, 1247.
v. Plunkett, 1175.
Squire v. Hollenbeck, 1107.
v. Somerville, 1068.
v. Western U. T. Co., 963, 969.
St. Helen's Smelting Co. v. Tipping, 1037.
St. Joe, etc., R. Co. v. Orr, 1083.
St. John v. American Ins. Co., 832.
v. Mayor, 867, 868, 1029, 1054.
v. O'Connell, 1132.
St. Johnsbury, etc., R. Co. v. Hunt, 1234.
v. Willard, 1076.
St. Joseph, etc., R. Co. v. Wheeler, 1273.
St. Lawrence, etc., Ry. v. Lett, 1262, 1266.
St. Louis Public Schools v. Boatmen's Ins. Co., 850.
St. Louis, etc., R. Co. v. Anderson, 1066, 1072, 1087, 1089.
v. Brown, 1088.
v. Cantrell, 1250.
v. Capps, 1054, 1061, 1069.
v. Freeman, 1266.
v. Johnston, 1269.
v. Kirby, 1072, 1074.
v. Lesser, 904, 905.
v. McAuliff, 1066.
v. McCormick, 1280.
v. Mackie, 942, 948, 949.
v. Mudford, 905, 906, 907, 913, 914.
v. Myrtle, 953.
v. Neel, 902.
v. North, 1072.
v. Phelps, 918, 920, 933.
v. Richardson, 1084.
v. Riggs, 1096, 1097.
v. Smuck, 925.
v. Teters, 1064, 1066, 1082.
v. Weakly, 925.
St. Paul Distilling Co. v. Pratt, 1164.
St. Paul F. & M. Ins. Co. v. Johnson, 830.
St. Paul, etc., R. Co. v. Matthews, 1082.
v. Murphy, 1083, 1088.
St. Peter's Church v. Beach, 1101, 1118.
Staal v. Grand Rapids, etc., R. Co., 1275.
Staat v. Grand Street & N. R. Co., 1248, 1251.
v. Royal Ins. Co., 822.
Stadler v. Grieben, 1037, 1038, 1039.
Stafford v. Maus, 1167.
v. Oskaloosa, 1246, 1248.
v. Providence, 1083.
v. Rubens, 1274.
Stainforth v. Lyall, 881.
Stallings v. Whittaker, 1214, 1216.
Standard F. Ins. Co. v. Wren, 811.
Standard Oil Co. v. Tierney, 1256.
Stanley v. Donohe, 1144.
v. Towgood, 855.
Stanton v. Hart, 1240.
v. Prichard, 1020.
Stanwood v. Whitmore, 1210.
Staple v. Spring, 1036, 1040, 1041, 1057.
Staples v. Anderson, 876.
Stapleton v. King, 1118.
Starbird v. Frankfort, 1252.
Stark v. McGowen, 1051.
v. Starr, 999.
Starkey v. Kelley, 1098, 1114.
Star of Hope, The, 819.
Star of India, The, 1290, 1292.
Starr v. Gardner, 1213.
v. Jackson, 1012.
State v. Baltimore, etc., R. Co., 1273.
v. Berning, 1132, 1141.
v. Cecil Co. Comm'rs, 1268.
v. District Court, 1077.
v. Grand Trunk Ry., 1260.
v. Haines, 1035.
v. Harrington, 1141.
v. Hastings, 796.
v. Hulick, 1081.
v. Ingram, 858.
v. Jeandell, 1206.
v. Jefferson, 1255.
v. Knapp, 1255.
v. Maine C. R. Co., 1260.
v. Pacific Guano Co., 1020.
v. Pittsburgh, etc., R. Co., 1280.
v. Shardlow, 1077.
v. Smily, 1204.
v. Smith, 1096, 1098, 1113, 1144.
v. Taylor, 1035.
State Ins. Co. v. Jamison, 769, 771.
v. Taylor, 813, 824.
v. Todd, 811.
Stauffer v. Miller Soap Co., 1022.
Steadman v. Western T. Co., 903.
Steamboat Emily v. Carney, 918.
Steamboat John Owen v. Johnson, 931.
Steam Stone-Cutter Co. v. Sheldons, 1185.

References are to sections.

Steam Stone-Cutter Co. v. Windsor Manuf. Co., 1189, 1191, 1195, 1197.
Stearine, etc., Co. v. Heintzmann, 774.
Stearns v. Cox, 1206.
v. McGinty, 1101.
v. Marsh, 1137.
v. Reidy, 1256.
Stebbing v. Metropolitan Board, 1074.
Stedman v. Fortune, 1001.
v. Taylor, 887.
Steel v. Kurtz, 1276.
Steele v. Davis, 1011.
v. Townsend, 917.
v. United States, 1128.
Steiger v. Hillen, 1003.
Steinman v. McWilliams, 1212.
Steinmetz v. Kelly, 1255.
Stellar v. Nellis, 1255.
Stephens v. Felt, 1185.
v. Hannibal, etc., Ry. Co., 1254.
v. Hudson Valley R. Co., 1256.
v. Koonce, 1115.
Stephenson v. Little, 1128.
v. Piscataqua F. & M. Ins. Co., 808.
v. Price, 1118.
v. Thayer, 1132.
Sterling v. Peet, 864, 865.
Sterling, The, and The Equator, 1287.
Sterry v. Foreman, 1219.
Stetson v. Chicago, etc., R. Co., 1061.
v. Faxon, 1054.
Stevens v. Cady, 1199.
v. Coffeen, 841.
v. Fuller, 1166.
v. Gladding, 1198, 1199.
v. Hartwell, 1221.
v. Hollister, 1008.
v. Low, 1115, 1137, 1140.
v. New York E. R. Co., 1088.
v. Robins, 792.
v. Sayward, 887.
v. Tuite, 1158.
Stevenson v. Lombard, 848, 849.
v. Lord, 1160.
v. Maxwell, 854.
v. Montreal T. Co., 971.
v. Morris, 1244.
Steward v. Gromett, 1234.
Stewart v. Beard, 1006.
v. Cole, 1235.
v. Lanier House Co., 867, 876.
v. Maddox, 1257.
v. Martin, 1105, 1141.
v. Ripon, 977, 1243, 1244, 1249, 1251.
v. Sonneborn, 1238.
v. Steele, 815.
v. West India, etc., Co., 818.
Stickney v. Allen, 1099, 1117, 1139.
Stiles v. Comstock, 1226, 1230.
v. Tilford, 1283.
Stiles v. Western U. T. Co., 965.
v. White, 1165, 1171, 1172, 1179.
Stillwell v. Barnett, 1031.
Stilson v. Gibbs, 1092.
Stimson v. Connecticut, etc., R. Co., 954.
Stinson v. Chicago, etc., Ry. Co., 1074, 1089.
Stirling v. Garritee, 1108, 1109.
Stitt v. Little, 1169.
Stitzell v. Reynolds, 1204.
Stix v. Keith, 1096.
Stockbridge Iron Co. v. Cone Iron Works, 994, 1020, 1127.
Stockdale v. Tarte, 1228.
Stocking v. Sage, 793.
Stockton v. Frey, 945.
v. Guthrie, 854.
Stockton, etc., R. Co. v. Galgiani, 1083.
Stodghill v. Chicago, etc., R. Co., 1016.
Stoher v. St. Louis, etc., R. Co., 1267.
Stokes v. Cooper, 848.
Stollenwerck v. Thatcher, 782, 1138.
Stone v. Clough, 1132.
v. Codman, 907.
v. Cooper, 1204.
v. Denny, 1169.
v. Evans, 1252.
v. Heath, 1072.
v. Varney, 1211, 1226.
v. Woodruff, 877, 878, 880.
Stonebreaker v. Stonebreaker, 1200.
Stoneman v. Erie R. Co., 954.
Stopp v. Smith, 1101, 1238.
Storer v. Eaton, 772.
v. Elliot Ins. Co., 827.
Storey v. Early, 1210, 1227, 1231.
Story v. New York E. R. Co., 1061, 1080, 1082.
v. O'Dea, 1157.
Stoudenmire v. De Bardelaben, 1034.
Stout v. Merrill, 1167.
Stow v. Converse, 1209, 1211, 1212.
v. Steel, 1006.
v. Tifft, 1006.
Strasberger v. Barber, 1098.
v. Western U. T. Co., 961.
Strasburger, In re, 864.
Stratton v. Lyons, 1012.
Straus v. Young, 1239.
Strawn v. Strawn, 1005.
Streeper v. Ferris, 1236.
Street v. Augusta, etc., Ins. Co., 803.
v. Laumier, 1101.
v. Sinclair, 1097, 1100.
Street Ry. Co. v. Doyle, 1082.
Stribling v. Ross, 1006.
Striegel v. Moore, 1020.
Strohn v. Hartford Ins. Co., 820.
v. New York, etc., R. Co., 1251, 1252.

References are to sections.

Strong v. American Central L. Ins. Co., 840.
v. Manufacturers' Ins. Co., 814, 821.
v. New York F. Ins. Co., 818.
v. Strong, 1174.
Strouss v. Wabash, etc., Ry. Co., 954, 955.
Stuart v. Western U. T. Co., 975, 976, 978.
Stubbings v. Evanston, 853.
Stultz v. Locke, 855.
Stumm v. Hummell, 1285.
Sturdevant v. Pike, 768.
Sturgeon v. St. Louis, etc., R. Co., 906, 907.
Sturges v. Bridgman, 1037.
v. Keith, 1112, 1117, 1118.
Sturgess v. Bissell, 781, 918, 922.
Sturgis v. Clough, 1292.
v. Warren, 1019.
Sturm v. Atlantic Mut. Ins. Co., 806.
Stutz v. Armstrong, 1183, 1185.
v. Chicago & N. Ry. Co., 942, 943, 944.
Success, The, 909.
Suffolk, The, 906.
Suffolk Co. v. Hayden, 1183, 1184, 1185.
Suffolk Ins. Co. v. Boyden, 828.
Sullens v. Chicago, etc., R. Co., 1047.
Sullings v. Shakespeare, 1228.
Sullivan v. Dee, 1095.
v. Jones, 842.
v. Lafayette Co., 1064, 1089.
v. Oregon Ry. & N. Co., 950, 951.
v. Sullivan, 1151.
Summers v. Babb, 1001, 1002.
Sumner v. Utley, 1204.
v. Williams, 798, 864.
Sunbury & E. Ry. Co. v. Hummell, 1066.
Sunday v. Gordon, 938.
Sun Mut. Ins. Co. v. Holland, 806.
Supervisors v. Bates, 769.
Surrey, The, 918.
Survey v. Wells, etc., Co., 1132.
Sussex Ins. Co. v. Woodruff, 829.
Sutliff v. Atwood, 849, 850, 851.
Sutton v. Buck, 1097.
v. Huffman, 1281, 1282.
v. Johnson, 1239.
v. Louisville, 1061, 1087.
v. Temple, 851.
Suydam v. Jenkins, 1098, 1099, 1104, 1115, 1117, 1118, 1120, 1152, 1157, 1158.
v. Watts, 1171.
Swaine v. Perine, 1007.
Swallow, The, 897.
Swan v. Liverpool, L. & G. Ins. Co., 809, 810.
Swan v. Middlesex, 1089.
v. Nesmith, 783.
v. Tappan, 1223.
Swarthout v. New Jersey S. B. Co., 1242.
Swatman v. Ambler, 843.
Sweatland v. Illinois, etc., T. Co., 958, 961.
Swett v. Troy, 1061.
Swift v. Barnes, 1150, 1152, 1157.
v. Brownell, 1296.
v. Dickerman, 1206, 1212, 1214, 1231.
v. Gifford, 1108, 1142.
Swindler v. Hilliard, 917.
Swire v. Leach, 1097, 1105.
Switzer v. Connett, 778.
Swords v. Edgar, 1025.
Syeds v. Hay, 774.
Sykes v. Lawler, 1252.
Syllivan v. Stradling, 841.
Sylvester v. Girard, 1136.
Symes v. Oliver, 1125, 1126.
Symington v. McLin, 774.
Symonds v. Carter, 1206, 1208, 1209, 1216.
v. Cincinnati, 1061, 1063, 1084.
v. Page, 993.
Syracuse, etc., R. Co. v. Collins, 775.

Taber v. China Mut. Ins. Co., 807.
v. Hutson, 942, 1243.
v. Jenny, 1108, 1128, 1142, 1296.
Tackwell v. Lambert, 1171.
Talbot v. Whipple, 1056.
Talcott v. Crippen, 1146.
Tallman v. Metropolitan E. R. Co., 1017, 1039, 1047.
Tamvaco v. Simpson, 1141.
Tancred v. Leyland, 1235.
Tandler v. Saunders, 1157.
Tangier, The, 896.
Tanner v. Kellogg, 1082.
Tappan v. Wilson, 1204.
Tarpley v. Blabey, 1232.
v. Wilson, 1115.
Tate v. Doe, 993.
v. Parrish, 1035.
v. Watts, 1178.
Tatham v. Le Roy, 1189.
Tatnall v. Courtney, 1253, 1255.
Tatum v. McLellan, 996.
v. Manning, 1118.
Taussig v. Hart, 774, 786.
Taverner's Case, 851.
Tayloe v. Merchants' Ins. Co., 810, 820.
Taylor v. Ætna Ins. Co., 810.
v. Bennett, 1099.
v. Brodick, 1002.
v. Carpenter, 1200, 1202.
v. Church, 1216.

References are to sections.

Taylor v. Collier, 918.
v. Dustin, 945, 1060.
v. Gilman, 1199.
v. Hall, 1204.
v. Hines, 1097.
v. Ketchum, 786, 1109.
v. Knox, 771.
v. Leith, 1169.
v. Metropolitan E. Ry. Co., 1080.
v. Monroe, 1247.
v. Morton, 1146.
v. Pennsylvania Co., 1280.
v. Robinson, 1240.
v. Roger Williams Ins. Co., 811.
v. Shelkett, 1283.
v. Shum, 850.
v. Tully, 1219.
v. Western P. R. Co., 1265.
v. Williams, 1239.
Teagarden v. Hetfield, 1060.
Teague v. Irwin, 1167.
Tefft v. Wilcox, 1242, 1246, 1248, 1251.
Telegraph Co. v. Griswold, 957, 958, 969.
v. Munford, 958.
Telfer v. Northern R. Co., 1263, 1265, 1266, 1268.
Templemore v. Moore, 1019.
Templeton v. Graves, 1216, 1217.
Tenant v. Goldwin, 1035.
Tenbrooke v. Jahke, 1082.
Ten Eyck v. Houghtaling, 854.
Tennessee, etc., R. Co. v. Lockhart, 942.
Tenney v. State Bank, 1136.
Terre Haute v. Hudnutt, 1054.
Terre Haute & I. R. Co. v. Buck, 1244.
Terre Haute, etc., R. Co. v. Vanatta, 949.
Terry v. Allis, 1132.
v. Birmingham Nat. Bank, 1118.
v. Hutchinson, 1281.
v. Mayor, 873, 1055.
Terwilliger v. Beals, 842.
v. Wands, 1218, 1220, 1221.
Texas, etc., R. Co. v. Casey, 953.
v. Matthews, 1016.
Texas M. Ry. Co. v. Douglass, 1245.
Texas P. Ry. Co. v. Cole, 940.
v. Cox, 1280.
v. Davidson, 1256.
v. Ferguson, 955.
v. Johnson, 1256.
v. Lester, 1272.
v. Morin, 1249, 1252.
v. Nicholson, 900, 902.
v. Richards, 1280.
v. Tankersley, 920.
Texas W. Ry. Co. v. Cave, 1083.
Thayer v. Brooks, 1038.
v. Hutchinson, 1108, 1136.
v. Manley, 1132, 1140.
Thayer v. Sherlock, 1019, 1030.
Thetford v. Tyler, 842.
Theobald v. Railway Pass. Ass. Co., 835.
Thew v. Miller, 1109.
Thibault v. Russell, 887.
Third Nat. Bank v. Boyd, 1112, 1118.
Thomas v. Brooklyn, 1249.
v. Clarke, 883, 895.
v. Croswell, 1208.
v. Dunaway, 1224.
v. Fischer, 1224.
v. Gammel, 1002, 1003.
v. Great Western Ry. Co., 954.
v. Isett, 1096, 1098.
v. McCann, 1169.
v. Mallinckrodt, 1003.
v. New York L. Ins. Co., 1141.
v. Russell, 1240.
v. Thomas, 999.
v. Wiggers, 876.
v. Winchester, 1173.
v. Womack, 953.
v. Zumbalen, 842.
Thomas, etc., Manuf. Co. v. Wabash, etc., Ry. Co., 905, 911, 913, 918, 920.
Thomas P. Way, The, 1291.
Thompson, In re, 1061.
Thompson v. Bowers, 1206, 1228.
v. Charnock, 808.
v. Clendening, 1284.
v. Crocker, 1037.
v. Ellsworth, 1257.
v. Fargo, 923.
v. Gibson, 1036, 1040.
v. Gwyn, 774, 778.
v. Halbert, 1132.
v. Liverpool L. & G. Ins. Co., 821.
v. Louisville, etc., R. Co., 1263.
v. Milwaukee, etc., R. Co., 1072.
v. Moiles, 1019, 1020.
v. Montreal Ins. Co., 821.
v. Morris Canal, etc., Co., 1039.
v. New Orleans, etc., R. Co., 938, 950.
v. Perkins, 783.
v. Pettitt, 1094.
v. Powning, 1101.
v. Rowcroft, 817.
v. Scheid, 1144.
v. Sheplar, 1172.
v. St. Louis Ins. Co., 808.
v. Western U. T. Co., 958, 961, 969, 975, 977.
Thomson v. Winchester, 1165, 1200.
Thorn v. Knapp, 986, 987, 1225.
Thorne v. Deas, 772.
v. McVeagh, 913.
Thornton v. Smith, 1035.
v. United States Ins. Co., 819.
Thorpe v. Wray, 1258.

References are to sections.

Thrall v. Knapp, 1255.
Thrasher v. Pinckard, 1002.
v. Tyack, 1003.
Throgmorton v. Davis, 1206.
Thunder Bay River B. Co. v. Spechly, 1054.
Thurman v. Wells, 916.
Thurston v. Hancock, 1053.
v. Koch, 806.
v. Portland, 1082.
Thwing v. Washington Ins. Co., 891.
Tiblier v. Alford, 1238, 1239.
Tice v. Munn, 1244.
Tidman v. Ainslie, 1233.
Tift v. Towns, 1101.
Tighe v. Wicks, 1213.
Tilden v. Johnson, 1127, 1128.
Tilghman v. Proctor, 1183, 1187, 1189, 1190, 1197.
Tilley v. Hudson R. R. Co., 1263, 1266, 1267, 1271.
Tillotson v. Cheetham, 1210, 1216.
Tillson v. Robbins, 1204.
Tilton v. Hamilton F. Ins. Co., 821.
Timken v. Olin, 1183.
Tindall v. Bell, 857.
Tingley v. Providence, etc., R. Co., 1085, 1089.
Tinney v. New Jersey S. B. Co., 953, 1251.
Tinsley v. Tinsley, 876.
Tisdall v. Kingman, 1234.
Tissot v. Great Southern T. & T. Co., 1010, 1019.
Titus v. Corkins, 1101.
v. Follett, 1213.
v. Neilson, 1007.
Tobias v. Harland, 1219.
Tobin v. Harford, 817.
v. Post, 1102.
Tod v. Baylor, 1002.
Todd v. Jackson, 1012.
v. Kankakee R. Co., 1087, 1088.
Toledo, etc., R. Co. v. Baddeley, 1243, 1251.
v. Detroit, etc., R. Co., 1078.
v. Dunlap, 1076.
v. Fredericks, 1256.
v. Hammond, 954.
v. Kichler, 933.
v. Morrison, 1061.
v. Patterson, 950.
Tolleson v. Posey, 1209.
Tome v. Dubois, 1110, 1127.
Tomkinson v. Willets Manuf. Co., 1193.
Tomlinson v. Day, 843.
v. Derby, 1246, 1247, 1248.
v. Warner, 1235.
Tompkins v. Kanawha Board, 906, 923.
v. West, 1250.
Tompson v. Massey, 1237.
Toms v. Whitney, 1222.
Tone v. Brace, 847, 863.
Tongue v. Nutwell, 999.
Tonica, etc., R. Co. v. Unsicker, 1072.
Toogood v. Spring, 1209.
Torp v. Gulseth, 1137.
Torre v. Summers, 1285.
Torrey v. Minor, 1001.
Totten v. Burhans, 1169.
Towle v. Stevenson, 787.
Townsend v. Nickerson Wharf Co., 864, 866, 867.
v. Paoli, 1251.
Trabue v. Mays, 1206, 1233.
Tracey v. Albany Exp. Co., 864.
v. Butters, 1008.
Trade-Mark Cases, 1200, 1201.
Traloff v. New York, etc., R. Co., 933.
Transportation v. Chicago, 1035, 1061.
v. Downer, 917.
Trask v. Insurance Co., 811.
Trauerman v. Lippincott, 1031.
Travis v. Barger, 1284.
Trawick v. Martin Brown Co., 1235.
Treadwell v. Davis, 1097, 1136.
Treat v. Barber, 1095, 1253.
v. Browning, 1226, 1228, 1233.
Treman v. Morris, 1157.
Tremeere v. Morison, 856.
Tremolo Patent, 1193, 1195.
Trenton Mut. L. & F. Ins. Co. v. Johnson, 833.
v. Perrine, 1219.
Trigg v. St. Louis, etc., Ry. Co., 938, 943, 953.
Triggs v. Jones, 770, 774, 787.
Trimble v. Spiller, 1252.
Trinity College v. Hartford, 1063, 1084, 1085.
Trinity & S. Ry. Co. v. Lane, 1256.
v. Schofield, 1047, 1048, 1049.
Tripp v. Grouner, 1141.
Triscony v. Brandenstein, 1010.
Trombley v. Humphrey, 1061.
Trosper v. Commissioners, 1085.
Trowbridge v. Brookline, 1067.
Troy v. Cheshire R. Co., 1016, 1041, 1043, 1077.
Troy, etc., R. Co. v. Northern T. Co., 1071, 1072, 1089.
True v. International T. Co., 958, 961, 963, 969.
v. Plumley, 1206, 1240.
Truitt v. Revill, 1149.
Trull v. Granger, 863, 864.
Trust Co. v. Floyd, 796.
Trustees of Baptist Church v. Brooklyn F. Ins. Co., 802, 820.
Tryon v. Whitmarsh, 1163.
Tubbs v. Van Kleek, 984.
Tucker v. Chaplin, 1260.

References are to sections.

Tucker v. Cole, 1126.
v. Massachusetts C. R. Co., 1064, 1066.
v. Newman, 1033.
v. Wright, 1140.
Tuckwell v. Lambert, 1165.
Tudor v. Macomber, 819.
Tuebner v. California Street R. Co., 1047, 1055.
Tuers v. Tuers, 771.
Tufts v. Charlestown, 1073, 1089.
Tuite v. Wakelee, 774.
Tullidge v. Wade, 1031, 1283.
Tully v. Dunn, 842.
Tunis v. Grandy, 847, 848.
Turnbull v. Gadsden, 1163.
v. Garden, 768.
Turner v. Beall, 774.
v. Hawkeye T. Co., 961, 969.
v. Lamb, 856.
v. Morris, 1003.
v. North Beach & M. R. Co., 951.
v. Retter, 1132.
v. Richardson, 850.
v. Robinson, 1198.
v. Telgate, 1258.
v. Turner, 776.
v. Younker, 1144.
Turney v. Smith, 1004.
Turnpike Road v. Brosi, 1086.
Turrill v. Illinois C. R. Co., 1191.
Tuteur v. Chicago, etc., R. Co., 1267, 1273.
Tuttle v. Brown, 1172.
v. C., R. I. & P. R. Co., 1252.
v. Wilson, 1126.
Twinam v. Swart, 1144.
Twycross v. Grant, 1172.
Twynam v. Knowles, 1012.
Tyler v. Etna Ins. Co., 829.
v. Salley, 984, 985.
v. Western U. T. Co., 957, 958, 963.
Tyly v. Morrice, 925.
Tynberg v. Cohen, 1234.
Tyner v. Cotter, 1168, 1174.
Tyng v. Commercial Warehouse Co., 781, 1109, 1119, 1132.
Tyson v. Booth, 1244, 1255.
v. State Bank, 775.

Uhler v. Semple, 1007.
Uline v. New York, etc., R. Co., 1016, 1035, 1039, 1043, 1046.
Ullman v. Barnard, 1097.
Umbria, The, 1296.
Underhill v. Agawan, 821.
v. Taylor, 1232, 1233.
v. Welton, 1218.
Underwood v. Birchard, 863.
v. Farmers' Joint Stock Ins. Co., 811.
Unger v. Leiter, 1007.
Union Central L. Ins. Co. v. McHugh, 839.
Union Depot R. Co. v. Smith, 1258.
Union Exp. Co. v. Graham, 917.
Union Hall v. Morrison, 999.
Union L. Co. v. Tronson, 1160.
Union P. R. Co. v. Hause, 953.
v. Jones, 1251.
v. Young, 1246, 1256.
Union R. & T. Co. v. Trabue, 918.
Union Village, etc., R. Co., In re, 1061, 1066.
United Horse Shoe & Nail Co. v. Stewart, 1196.
United Merthyr Collieries Co., In re, 1020.
United Nickel Co. v. Worthington, 1186.
United States v. Land in Monterey Co., 1076, 1083.
v. Magoon, 1127.
v. Mills, 1126.
v. Taylor, 1019, 1031.
v. Williams, 1026.
United States Exp. Co. v. Bachman, 917, 925.
v. Haines, 905.
v. Keefer, 931.
United States Ins. Co. v. Lenox, 893.
United States T. Co. v. Gildersleeve, 958, 971.
v. Wenger, 961.
Universal L. Ins. Co. v. Binford, 838.
Untermeyer v. Freund, 1190.
Updegrove v. Zimmerman, 1224.
Upham v. Lefavour, 790.
Upton v. Townend, 847, 848.
v. Upton, 1216.
v. Vail, 1163, 1166.
Uransky v. Dry Dock Co., 1249.
Urquhart v. McIver, 782.
U. S. Bacon, The, v. Transportation Co., 897.
Usher v. Severance, 1232.
Utica, etc., R. Co., In re, 1065.
Utter v. Chapman, 877, 880, 882.
Utterbach v. Binns, 999.

Vail v. Reynolds, 1174.
Valle v. Fleming, 999.
Valton v. National L. Ass. Co., 833.
Van Alen v. Rogers, 992.
Van Ankin v. Westfall, 1228.
Van Arsdale v. Howard, 1169.
Van Benschoten v. Yaple, 1224, 1226, 1230.
Van Brocklin v. Brantford, 864.
Van Brunt v. Railroad Co., 1274.
v. Schenck, 1107.
Van Buren v. Fishkill Water-works Co., 1047.

References are to sections.

Vance v. Evans, 854.
v. Inhabitants, etc., 993.
Vancleave v. Beach, 1109.
Vandegrift v. Abbott, 873, 876.
Vandenburgh v. Truax, 1029.
Vanderpool v. Richardson, 986.
v. Smith, 872.
Vanderslice v. Philadelphia, 1050.
Vanderveer v. Sutphin, 1206, 1227.
Vanderwerkin v. New York, etc., R. Co., 1280.
Van Deusen v. Newcomer, 1258.
v. Young, 1019, 1033, 1034.
Vandevoort v. Gould, 843.
Vandyke v. Brown, 789.
Van Epps v. Harrison, 1165, 1168, 1171.
Van Horn v. Crane, 849.
v. Kennit, 954.
Van Name v. Van Name, 1001.
Van Natta v. Mutual Security Ins. Co., 821.
Van Pelt v. Davenport, 1043, 1055.
v. McGraw, 1034.
Van Rensselaer v. Bradley, 849, 850.
v. Chadwick, 849, 850.
v. Gallup, 850.
v. Gifford, 850.
v. Jewett, 854, 920.
v. Jones, 850, 854.
v. Mould, 1022.
v. Radcliff, 1009.
Van Schoick v. Delaware & R. Canal Co., 1070.
Van Steenburgh v. Tobias, 1059.
Van Tassel v. Capron, 1213.
Vantries v. Richey, 769.
Van Sickle v. Brown, 1239.
Van Vacter v. McKillip, 1285.
Van Vleet v. McLean, 1168, 1169.
Van Vronker v. Eastman, 1007.
Van Wart v. Smith, 775.
v. Woolley, 775, 787.
Van Winkle v. U. S. Mail Steamship Co., 918, 933.
Van Winter v. Henry County, 1256.
Van Wyck v. Allen, 1023.
Vassel v. Cole, 1282.
Vatel v. Herner, 848, 876.
Vaughan v. Blanchard, 847.
v. Wood, 1123.
Vaughan, The, and The Telegraph, 1296.
Vawter v. Missouri P. Ry. Co., 1280.
Veasey v. Doton, 1166.
Veazie v. Somerby, 1160.
v. Williams, 1163.
Vedder v. Vedder, 1038.
Venard v. Cross, 1058.
Venus, The, 1291.
Verholf v. Van Houwenlengen, 1285.
Vermilya v. Chicago, etc., Ry. Co., 1023.
Vernam v. Smith, 848, 863.
Vernon v. Keys, 1166.
Verrill v. Minot, 1242.
Verry v. Watkins, 1255, 1284.
Viany v. Ferran, 845.
Vicars v. Wilcocks, 1221.
Vick v. Whitfield, 1226.
Vicksburg, etc., R. Co. v. Calderwood, 1087.
v. Patton, 950.
v. Ragsdale, 903, 913, 914.
Vicksburg & M. R. Co. v. Putnam, 1251.
Victorian Ry. Commissioners v. Coultas, 943, 978.
Viele v. Goss, 1166, 1174.
Vienna v. Barclay, 771.
Viliski v. Minneapolis, 1020, 1127, 1128.
Villipique v. Shuler, 1282.
Vinal v. Core, 1234, 1238, 1239, 1240.
Violett v. Stettinius, 888.
Virginia, etc., R. Co. v. Henry, 1069.
v. Lovejoy, 1083.
v. Lynch, 1086.
Vivian v. Campion, 856.
Vlierboom v. Chapman, 890.
Vollum v. Simpson, 1162.
Von Storch v. Griffin, 990.
v. Winslow, 1095.
Vosburg v. Putney, 1254.
Vreeland v. Van Blarcom, 768.
Vroman v. American, etc., Exp. Co., 933.

Wabash Printing & P. Co. v. Crumrine, 1205.
Wabash, etc., Ry. Co. v. Lynch, 913, 918, 919, 921, 933.
v. McDougall, 1070, 1071, 1082, 1099.
Wachter v. Quenzer, 1230.
Wade v. Halligan, 847, 876, 1161.
v. Leroy, 945, 1246.
v. Roberts, 789.
v. Thayer, 951.
Wadleigh v. Buckingham, 1144, 1146.
Wadsworth v. Pacific Ins. Co., 813.
v. Treat, 1243.
v. Western U. T. Co., 972, 975.
Wagaman v. Byers, 1204.
Waggoner v. Jermaine, 1035.
Wagner v. Gage Co., 1087.
v. Peterson, 781, 786, 1121.
v. Second Ward Sav. Bank, 1144.
v. White, 851.
Wainscot v. Silvers, 855.
Waite v. Gilbert, 911.
Waithman v. Weaver, 1227.
Wakefield v. Stedman, 1113.
Wakeman v. Dalley, 1169.
Walbum v. Insurance Co., 830.
Waldheimer v. Hannibal, etc., Ry. Co., 1256.

References are to sections.

Waldron v. McCarty, 848.
Wales v. Miner, 1285.
Walker v. Bank of State, 775, 776.
v. Borland, 1096.
v. Erie Ry. Co., 942, 944, 947, 1243, 1246, 1251.
v. Fuller, 1102, 1103.
v. Hadduck, 854.
v. Hatton, 855, 857.
v. Jackson, 885.
v. Johnson, 1110.
v. Osgood, 1152, 1157, 1159.
v. Palmer, 768.
v. Reeves, 850.
v. Schuyler, 1002.
v. Shoemaker, 876.
v. Smith, 774.
v. Tribune Co., 1218.
v. Tucker, 847.
v. United States Ins. Co., 819.
v. Wickens, 1224.
Wall v. Gordon, 1198.
v. Hill, 1002.
v. Hinds, 849.
v. Hoskins, 1280.
v. Livezay, 1242, 1250.
Wallace v. Bentley, 798.
v. Clark, 1284.
v. Drew, 1059.
v. Finberg, 1102.
v. Goodall, 1019, 1020, 1021.
v. Lent, 876.
v. Matthews, 884.
v. Swift, 770, 931.
v. Tellfair, 775.
v. Thames & Mersey Ins. Co., 813.
v. Western, etc., R. Co., 1242, 1243, 1246, 1251.
Waller v. Midland, etc., Ry. Co., 902, 1244.
Wallerstein v. Columbian Ins. Co., 807.
Wallingford v. Columbia & G. R. Co., 918.
Wallis v. Cook, 918.
Walls v. Bailey, 771.
v. Johnson, 1157.
Walrath v. Campbell, 1160.
v. Redfield, 1026, 1047, 1054, 1055.
Walser v. Thies, 1235.
Walsh v. Chicago, etc., R. Co., 939.
v. Sisson, 1174.
v. Washington Marine Ins. Co., 810.
Walter v. Post, 1012, 1029.
v. Selfe, 1035.
Walters v. Chamberlin, 1018.
v. Chicago, etc., R. Co., 1273.
Walther v. Wetmore, 1126, 1128, 1138.
Walton v. Crowley, 1200.
v. Fothergill, 902.
v. Hargroves, 1006.
Walton v. Jordan, 1168.
v. Waterhouse, 855.
Wampach v. St. Paul, etc., R. Co., 1060.
Wanamaker v. Bowes, 1105, 1107, 1140.
Wann v. Western U. T. Co., 957, 958.
Wanzer v. Bright, 1238.
v. Wyckoff, 1235, 1239.
Ward v. Benson, 1105, 1141.
v. Blackwood, 1256.
v. Center, 1166.
v. Dick, 1206, 1207.
v. Henry, 1097, 1136.
v. Kelsey, 872.
v. New York C. R. Co., 903, 906, 909, 1054.
v. Smith, 869.
v. Vanderbilt, 936, 942, 1244.
v. Warner, 1014.
v. Weeks, 1221.
v. Wilcox, 842.
Ward's C. P. & L. Co. v. Elkins, 899, 918.
Wardell v. Fosdick, 1166.
Wardle v. New Orleans, etc., R. Co., 1251, 1256.
Ware v. Cartledge, 1210.
Ware River R. v. Vibbard, 1224.
Warmouth v. Cramer, 1228.
Warner v. Abbey, 1030.
v. Caulk, 1161.
v. Hale, 841.
v. Hitchins, 855.
v. Lockerby, 1212, 1226, 1228, 1232.
v. Martin, 1138.
v. Press Publishing Co., 1214, 1216.
v. Valilly, 1136.
Warren v. Cole, 1093, 1101, 1168, 1171, 1174.
v. First Division, etc., R. Co., 1083, 1091.
v. Franklin Ins. Co., 814.
v. Hewett, 789.
v. Kelley, 1097.
v. St. Paul, etc., Ry. Co., 1083, 1091.
v. Wagner, 848, 851.
Warrington v. Furbor, 775.
Warwick v. Foulkes, 1224, 1258.
Washburn v. Milwaukee, etc., R. Co., 1064, 1085, 1086, 1089.
v. Roberts, 1144.
Washburn & M. Manuf. Co. v. Worcester, 1067.
Washington Ice Co. v. Shortall, 1022.
v. Webster, 1102, 1144, 1157, 1158.
Washington Mills Manuf. Co. v. Commercial F. Ins. Co., 821.
v. Weymouth & B. Mut. F. Ins. Co., 821, 828.

References are to sections.

Washington T. Co. v. Hobson, 957, 964.
Water Lot Co. v. Leonard, 1102.
Waterman v. Chicago & A. R. Co., 1256.
v. Dutton, 811.
Waters v. Jones, 1211.
v. Gooch, 1003.
v. Langdon, 1098.
Watkins v. Baird, 1235.
Watkinson v. Laughton, 920.
Watriss v. First Nat. Bank, 858.
Watson v. Bigelow, 787.
v. Christie, 1226.
v. Duykinck, 896.
v. Hooton, 872.
v. Loring, 775.
v. Marine Ins. Co., 814.
v. Milwaukee & M. Ry. Co., 1074, 1075, 1089, 1091.
v. Moore, 1227, 1228.
v. Pittsburgh, etc., R. Co., 1066.
v. Trask, 1204.
v. Watson, 1003, 1283, 1284.
Watt v. Corey, 1240.
v. Potter, 1096, 1109, 1113.
Watts v. Camors, 878.
v. Coffin, 847.
v. Fraser, 1232.
Wayland v. St. Louis, etc., Ry. Co., 1059.
Waynesboro Mut. F. Ins. Co. v. Creaton, 821.
Waywood v. Logan, 848.
Weaver v. Bachert, 984.
v. Hendrick, 1208, 1233.
v. Lloyd, 1228.
v. Mississippi, etc., Boom Co., 1014.
v. Page, 1235, 1237, 1238.
Webb v. Boyle, 1001.
v. Gilman, 1243, 1253.
Weber v. Henry, 1160.
v. Weber, 1168.
Webster v. De Tastett, 772, 775.
v. Moe, 1020, 1126.
v. New Brunswick Carpet Co., 1191.
v. Pierce, 774, 776.
v. Whitworth, 776.
Webster Loom Co. v. Higgins, 1191.
Weckler v. Chicago, 1061.
Weed v. Adams, 779.
v. Panama R. Co., 951.
Weeks v. Prescott, 1102.
v. Profert, 796.
Wegener v. Smith, 897.
Wehle v. Butler, 1098, 1113, 1139, 1141.
v. Haviland, 781, 1098, 1105, 1113.
v. Spelman, 1141.
Wehrman v. Priest, 872.
Weir v. St. Paul, etc., R. Co., 1061, 1084.
Weiss v. Whittemore, 1214, 1215, 1219
Weitzel v. Marr, 1097.
Welch v. Boston, etc., R. Co., 904.
v. Buckins, 1006.
v. Hicks, 888, 889, 890.
v. McAllister, 1256.
v. Milwaukee, etc., R. Co., 1088.
v. Ware, 1208, 1217, 1242, 1243.
Welker v. Butler, 1214, 1231.
Welles v. Boston Ins. Co., 821, 826.
v. Castles, 848, 851.
Welling v. La Bau, 1188, 1193.
Wellington v. Downer K. Oil Co., 1244.
v. Small, 1176.
Wellman v. Dickey, 1092.
Wells v. Mason, 847.
v. New Haven & N. Co., 1037, 1044.
v. Padgett, 983, 984, 990.
v. Waterhouse, 1166.
Welsh v. Kibber, 865.
v. Pittsburg, etc., R. Co., 904.
v. Railroad Co., 907.
v. Wilson, 1027, 1105.
Welton v. Martin, 1058.
Wemhak v. Morgan, 1219.
Wenger v. Beashore, 1235.
Wentz v. Bernhardt, 1257.
Wertz v. Western U. T. Co., 958.
West v. Caldwell, 1157.
v. Druff, 1283, 1284.
v. Forrest, 1243.
v. Hart, 855.
v. Hughes, 992.
v. Lanier, 1009.
v. Milwaukee, etc., Ry. Co., 1083, 1091.
v. Walker, 1224, 1233.
v. Wentworth, 1120.
v. Western U. T. Co., 974, 977.
v. Wright, 1168, 1169.
Westchester F. Ins. Co. v. Earle, 822.
Westcott v. Campbell, 1002.
v. Fargo, 904, 917.
West Counties Manure Co. v. Lower Chemical Manure Co., 1223.
Western Manuf. Co. v. The Guiding Star, 917, 918, 920.
Western News Co. v. Wilmarth, 1237.
Western & A. R. Co. v. Turner, 951.
v. Young, 1243, 1245, 1256.
Western, etc., R. Co. v. Johnston, 1061.
v. Strong, 1280.
Western P. R. Co. v. Hill, 1066, 1068.
Western T. Co. v. Hoyt, 889, 890.
v. Newhall, 917.
Western U. T. Co. v. Adams, 972, 978, 981.
v. Bertram, 960.
v. Blanchard, 958, 969.
v. Bowen, 967, 971.

References are to sections.

Western U. T. Co. v. Broesche, 958, 968, 975, 978, 982.
v. Brown, 961, 974.
v. Buchanan, 958.
v. Carew, 957, 958.
v. Clifton, 959.
v. Collins, 962.
v. Cooper, 975, 976, 978.
v. Crall, 957, 958.
v. Dubois, 972.
v. Edsall, 957, 969, 970.
v. Eyser, 950.
v. Fatman, 960, 967, 969.
v. Feegles, 978, 981.
v. Fenton, 958, 967, 968.
v. Fontaine, 958.
v. Graham, 958, 964.
v. Hall, 961.
v. Harris, 958, 962, 969.
v. Hearne, 958.
v. Henderson, 975.
v. Hoffman, 961, 973.
v. Houghton, 982.
v. Hyer, 960, 961.
v. Kirkpatrick, 971, 981.
v. Landis, 962.
v. Longwill, 958, 967, 972.
v. McKibben, 958, 967, 972.
v. McKinney, 960, 968, 970.
v. Martin, 959.
v. Meek, 958.
v. Moore, 971, 978, 981.
v. Nations, 982.
v. Neill, 957, 958.
v. Rains, 958.
v. Reid, 961.
v. Reynolds, 960.
v. Richman, 958, 962.
v. Rogers, 977, 978.
v. Rosentreter, 981, 982.
v. Sheffield, 965, 969, 973.
v. Short, 957, 958, 966, 969.
v. Shotter, 958, 962, 973.
v. Simpson, 975, 978, 982.
v. Smith, 959.
v. Valentine, 967.
v. Virginia Paper Co., 961.
v. Way, 958, 960, 961, 973.
v. Weiting, 960.
v. Wilson, 975.
v. Yopst, 958.
Westlake v. De Graw, 842, 851, 876.
West Newbury v. Chase, 1089.
Weston v. Gravlin, 1012, 1032.
v. Railroad Co., 906.
v. Weston, 842.
West Virginia T. Co. v. Sweetzer, 884.
Westwood v. Cowne, 1219.
Wetherbee v. Green, 1020, 1127, 1128, 1154, 1158.
v. Marsh, 1227.
Wetmore v. Mellinger, 1235.
Wetzell v. Dinsmore, 926.
Weyer v. Chicago, etc., R. Co., 1065, 1066.
v. Wegner, 1031.
Weymouth v. Chicago & N. Ry. Co., 1020, 1128.
Whalen v. Keith, 1035.
v. Layman, 984.
v. St. Louis, etc., R. Co., 942, 946.
Wharf v. Roberts, 1169.
Wharton v. Lewis, 989.
Wheatley v. Thorn, 1253.
Wheaton v. Peters, 1198.
Wheelden v. Lowell, 1169.
Whelan v. Lynch, 777, 780, 781.
Wheeler v. Nesbitt, 1239.
v. Pereles, 1133, 1137.
v. Shed, 843.
v. Townshend, 1101.
v. Train, 1160.
Wheeler & W. Manuf. Co. v. Boyce, 1257.
Wheelock v. Wheelwright, 774, 1139.
Whipple v. Fuller, 1235.
v. Wanskuck Co., 1028.
Whissenhunt v. Jones, 993.
Whitaker v. Hawley, 851, 862.
v. Phœnixville, 1083.
Whitbeck v. New York, etc., R. Co., 1015, 1019, 1020.
Whitcher v. Benton, 1085, 1086.
White v. Allen, 1138.
v. Binstead, 1106, 1140.
v. Campbell, 1283.
v. Charlotte, etc., R. Co., 1063, 1074.
v. Clack, 993.
v. Connecticut Mut. L. Ins. Co., 806.
v. County Commissioners, 1063.
v. Dresser, 1053.
v. Foxborough, 1072, 1073.
v. Lloyd, 1155.
v. Madison, 797, 798.
v. Merritt, 1223.
v. Milwaukee City Ry. Co., 1251.
v. Molyneux, 851.
v. Moseley, 1028, 1054.
v. Moses, 999.
v. Murtland, 1281, 1283, 1284.
v. Nellis, 1281, 1283.
v. Republic F. Ins. Co., 821.
v. Ross, 1151.
v. Salisbury, 1118.
v. Sheffield, etc., Ry. Co., 1144.
v. Smith, 778, 786, 1171.
v. Stoner, 1019, 1034.
v. Teal, 1136.
v. Thomas, 986.
v. Tucker, 1240.
v. Van Houten, 1157.
v. Webb, 1097.

References are to sections.

White v. Whitney, 864.
Whitehead v. Darling, 793.
v. Kennedy, 953.
v. Mathaway, 1255.
Whitehouse v. Atkinson, 1110, 1116.
Whiteley v. Mississippi, etc., Co., 1084.
Whitford v. Panama R. Co., 1260, 1280.
Whitham v. Kershaw, 1034.
Whiting v. Independent Mut. Ins. Co., 806.
Whitman v. Boston, etc., R. Co., 1063, 1084, 1089, 1091.
Whitmark v. Lorton, 1113.
Whitmore v. Bischoff, 1038, 1047.
Whitney v. Allaire, 1168.
v. Bartholomew, 1035.
v. Beckford, 884, 1138.
v. Chicago & N. R. Co., 918, 920.
v. Elmer, 1283.
v. Hitchcock, 1252.
v. Huntington, 1020, 1127, 1128.
v. Janesville Gazette, 1231.
v. Martine, 786.
v. Merchants' U. Exp. Co., 774, 776, 918, 931.
v. Meyers, 847, 848.
v. Moignard, 1207.
v. New York Ins. Co., 890.
v. Rogers, 890.
v. Wyman, 779.
v. Cutter, 1184.
v. Weiss, 1204.
v. Moore, 842.
Whitten v. Fuller, 1140.
White Valley, etc., R. Co. v. McClure, 1072.
Whitwell v. Wells, 1155, 1157.
Whorton v. Webster, 1034.
Wibert v. New York & E. R. Co., 903.
Wichita & W. R. Co. v. Kuhn, 1064, 1068, 1087, 1091.
Wicker v. Hotchkiss, 1240.
Wickham v. Freeman, 1009.
Wicks v. Shepherd, 1219.
Wiel v. Stewart, 1047, 1051.
Wier v. Allen, 1215, 1223.
v. St. Louis, etc., R. Co., 1083.
Wiesenberg v. Appleton, 1251, 1256.
Wieting v. Millston, 1244.
Wiggin v. Coffin, 953.
v. Suffolk Ins. Co., 806.
Wightman v. Chicago & N. Ry. Co., 942, 953.
v. Coates, 984.
v. Macadam, 819.
v. Providence, 1256.
v. Western Ins. Co., 809, 811.
Wilbur v. Beecher, 1185.
v. Johnson, 983, 988.
Wilcox v. Richmond & D. R. Co., 943, 977.
Wilcox v. Five Hundred Tons of Coal, 884, 888.
v. Parmelee, 931.
v. St. Paul, etc., R. Co., 1088.
Wild v. Holt, 1020.
Wilder v. Gaylor, 1201.
v. House, 1009.
Wildman v. North, 1155.
v. Norton, 1155.
Wilford v. Berkeley, 1285.
Wilhoit v. Hancock, 1282.
Wilkes v. Hungerford Market Co., 868.
v. Lion, 992.
Wilkins v. Treynor, 1157.
v. Wingate, 841.
Wilkinson v. Clay, 774.
v. Coverdale, 772.
v. Laughton, 773.
v. Searcy, 1095.
Willard v. Bridge, 1120.
v. Stone, 990, 1255.
Willetts v. Buffalo, etc., R. Co., 1260.
Willey v. Hunter, 1047.
William Branfoot, The, 1242, 1251.
William Gilliam, The, 819.
Williams v. Beede, 1162.
v. Burrell, 864, 865.
v. Crum, 1109.
v. Currie, 1023.
v. Earle, 861.
v. Hartford Ins. Co., 807.
v. Hill, 1218, 1219.
v. Holdredge, 1204.
v. Hollingsworth, 984, 990.
v. Hunter, 1235.
v. Johnson, 1200.
v. Littlefield, 771.
v. McFadden, 1167, 1169, 1171.
v. Missouri Furnace Co., 1053.
v. Oliphant, 865, 870.
v. Peel River, etc., Co., 1123.
v. Railroad Co., 1260.
v. Rome, etc., R. Co., 1189, 1196.
v. Sherman, 841.
v. Vail, 1159.
v. Vanderbilt, 836, 936, 940, 942, 1244.
v. Williams, 856, 858.
Williams and Anthony Streets, 853.
Williamsburg City F. Ins. Co. v. Cary, 810.
Williamson v. Allison, 1169.
v. Barrett, 1101, 1292.
v. Freen, 1209.
Willingham v. Long, 999.
Willis v. Branch, 1012, 1015, 1024, 1027.
v. Forrest, 1255.
v. Miller, 1092.
v. Missouri P. Ry. Co., 1280.
v. Morris, 993, 994.

References are to sections.

Willover v. Hill, 1227, 1230, 1231.
Wilmes v. Minneapolis & N. Ry. Co., 1064, 1088.
Wilmington, etc., R. Co. v. Smith, 1084.
v. Stauffer, 1064, 1066.
Wilms v. White, 1210.
Wills v. Wells, 814, 1133.
Willson v. Willson, 865.
Wilson v. Apple, 1228, 1229.
v. Baltimore & O. R. Co., 956.
v. Bowen, 1237.
v. Conine, 1115, 1132, 1138.
v. Cross, 818.
v. Davisson, 1007.
v. Dubois, 1223.
v. Fitch, 1227.
v. Goit, 1218.
v. Granby, 1256.
v. Greensboro, 770.
v. Hamilton, 907.
v. Lancashire, etc., R. Co., 906, 907, 908.
v. Martin, 1097.
v. Mathews, 1120.
v. Nations, 1224.
v. Newcastle & B. R. Co., 906, 907, 908.
v. New Orleans & N. R. Co., 937, 950.
v. New York C. R. Co., 904.
v. Noonan, 1205, 1208, 1211.
v. Oatman, 1002.
v. Robinson, 1224.
v. Rockford, etc., R. Co., 1064, 1066, 1067, 1086, 1087.
v. Runyon, 1213.
v. Shepler, 1283.
v. Sproul, 1283.
v. Wilson, 774.
v. York, etc., Co., 906.
v. Young, 1032, 1243, 1246, 1255.
Wilt v. Vickers, 1251.
Winchester v. Craig, 1020, 1127, 1128.
v. Patterson, 918.
Winfield v. Kean, 1239.
Wingate v. Mechanics' Bank, 776.
v. Smith, 1020.
Winklemans v. Des Moines N. Ry. Co., 1067.
Winkler v. St. Louis, etc., Ry. Co., 938, 1242, 1243.
Winn v. Abeles, 1053.
v. Elliott, 1006.
Winne v. Illinois C. R. Co., 917, 921.
Winnt v. International, etc., R. Co., 1269.
Winona v. Minnesota Ry. Const. Co., 1132.
Winona, etc., R. Co. v. Denman, 1083.
v. Waldron, 1072, 1083, 1084.
Winpenny v. French, 787.
Winslow v. Vermont, etc., R. Co., 931.
Winstead v. Hulme, 1146.
Winter v. Henn, 1285.
Winton v. Cornish, 852.
Wintz v. Morrison, 1165, 1173.
Wisdom v. Newberry, 873.
Wise v. Falkner, 849.
Witherell v. Maine Ins. Co., 821.
Witters v. Macon, etc., R. Co., 887, 888.
Witthaus v. Shack, 1007.
Witty v. Matthews, 872.
Wohler v. Buffalo, etc., Co., 1008.
Wolcott v. Eagle Ins. Co., 806, 818.
v. Hall, 1227.
v. Sullivan, 873.
Wolf v. Lacy, 918, 920.
v. Studebaker, 864, 871, 877.
v. Trinkle, 1243.
v. Weiner, 817.
v. Western U. T. Co., 958.
Wolfe v. Howard Ins. Co., 814, 824.
v. Koppel, 783.
Wolff v. Liverpool, L. & G. Ins. Co., 808.
Wolfley v. Rising, 1160.
Wolfskehl v. Western U. T. Co., 972.
Wollasten v. Haskewill, 849.
Wolveridge v. Steward, 859.
Womack v. McQuarry, 852.
v. Western U. T. Co., 957, 958.
Wood v. Bell, 1117.
v. Braynard, 1152, 1157.
v. Cooper, 776.
v. Franks, 1097.
v. Griffin, 1033.
v. Hudson, 1084.
v. Lincoln & K. Ins. Co., 815.
v. Mathews, 1285.
v. Morewood, 1020, 1127.
v. Partridge, 849.
v. Phœnix Ins. Co., 818.
v. Poughkeepsie Ins. Co., 820.
v. Weir, 1235.
Woodard v. Bellamy, 990.
v. Michigan, etc., R. Co., 1280.
Woodborne v. Scarborough, 1132.
Woodbury v. Jones, 865.
v. Thompson, 1218.
Wooden v. Western, etc., R. Co., 1280.
Wooden-ware Co. v. United States, 1020, 1110, 1126, 1128.
Woodes v. Dennett, 798.
Woodfolk v. Nashville, etc., R. Co., 1087.
Woodger v. Great W. Ry. Co., 911.
Woodham v. Gelston, 1103.
Woodhouse v. Walker, 858.
Woodhull v. Rosenthal, 992, 994, 997, 999, 1000.
Woodin v. Hunter, 1047.
Woodman v. Tufts, 1035.

References are to sections.

Woodmansee v. Logan, 1235.
Woodruff v. Bradstreet Co., 1218.
v. Brown, 1003.
Woods v. Banks, 1012.
v. Devin, 954.
v. Finnell, 1235, 1238.
v. Kernan, 864.
v. Pangburn, 1208.
v. Pope, 858.
v. Wallace, 1007.
Woodward v. Aborn, 1035.
v. Anderson, 1282.
v. Glidden, 1257, 1258.
v. Illinois C. R. Co., 920.
v. Suydam, 787.
v. Thatcher, 1172.
v. Walton, 1030.
Woolenslagle v. Runals, 1172.
Wooley v. Carter, 1019, 1030, 1100.
v. Wathling, 842.
Woolridge v. Wilkins, 1002.
Worcester School Trustees v. Rowlands, 855, 856.
Wordin v. Bemis, 897.
Work v. Bennett, 1121.
Workman v. Mifflin, 853.
Works v. Farmers' Ins. Co., 810.
Worley v. Cincinnati R. Co., 1259.
Worrall v. Munn, 1034.
Worten v. Searing, 1213.
Worthington v. Young, 999.
Wooster v. Simonson, 1183.
v. Taylor, 1196.
Wotherspoon v. Crowley, 1200.
Wotton v. Shirt, 849.
Wren v. Kirton, 776.
v. Weild, 1223.
Wright v. Baldwin, 797.
v. Bank of Metropolis, 778, 786, 1119.
v. Bennett, 1160.
v. Bolles W. W. Co., 1126.
v. California R. Co., 940.
v. Chandler, 1030.
v. Compton, 1243.
v. Hartford Ins. Co., 808.
v. Jennings, 1002, 1003.
v. Lattin, 847, 848, 876.
v. Mathews, 1162.
v. Mulvaney, 1101, 1102.
v. Roach, 1171.
v. Schroeder, 1212, 1226.
v. Spencer, 1141.
v. Walker, 1108.
v. Wilcox, 951.
v. Wisconsin R. Co., 1082.
v. Woodgate, 1209.
Wright and Pole, Matter of, 821.
Wrightup v. Chamberlain, 857, 865.
Wyatt v. Harrison, 1053.
v. White, 1240.
Wylie v. Smitherman, 1092.
Wyman v. Leavitt, 977, 978, 1243, 1245.
v. Lexington, etc., R. Co., 1089.
Wynn v. Brooke, 865.
v. Longley, 1171.
Wynne v. Parsons, 1205, 1216.
Wyrley Canal Co. v. Bradley, 1053.
Wythe v. Myers, 999, 1000.

Yahoola, etc., Co. v. Irby, 1020.
Yale v. Saunders, 1139, 1140.
Yale Lock Manuf. Co. v. Sargent, 1196.
Yallop-De Groot Co. v. Minnesota, etc., Ry. Co., 1159.
Yater v. Mullen, 1109.
Yates v. Dunster, 858.
v. Fassett, 1152.
v. Joyce, 1176.
v. Paddock, 1001.
v. Southwestern, etc., Co., 1256.
Yeager v. Weaver, 864, 865, 870.
Yeates v. Allin, 1009.
v. Reed, 1231, 1233.
Yeatman v. Corder, 789, 793.
Yeaton v. Fry, 805.
Yeo v. Mercereau, 1006.
Yolo County v. Sacramento, 1058.
Yon v. Blanchard, 776.
Yonge v. Pacific Mail S. S. Co., 936.
Yonkers, etc., F. Ins. Co. v. Hoffman Ins. Co., 840.
Yorgensen v. Yorgensen, 1009.
York v. Pease, 1209.
York M. Co. v. Illinois C. R. Co., 904.
Yorton v. Milwaukee, etc., Ry. Co., 949.
Young v. Bennett, 1226, 1228.
v. Harrison, 1063, 1074, 1084.
v. Hartford F. Ins. Co., 811.
v. Lloyd, 1127.
v. Spencer, 1033.
v. Tarbell, 1006.
v. Western U. T. Co., 958, 972, 975, 976.
v. Willet, 1151, 1152.

Zabriskie v. Smith, 1163, 1259.
Zale v. Zale, 847.
Zane v. Peck, 1195, 1196.
Zeliff v. Jennings, 1204, 1206, 1214, 1216.
Zenobia, The, 938.
Ziebarth v. Nye, 1017, 1018.
Ziegler v. Wells, etc., Co., 918, 1132.
Zimmerman v. Shreve, 1009, 1012.
Zitske v. Goldberg, 1146.

THE LAW OF DAMAGES.

PART II.

ITS APPLICATION TO VARIOUS CONTRACTS AND WRONGS.

CHAPTER XVIII.

AGENCY.

SECTION 1.

PRINCIPAL AGAINST AGENT.

§ 768, 769. The reciprocal obligations of principal and agent.
770, 771. Agent's particular duties and liabilities.
772. Neglect of duty or agreement concerning insurance.
773. Disregard of orders for the purchase and shipment of goods.
774. Miscellaneous illustrations of agent's liability.
775, 776. Defaults in regard to commercial paper.
777. Same principles applied to factors.
778, 779. Sales at unauthorized price.
780, 781. Duty to sell at certain times.
782. Terms of sale.
783. Guaranty commission.
784. Rendering accounts.
785. Remitting funds.
786. Liability of brokers.
787. Damages for acting as agent without or in excess of authority.

SECTION 2.

AGENT AGAINST PRINCIPAL.

788. Agent's rights.
789. Reimbursement of expenditures.
790. Factor's right to reimburse himself by sales.
791. Agent may charge for exchange.
792. How right of reimbursement affected by mode of doing business.
793. Agent's right to indemnity.
794. No indemnity for unlawful act.
795. Measure of recovery.

SECTION 3.

THIRD PERSONS AGAINST AGENT.

§ 796. When agent liable to third persons.
797. Agent liable on implied warranty of authority.
798. The measure of damages.
799. Recovery of money from agent.
800. Agent liable for his torts.

SECTION 1.

PRINCIPAL AGAINST AGENT.

§ 768. The reciprocal obligations of principal and agent. Agency is founded upon a contract, either express or implied, by which one party confides to the other the management of some business to be transacted in his name or on his account, and by which the other assumes to do the business and to render an account of it.[1] The contract embraces reciprocal obligations between the parties, and either may have redress in damages for their violation. An agent who has no interest is bound to obey the instructions of his principal as a paramount duty, and to do the business placed in his hands with diligence and fidelity; he must also exercise a reasonable degree of skill and good judgment, according to the delicacy and importance of his undertaking.[2] Infractions of his contract are also instances of failure in duty; and the principal [2] has an election to sue on the contract or for negligence as a tort.[3] But except where the dereliction is aggravated by fraud, the measure of damages is the same whether the action is in one form or the other, and is equally governed by the contract.[4] The agent is an employee, and therefore entitled to compensation; he acts in the place of his principal and to effectuate his purposes, and has a right to indemnity; his functions are of a fiduciary nature, and he is subject to the rigid rules which apply to trustees. In respect of the matter of his agency he can accept no inconsistent employment, nor act for his own benefit to the injury of his principal. Any

[1] 2 Kent's Com. 612; Mechem on Agency, § 1.

[2] Redfield v. Davis, 6 Conn. 438; § 771, *infra*.

[3] Ashley v. Root, 4 Allen, 504.

[4] Bank of Orange v. Brown, 3 Wend. 158; Baker v. Drake, 53 N. Y. 211; Pinkerton v. Manchester R., 42 N. H. 424.

advantage gained by the agent, whether it is the fruit of performance or of violation of duty, belongs to his principal.[1] Thus, an agent charged with the duty of paying taxes on land cannot acquire title thereto at a tax sale of it.[2] If he takes a deed in his own name he holds the land as trustee for his principal and must account for the net profits he receives.[3] The treasurer of a bank was instructed to sell its property at not less than a price designated. He became the purchaser at that price, which was less than its market value. The difference between the two sums was recovered by the bank; but it was not entitled to the profits realized from the property after the sale.[4]

Where, by departing from the instructions of his principal, the agent obtains a better result than would have been obtained by following them, the principal may claim the advantage, though the agent contributed his own funds or responsi-

[1] Dodd v. Wakeman, 26 N. J. Eq. 484; Lafferty v. Jelley, 22 Ind. 471; Mauran v. Warren, 2 Low. 53; Bruce v. Davenport, 36 Barb. 349; Morrison v. Ogdensburgh, etc. R. Co., 52 Barb. 173; Morrison v. Thompson, L. R. 9 Q. B. 480; Parker v. Nickerson, 112 Mass. 195; Hunsaker v. Sturgis, 29 Cal. 142; Parkist v. Alexander, 1 Johns. Ch. 394; Bain v. Brown, 56 N. Y. 285; Greentree v. Rosenstock, 61 N. Y. 583; Segar v. Edwards, 11 Leigh, 213; Mechem on Agency, §§ 455–457, 469; Vreeland v. Van Blarcom, 35 N. J. Eq. 530; Greenfield Savings Bank v. Simons, 133 Mass. 415; Porter v. Woodruff, 36 N. J. Eq. 174; Gower v. Andrew, 59 Cal. 119; Adams v. Sayre, 70 Ala. 318; Davis v. Hamlin, 108 Ill. 39; Savage v. Savage, 12 Ore. 459; Kramer v. Winslow, 130 Pa. St. 484; Crump v. Ingersoll, 44 Minn. 84; McNutt v. Dix, 83 Mich. 328. See Ætna Ins. Co. v. Church, 21 Ohio St. 492; Ingersol v. Starkweather, Walk. Ch. 346; McKinley v. Irvine, 13 Ala. 681; Banks v. Judah, 8 Conn. 145; Church v. Sterling, 16 Conn. 388; Sturdevant v. Pike, 1 Ind. 277; Copeland v. Mercantile Ins. Co., 6 Pick. 198; Moore v. Mandlebaum, 8 Mich. 433; Moore v. Moore, 5 N. Y. 256; Cumberland Coal Co. v. Sherman, 30 Barb. 553; Shannon v. Marmaduke, 14 Tex. 217; Walker v. Palmer, 24 Ala. 358; Hitchcock v. Watson, 18 Ill. 289; Kimber v. Barber, L. R. 8 Ch. App. 56; Turnbull v. Garden, 38 L. J. (Ch.) 331.

[2] McMahon v. McGraw, 26 Wis. 614; Fountain Oil Co. v. Phelps, 95 Ind. 271; Ellsworth v. Cordrey, 63 Iowa, 675; Murdoch v. Milner, 84 Mo. 96.

[3] Collins v. Rainey, 42 Ark. 531. In Arkansas the deed will be canceled on the principal making reimbursement to his agent. Id. But in Iowa the principal must pay the same amount to his agent on account of taxes paid by the latter subsequently to his purchase, as he would have been liable for if such payment had not been made. Ellsworth v. Cordrey, 63 Iowa, 675.

[4] Greenfield Savings Bank v. Simons, 133 Mass. 415.

bility in producing that result, and the principal incurred no risk or expense. The plaintiff's intestate, D., having a policy of insurance upon his life, agreed with the company for its surrender and a return to him of the premium notes held by it, which notes for that purpose had been sent to the company's agent to be delivered up. D. intrusted the policy to the defendant as his agent, with instruction to surrender it [3] for cancellation. Defendant surrendered the policy, but, before the notes had been canceled or surrendered, applied to have it renewed for himself and one G. The agent thereupon returned the notes to the company, with the statement that D. wished to renew and that defendant and G. were to help him. A renewal policy was thereupon issued for the benefit of defendant and G. The premiums were thereafter paid by them, as were also D.'s premium notes, less the dividends credited thereon. G. assigned his interest to defendant, and upon the death of D. defendant collected and received the amount of the policy. In an action to compel him to account it was held that, by accepting the renewal policy, the defendant must be deemed to have adopted the instrumentalities by which it was obtained, and was bound by the representation made by the agent to the company; that aside from this, the defendant while acting as agent having acquired, by departing from his instructions, a benefit, a part of the consideration for which proceeded from his principal, the plaintiff had a right to adopt his acts and to call him to account for the profits derived from the transaction.[1]

§ 769. Same subject. So long as property or money belonging to the principal can be traced and distinguished in the hands of the agent, his representatives or assignees, the principal is entitled to recover it, unless it has been transferred for value without notice.[2] In respect to third persons the agent is identified with his principal, and for the most part incurs no personal responsibility when he acts, in the making and execution of contracts, in the latter's name. The agent may, however, make himself a party, and assume liabilities as

[1] Dutton v. Willner, 52 N. Y. 312. See Ackenburgh v. McCool, 36 Ind. 473; Bain v. Brown, 7 Lans. 506; 56 N. Y. 285.

[2] Overseers of Poor v. Bank of Va., 2 Gratt. 547; Denston v. Perkins, 2 Pick. 86; Atkinson v. Ward, 47 Ark. 533.

such by failing to disclose his principal, or to act in his name when a disclosure of his identity has been made.

An agent derives possession from his principal or by virtue of his employment and cannot dispute his title.[1] Thus money borrowed for a public object, and on the credit of the county, by an agent of the board of supervisors under a resolution passed by them without authority, but not in violation of public policy or any positive statute, may be recovered [4] from the hands of such agent by the board, and their want of authority to make the loan is no defense.[2] An agent must account to his principal until the true owner appears and establishes his title or right.[3] An auctioneer sued for the proceeds of goods intrusted to and sold by him cannot set up title in himself as a defense or in mitigation of damages.[4] But an agent is not precluded from proving that the principal obtained the goods by fraud, where the rightful owner has given notice of his rights.[5]

It is an agent's duty to give the principal necessary information of what transpires in the agency, to enable him to protect his interests; to keep proper accounts and to render them on, and under certain circumstances without, demand.[6] The principal has a right to act on the assumption that the agent's reports made and accounts rendered are correct, and the latter will not be at liberty to dispute them.[7] Thus trover was brought for two insurance policies by the principal, a master of a vessel, against his agents, who were insurance brokers, and who had written the plaintiff that they had got two policies, one on account of his clothes and wages, and another on

[1] Placer Co. v. Astin, 8 Cal. 303; Clark v. Moody, 17 Mass. 145; Hammond v. Christie, 5 Robert. 160.

[2] Supervisors v. Bates, 17 N. Y. 242.

[3] Bain v. Clark, 39 Mo. 252; Aubery v. Fiske, 36 N. Y. 47; Floyd v. Bovard, 6 W. & S. 75; Bevan v. Cullen, 7 Pa. St. 281; Ledoux v. Anderson, 2 La. Ann. 558; Ledoux v. Cooper, id. 586.

[4] Osgood v. Nichols, 5 Gray, 420.

[5] Hardman v. Willcock, 9 Bing. 382, note.

[6] 1 Pars. on Cont. 88; Elliott v. Walker, 1 Rawle, 126; Peterson v. Poignard, 8 B. Mon. 309; Brown v. Arrott, 6 W. & S. 402; Forrestier v. Bordman, 1 Story, 43; Ruffner v. Hewitt, 7 W. Va. 585; Eaton v. Welton, 32 N. H. 352; Lyle v. Murray, 4 Sandf. 590; Terwilliger v. Beals, 6 Lans. 403; State Ins. Co. v. Jamison, 79 Iowa, 245.

[7] Vantries v. Richey, 8 W. & S. 87; Boston Carpet Co. v. Journeay, 36 N. Y. 384.

account of the owners, underwritten by N. A loss having happened, the defendants produced a policy underwritten by S., insuring only the ship, in which plaintiff had no interest. Lord Mansfield said: "I shall consider the defendants as the actual insurers." The defense attempted was that the letter was written by defendants' clerk through mistake, and that trover would not lie for that which never existed, but it was held that the defendants could not contradict their own representation.[1]

[5] Where, on the proofs presented, a factor, as defendant, was liable for a loss occasioned by his negligence, the *onus* of proving the actual loss was held to be on him, and not upon the principal; in the absence of such proof, the full value of the goods, or at least of the money produced by their sale, might be adopted as the measure of damages.[2]

§ 770. **Agent's particular duties and liabilities.** The particular duties of agents are various, depending on the nature of their agency; and breaches of duty will vary accordingly. The general rules of compensation, however, are the same as to all, but they have a special application according to the duty in the particular instance and the peculiar facts which constitute a breach. And whether the duty is such as is implied by the situation and the usages and course of business, or such as may be imposed by instructions, the agent is liable for all losses which result from his failure to fulfill his obligations. He is liable for at least nominal damages for any breach

[1] Harding v. Carter, 11 Petersdorff's Abr. 400.

In Shaw v. Picton, 4 B. & C. 715, Bayley, J., said: "It is quite clear that if an agent (employed to receive money, and bound by his duty to his principal from time to time to communicate to him whether the money is received or not) renders an account from time to time, which contains a statement that the money is received, he is bound by that account, unless he can show that that statement was made unintentionally and by mistake. If he cannot show that, he is not at liberty afterwards to say that the money had not been received and never will be received, and to claim reimbursement in respect of those sums for which he had previously given credit. I think that when an agent has deliberately and intentionally communicated to a principal that the money due to him has been received, he makes the communication at his peril, and is not at liberty afterwards to recover the money back again."

[2] Brown v. Arrott, 6 W. & S. 402; Beckman v. Shouse, 5 Rawle, 179; Beardslee v. Richardson, 11 Wend. 25; Clark v. Miller, 4 id. 628.

of his agreement or duty; for the law presumes some damage from every violation of contract.[1]

Where the principal suffers actual injury he is entitled to full indemnity.[2] An examination of the cases will show that the general principle that the injured party is entitled to re- [6] cover such a sum in damages as will place him in as favorable condition as he would have been in had the contract and duty been fulfilled is peculiarly applicable.[3] But such damages must be a proximate consequence of the agent's breach of duty or such as it may reasonably be supposed were within the contemplation of the parties. The injury need not proceed directly from his act or omission; but if it does not there must be an immediate practical dependence for exemption therefrom on some act which it was his duty to perform; or the exposure to the loss which occurs from an independent cause must proceed directly from some act which was a departure from the line of the agent's duty, or from his omission of some act which it was his duty to perform to avoid such exposure or to provide indemnity against its possible consequences.[4] This may be made clearer by some illustrations.

[1] Frothingham v. Everton, 12 N. H. 239; Blot v. Boiceau, 3 N. Y. 78; Marzetti v. Williams, 1 B. & Ad. 415; vol. 1, ch. 2.

[2] Brown v. Arrott, 6 W. & S. 402; Frothingham v. Everton, 12 N. H. 239; Amory v. Hamilton, 17 Mass. 103; Harvey v. Turner, 4 Rawle, 223; Wilson v. Greensboro, 54 Vt. 533; Triggs v. Jones, 46 Minn. 277.

[3] Magnin v. Dinsmore, 62 N. Y. 35; Blood v. Wilkins, 43 Iowa, 565. In this case the grantee of lands agreed to discharge tax liens thereon with money furnished by the grantor. The latter supposed that he had done so. The damages were measured by the value of the land when the time of redemption from the tax sale expired.

[4] In Boyd v. Fitt, 14 Irish C. L. (N. S.) 43, the defendant agreed to act as the Glasgow agent of the plaintiff, who was a cattle and provision dealer in Dublin. The contract provided that the defendant should open a cash account at a bank in G. to the amount of £500, to be used at any time in honoring and retiring plaintiff's cash orders; also that no order would be drawn without the defendant having in his hands the full amount necessary to meet it. While he had sufficient funds to meet an order and upon the day it fell due he absconded from G., and the order was dishonored and returned to D. It was proved that in consequence of this the plaintiff's trade in G. was suspended; that his business in D. was seriously impaired, and that he lost the agency of an Australian firm. It was held, after full consideration, that none of these heads of damage were too remote. See Larios v. Bonany y Gurety, L. R. 5 P. C. 347.

A plaintiff put lime on the defendant's barge to be conveyed from the Medway to London. The master deviated unnecessarily from the usual course, and during the deviation a tempest wet the lime, and the barge taking fire thereby, the whole was lost. It was held the law implied a duty on the owner of a vessel, whether a general ship or one hired for the special purpose of the voyage, to proceed, without unnecessary deviation, in the usual course. On the point whether the damage was so proximate to the defendant's breach of that duty as to be the subject of an action, Tindal, C. J., said: "It was not rested, as indeed it could not be rested, on the particular circumstances which accompanied the destruction of the barge; for it is obvious that the legal consequences must be the same whether the loss was immediately by the sinking of the barge at once by a heavy sea, when she was out of her direct and usual course, or whether it happened at the same place, not in consequence of an immediate death's wound, but by a connected chain of causes producing the same ultimate event. It is only a variation in the precise mode by which the vessel was destroyed, which variation will necessarily occur in each individual case. But the objection taken is that there is no natural or necessary connection between the wrong of [7] the master in taking the barge out of its proper course, and the loss itself; for that the same loss might have been occasioned by the very same tempest if the barge had proceeded in her direct course. But if this argument were to prevail, the deviation of the master, which is undoubtedly a ground of action against the owner, would never, or only under very peculiar circumstances, entitle the plaintiff to recover. For if a ship is captured in the course of deviation, no one can be certain that she might not have been captured if in her proper course. And yet in Parker v. James,[1] where a ship was captured whilst in the act of deviation, no such ground of defense was even suggested. Or, again, if the ship strike against a rock, or perishes by storm in the one course, no one can predicate that she might not equally have struck upon another rock or met with the same or another storm, if pursuing her right and ordinary voyage. The same answer might be attempted to an action against a defendant who had by mistake forwarded a parcel by

[1] 4 Camp. 112.

the wrong conveyance, and a loss had thereby ensued; and yet the defendant in that case would undoubtedly be liable. But we think the real answer to the objection is that no wrong-doer can be allowed to apportion or qualify his own wrong; and that as a loss has actually happened whilst his wrongful act was in operation and force and which is attributable to his wrongful act, he cannot set up as an answer to the action the bare possibility of a loss, if his wrongful act had not been done. It might admit of a different construction if he could show not only that the same loss *might* have happened, but that it *must* have happened, if the act complained of had not been done."[1]

§ **771. Same subject.** A factor is liable for a loss arising from his neglect to keep his principal informed of matters material to his interest,[2] or from allowing moneys to remain in the hands of a sub-agent after he is informed of his receipt of them.[3] Neither the ignorance of the principal nor the omission to call at once on the sub-agent for money in his hands is the immediate cause of loss; but the want of timely notice prevents the principal exerting himself when exer- [8] tion is necessary to prevent loss, and the failure to take moneys from the hands of a sub-agent leaves them exposed to the consequences of his insolvency or want of fidelity. An agent who unreasonably neglects to inform his principal of the receipt of money is chargeable with interest, although he acts in good faith.[4]

A judgment creditor agreed, in lieu of her judgment, to accept the bond of another, conditioned to provide for and maintain her during life, or to pay her, if she preferred it, $150 per annum; the bond to be secured by mortgage on the land of the obligor. A person employed to prepare the in-

[1] Davis v. Garrett, 6 Bing. 716. See Wallace v. Swift, 31 Up. Can. Q. B. 523.

[2] State Ins. Co. v. Jamison, 79 Iowa, 245, quoted from *infra*, n. 2, p. 1803.

[3] Brown v. Arrott, 6 W. & S. 402; Taylor v. Knox, 1 Dana, 395; Clark v. Bank of Wheeling, 17 Pa. St. 322.

[4] Dodge v. Perkins, 9 Pick. 368; Clark v. Moody, 17 Mass. 145.

An agent who must keep money to answer his principal's call is not chargeable with the highest rate of interest because he mingles it with his own and uses it in his business; the legal rate is the limit. Rochester v. Levering, 104 Ind. 562. See Tuers v. Tuers, *infra*, n. 3, p. 1802.

struments, and to have the mortgage entered of record, withheld it therefrom until the property became otherwise incumbered by claims to an amount beyond its value, and the debtor became insolvent. In an action on the case by the party injured, it was held she could recover from the agent all that she had lost by his default,— all that the mortgage, if duly recorded, would have been worth to her.[1] The liability of agents charged with the duty to procure insurance, and who fail therein, is another example of loss from exposure arising from their omission to perform an act to provide indemnity against its possible consequences.[2] An agent who neglects to pay taxes and misappropriates money received for that purpose is liable for the rate of interest imposed upon the owner for their non-payment, and for other proximate consequences, as the expense of foreclosure proceedings begun by a mortgagee.[3]

The acceptance of an agency is a general undertaking, among other things, to obey the directions of the principal, and this undertaking becomes specific when instructions are from time to time communicated. They may be general, given for the accomplishment of the object for which the agency is created, or special with a view of some subordinate and subsidiary detail, in furtherance of that object. The pecuniary advantages which these general or special instructions manifestly embrace, in the light of other information which the agent possesses in common with his principal, are thus brought within their contemplation. These instructions [9] are, unless the contrary intention is expressed, supplemented by the usages of trade and business;[4] they fix boundaries of the authority, as to subjects and methods, which may be exercised in the principal's name, at his risk and on his responsibility, independently of any subsequent election on his part. Hence, if the agent extends his operations to subjects not within his commission, or conducts them in a method excluded by his instructions, he acts at his peril; the principal is not

[1] Miller v. Wilson, 24 Pa. St. 114; Howell v. Young, 5 B. & C. 259; Shipherd v. Field, 70 Ill. 438; Short v. Skipworth, 1 Brock. 103; Park v. Hammond, 4 Camp. 344; S. C., 6 Taunt. 495; Charles v. Altin, 15 C. B. 46; Williams v. Littlefield, 12 Wend. 362; Caffrey v. Darby, 6 Ves. 488.

[2] See *post*, § 772.

[3] Tuers v. Tuers, 100 N. Y. 196.

[4] See Walls v. Bailey, 49 N. Y. 464.

bound; and if his property is thus lost, or his interests sacrificed or prejudiced, the agent must make good the loss,—and this loss is the amount shown to be necessary to place the principal in as good condition as a faithful performance of the agent's duty would have placed him in. The instructions may relate to measures deemed expedient by the principal to secure himself against a contingent or possible loss. If these are disregarded, the agent will not be heard to say that he is not liable by reason of the uncertainty of the loss, if it happens; for it is a loss in contemplation of the parties; the instructions were intended to make exemption from such possible loss certain. After the disregard of such instructions, the loss when it occurs is morally and legally the direct consequence of the agent's breach of duty, whatever may be the immediate physical cause.[1] Thus an insurance agent who is authorized to issue policies and charged with the duty of daily reporting all risks taken may be liable on his neglect to so report as to property insured by him for the loss paid thereon by the company. In an action against the agent the insurer may show that if he had notified it of the risk it would have canceled the policy before the loss, as it might have done. The establishment of that fact would prove that the agent's negligence was the proximate cause of the principal's loss.[2] In a recent case the conductor of a freight train

[1] The text is quoted with approval in Railroad v. Greer, 87 Tenn. 698, 704.

[2] State Ins. Co. v. Jamison, 79 Iowa, 245. Granger, J., said: "A question in the case is, how can it be established that the company would have canceled the policy if it had been duly reported? Of course, the fact under the testimony must be determined by the jury. But suppose it should appear in testimony that the company had an invariable business rule that it would carry only a certain number of risks in a single block or row of buildings, and that in many or all cases where a risk in excess of the number had been reported it had been canceled, and that this case came clearly within such a rule: and let it be added that this was an extra-hazardous risk; that it was such a risk as is generally refused by insurance companies, and such a one as to the ordinary observer would be unsafe and undesirable. Hundreds of facts are established between litigants upon evidence less satisfactory and conclusive. In judicial proceedings it is often necessary and proper to establish what a party would have done under certain facts in fixing the liability of another. Suppose A., as the agent of B., is stationed in Iowa to purchase and forward horses to B. in New York, to be sold on the market, and his instructions are to forward the purchases of each week

allowed a person to ride thereon in violation of the company's rules. While so riding the passenger was injured as the result of an accident caused by the negligence of other servants of the company. It was held that the conductor's act was the proximate cause of the injury, and he was liable to the company.[1] But in order that the agent shall be liable for not obeying instructions the principal must make them clear. If they are susceptible of two constructions the meaning given them in good faith by the agent will be regarded as correct, and he will not be liable for any loss resulting, regardless of the principal's belief of the agent's understanding of the instructions.[2]

§ 772. Neglect of duty or agreement concerning insurance. An agent who is in any case required to insure the property of his principal and fails to do so or does it defectively; or in case of his inability fails to give his principal timely notice that he may thereby be warned to do it himself, will be held liable for the loss, if one occurs, which would be covered by the required insurance; and this loss is equal to the indemnity which it was the agent's duty to procure.[3]

on the Monday following. After several weeks he neglects to forward as directed for a particular week, and before the horses are received there is a decline in the market and a loss of $500. Must B. lose the $500 because it could not be shown that he would have sold the horses if they had been forwarded? If it should appear in evidence that he had from week to week been selling under the same circumstances, and he should testify that if the horses had been there he would have sold them, would not the testimony justify a finding of the fact?"

[1] Railroad v. Greer, 87 Tenn. 698.

[2] Minnesota Linseed Oil Co. v. Montague, 65 Iowa, 67. See Vienna v. Barclay, 3 Cow. 231.

[3] Park v. Hammond, 4 Camp. 344; 6 Taunt. 495; Perkins v. Washington Ins. Co., 4 Cow. 645, 664; Morris v. Summerl, 2 Wash. C. C. 203; De Tastett v. Crousillat, id. 132; Thorne v. Deas, 4 Johns. 84; Wilkinson v. Coverdale, 1 Esp. 75; Webster v. De Tastett, 7 T. R. 157; Miner v. Tagert, 3 Bin. 204; Mallough v. Barber, 4 Camp. 150; Shoenfeld v. Fleisher, 73 Ill. 404; Beardsley v. Davis, 52 Barb. 159; Callander v. Oelrichs, 5 Bing. N. C. 58; Smith v. Lascelles, 2 T. R. 187; Gray v. Murray, 3 Johns. Ch. 167; Smith v. Price, 2 F. & F. 748. See Lancaster Mills v. Merchants', etc. Co., 89 Tenn. 155.

Under a contract requiring an agent to insure property delivered to him for sale for the benefit of his principal, and which provided that if any of it remained unsold eight months after its consignment it should be subject to the owner's order, the agent is not bound to insure for any length of time exceeding eight months. Milburn Wagon Co. v. Evans, 30 Minn. 89.

Upon an undertaking to effect an insurance according to special instructions a part of the duty implied is the giv- [10] ing of notice to the employer in case of failure; and an actual promise to that effect, though averred in the declaration, need not be proved.[1] A like duty to give notice was held to be imposed on a foreign merchant who had been accustomed to effect insurances for his correspondent abroad. It was held that he was answerable for his neglect because he thereby deprived the principal of any opportunity of applying elsewhere to procure the insurance.[2] If the custom of a factor has been to insure consignments of produce and this has been brought to the knowledge of the consignor by uniform charges therefor in his accounts rendered, he will be deemed to have continued that custom until he gives notice of a change, and is responsible for any loss consequent upon his failure to insure before such notice reaches his principal.[3]

An insurance broker received instructions to effect a policy for 550*l.* on a ship and freight at and from T. to L. at ten guineas per cent. He effected it in the words of the order to him without having subscribed a liberty, as was customary in such policies, "to touch and stay at all or any of the Canary Islands." It was held that the broker was liable for not having inserted the clause in question, and the principal recovered for the sum directed to be insured less the premium.[4] If an agent neglects to obey instructions to procure insurance he is not entitled to charge his principal the premium on account of his liability to answer for the loss, if one should occur, if no loss happens.[5] Where the agreement to insure is general, and there is no difficulty in procuring full insurance, and such is the general practice in the particular matter embraced in the contract, the fair and reasonable construction of it is that the party undertakes to procure a contract for full indemnity. In the absence of any evidence, aside from the general agreement, the court in fixing the amount of damages would not, it seems, stop short of a full insurance. The contract of insurance is one of indemnity; and the party whose property is

[1] Callander v. Oelrichs, 5 Bing. N. C. 58.

[2] Smith v. Lascelles, 2 T. R. 187.

[3] Area v. Milliken, 35 La. Ann. 1150.

[4] Mallough v. Barber, 4 Camp. 150.

[5] Storer v. Eaton, 50 Me. 219.

destroyed will not obtain that unless he recovers its full value. In an action against an agent for not procuring full insurance the measure of damages is therefore the value of the property destroyed; to be reduced by any amount received under a partial insurance.[1]

[11] If the insurance directed, however, would be invalid, an action against the agent would not be maintainable for substantial damages; nor would it be any answer to that defense, that by usage and courtesy such insurances were usually paid.[2] As to costs incurred by the principal in an unsuccessful suit against the underwriters, where the broker had been in fault in respect of his principal's orders to procure insurance, the costs of that action were disallowed, Lord Eldon saying there was no necessity to bring it to entitle the plaintiff to recover against the broker, and as it did not appear that the action on the policy was brought by the desire or with the concurrence of the broker, he was not liable for the costs.[3] An agent who disobeys an order to cancel a policy of insurance is liable to his principal for the damages resulting.[4]

§ 773. Disregard of orders for the purchase and shipment of goods. If an agent abroad is directed to invest funds furnished him in goods of a certain description, and ship them to another place or country, and he disobeys the order, the principal is thus deprived of a gain or profit, if the goods would be worth more at the place to which they were required to be sent than at the place of shipment, after paying the cost of transportation, and would have reached their destination had the order been executed. The right of the principal to recover damages for this breach of duty, measured by that gain or profit, is obvious if the difference of market value and the safe arrival of the goods can be established with the requisite certainty. It is a well-established rule that the damages to be recovered for the breach of a contract must be shown with certainty, and not left to speculation or conjecture. The

[1] Beardsley v. Davis, 52 Barb. 159; Ex parte Bateman, 20 Jur. 365; Betteley v. Stainsby, 12 C. B. (N. S.) 477; Douglass v. Murphy, 16 Up. Can. Q. B. 113.

[2] Webster v. De Tastett, 7 T. R. 157.

[3] Seller v. Work, cited in Marsh. on Ins. 243.

[4] Franklin Ins. Co. v. Sears, 21 Fed. Rep. 290; Phœnix Ins. Co. v. Frissell, 142 Mass. 513; Phœnix Ins. Co. v. Pratt, 36 Minn. 409.

former fact, although sometimes mentioned as an insuperable objection,[1] has ceased to be a legal obstacle. Market values are susceptible of proof as a legal proposition; though in a particular instance it may be practically impossible. The time and place being fixed with reasonable certainty, the state of the market is but an ordinary inquiry by evidence — it is a practical, not a legal, difficulty. A court or jury may take cognizance of the fact when it is proved, and whether it [12] is a foreign or domestic market can make no difference. That the property would have reached its destination if the agent had obeyed his instructions will, in many cases, be capable of the most satisfactory proof; as where directions are given to send by a particular vessel, and that vessel actually makes the voyage in safety.[2] Where the agent disobeys such an order the burden should rest on him to show that if he had not disobeyed a loss would have occurred; or, in other words, that no injury has resulted from his breach of duty; and it is not enough that if he had obeyed instructions a loss *might* have occurred; he must show that it *must* have happened.[3]

A merchant in New York directed his correspondent in China to invest money furnished him in silks for the New York market; he disregarded the order, and it appearing that the silks could have been sold at a profit, it was deemed profit which was within the contemplation of the parties, and being such as the proof showed with reasonable certainty would be realized, it was properly taken into consideration in the estimate of damages.[4] In this case Rapallo, J., said: "It is not necessary now to decide what is the proper rule of damages; but we are not prepared to sanction the idea that the rule adopted in cases of marine trespass, which is the prime cost or value of the property at the time of the loss, with interest,[5] is necessarily applicable to the case of the violation of a contract, entered into for the express purpose of procuring goods for sale at their place of destination, when their market value

[1] The Amiable Nancy, 3 Wheat. 546; L'Amistad de Rues, 5 id. 385.

[2] Bell v. Cunningham, 3 Pet. 69; S. C., 5 Mason, 161.

[3] Davis v. Garrett, 6 Bing. 716; Ryder v. Thayer, 3 La. Ann. 149; Farwell v. Price, 30 Mo. 587; Schmertz v. Dwyer, 53 Pa. St. 335; Eby v. Schumacher, 29 id. 40; Wilkinson v. Laughton, 8 Johns. 213.

[4] Heinemann v. Heard, 50 N. Y. 27.

[5] 3 Wheat. 560.

at that place can be shown. The fact that damages have been sustained must be proved with reasonable certainty; but even a loss of profits, if within the contemplation of the parties at the time of entering into the contract, and a direct consequence of the breach, and not speculative or contingent, [13] may be recoverable.[1] The certainty of the loss must depend upon the evidence; but to apply to such contracts the rules settled in cases of capture and collision would, in the generality of cases, exempt foreign agents from all responsibility for breaches of their contract with, or violation of their duty to, their principals, in respect to the purchase and shipment of goods, whether arising from negligence or fraud."[2]

The measure of damages indicated does not apply where the goods purchased by an agent are not of the description ordered. In such a case he is liable to his principal for all damages he sustains. If some of the goods have been sold and liability incurred by the principal to their purchaser the agent must respond to that extent and also for expenses necessarily made because of the defect in the quality of the goods. He is not liable for the difference between the price he paid for them and the market value of the goods he was directed to buy. In other words, the agent who buys after instructions does not occupy the position of a vendor.[3]

§ 774. Miscellaneous illustrations of agent's liability. The primary obligation of an agent whose authority is limited by instructions is to adhere faithfully to them; if he unnecessarily exceeds his commission he renders himself responsible for the consequences.[4] Where a carrier or other agent has charge of goods consigned C. O. D., and delivers them without collecting the moneys charged thereon, he will be held liable for the amount which he was required to col-

[1] Griffin v. Colver, 16 N. Y. 494; Masterton v. Mayor, 7 Hill, 61; Bell *v.* Cunningham, 3 Pet. 85.

[2] See Safford v. Kinsley, 40 Vt. 506.

[3] Cassaboglou v. Gibb, 11 Q. B. Div. 797; S. C., 9 id. 220.

[4] Adams v. Robinson, 65 Ala. 586; Fuller v. Ellis, 39 Vt. 345; Rundle v. Moore, 3 Johns. Cas. 36; Hutchings v. Ladd, 16 Mich. 493; Goodrich v. Thompson, 4 Robt. 75; Schmertz v. Dwyer, 53 Pa. St. 335; Johnson v. New York Cent. R. Co., 31 Barb. 196; Scott v. Rogers, 31 N. Y. 676; Leverick v. Meigs, 1 Cow. 668; Peters v. Ballistier, 3 Pick. 495; Kingston v. Wilson, 4 Wash. C. C. 310; Whitney v. Merchants' Exp. Co., 104 Mass. 152.

lect.[1] In such cases the agent disposes of the principal's property, though it is special, contrary to his instructions, and therefore is chargeable as upon an appropriation to his own use.[2] Any disposition of the principal's property or choses in action contrary to duty by which he is divested of it and suffers injury entitles him to recover of the agent as for a wrongful appropriation or conversion to the extent of his interest and rights in the same.[3] Where the insured employed a factor or agent to settle with the insurers as for a total [14] loss, and an abandonment was duly made, and the agent afterwards through mistake or misapprehension of a letter of the insured or from negligence adjusted the claim as an average loss at twenty per cent., and canceled the policy, he was responsible for the whole amount.[4]

An agent has no right to mix the funds of his principal with his own and hold him liable for their depreciation. If he would keep the money at the risk of his principal for losses on bank failures or other losses on the money itself, he must keep it separate and distinct from his own,[5] otherwise the principal will be entitled to the whole unless the agent shows the proportion which was his.[6]

Where grain was delivered to wharfingers to be shipped to a certain party in New Orleans, and before shipment they were notified not to ship to such party but to another, which they neglected to do and shipped according to the first direction, the price of the grain being lost in consequence of the insolvency of the consignees, the wharfingers were held liable to the shipper for its value.[7] A commission merchant took a

[1] Walker v. Smith, 4 Dall. 389; Laverty v. Snethen, 68 N. Y. 522; Wheelock v. Wheelwright, 5 Mass. 103; Scott v. Rogers, 31 N. Y. 676; McMorris v. Simpson, 21 Wend. 610; Syeds v. Hay, 4 T. R. 260; Stearine, etc. Co. v. Heintzmann, 17 C. B. (N. S.) 56; Hutchings v. Ladd, 16 Mich. 493; Thompson v. Gwyn, 46 Miss. 522.

[2] Id.; Le Guen v. Gouverneur, 1 Johns. Cas. 436.

[3] Id.; Hancock v. Gomez, 50 N. Y. 668; Tuite v. Wakelee, 19 Cal. 692; Taussig v. Hart, 58 N. Y. 425; Jackson v. Baker, 1 Wash. C. C. 394; Parsons v. Martin, 11 Gray, 111; Gray v. Murray, 3 Johns. Ch. 167; Rundle v. Moore, 3 Johns. Cas. 36; Allen v. Brown, 51 Barb. 86; Triggs v. Jones, 46 Minn. 277.

[4] Rundle v. Moore, 3 Johns. Cas. 36; Kempker v. Roblyer, 29 Iowa, 274.

[5] Webster v. Pierce, 35 Ill. 158.

[6] Atkinson v. Ward, 47 Ark. 533; Bate v. McDowell, 49 N. Y. Super. Ct. 106.

[7] Howell v. Morlan, 78 Ill. 162;

bond for a simple contract debt due to him for goods sold on commission, and included in the instrument a debt due to himself. It was held that by thus extinguishing the simple contract debt of his principal, and depriving him of the means of pursuing his claim against his debtor, the agent was at once answerable to him for the value of the goods.[1] If a principal direct his agent to ship goods by a particular steamer or mode of conveyance, and the agent unnecessarily send by another and they are lost, the directed method having been departed from, the goods are disposed of contrary to the duty of the agent and he must bear the loss.[2] An agent who is directed to remit money by mail in bank notes of a large denomination is responsible for a loss if he remits notes of a smaller denomination and a greater number of them.[3] If an agent who has a claim for collection disregards the principal's instructions as to the person to whom it shall be forwarded, he does so at his peril and cannot be permitted to show that the person he employed used reasonable diligence to secure the claim.[4]

[15] An agent, in matters left to his discretion, must exercise a reasonable judgment, and especially must act in good faith. One appointed to settle a claim against a third party received from the debtor promissory notes for the amount, payable at a future day, which were perfectly good, and were in fact paid when due. Before maturity the agent sold them for less than their face, without consulting with or informing his principals or making any inquiries of parties with whom money had been deposited for their payment. Upon being

Cutler v. Bell, 4 Camp. 184; Bessent v. Harris, 63 N. C. 542; Marr v. Barrett, 41 Me. 403.

[1] Jackson v. Baker, 1 Wash. C. C. 394. See Wilkinson v. Clay, 6 Taunt. 110.

[2] Johnson v. New York C. R. Co., 31 Barb. 196; Goodrich v. Thompson, 4 Robt. 75; Hand v. Baynes, 4 Whart. 204; Ang. on Car., §§ 162, 176, 178, 213.

In Johnson v. New York C. R. Co., *supra*, it was considered that a deviation from the course marked out by the principal which is rendered necessary by the circumstances of the case, not foreseen by the principal, is justifiable if the agent exercises the care and skill which his agency calls for, unless the instructions amount in substance to a prohibition of the act in any other than the prescribed method. Greenleaf v. Moody, 13 Allen, 363; Forrestier v. Bordman, 1 Story, 51.

[3] Wilson v. Wilson, 26 Pa. St. 393.

[4] Butts v. Phelps, 79 Mo. 302.

called upon to account he denied that he had received anything on the notes for which he was liable. It was held that their sale was a clear violation of duty, and warranted a finding that it was made without authority; that the principals were entitled to recover as for money had and received to the full amount of the notes.[1] An agent is bound to exercise his powers, or proceed in doing the business of his agency according to usage, or in the ordinary course of the business he is employed in; that he will do so is to be assumed as the tacit direction of his principal from the absence of express directions. Hence, in such matters as are regulated by usage, they are at once his commission and a chart for his guidance.[2] Thus it was held that an agent of an insurance company, from the nature of the power to receive payment, having authority to receive payment of premiums, necessarily had power to accept whatever was generally used for the purpose of making payments in the locality where the debts were to be collected. The actual currency of that locality soon after the direction to collect premiums, being supplanted by confederate notes, and thenceforth these being the financial means used in buying and selling property and in creating and discharging debts, he was held authorized in his discretion to receive such notes; having received them in good faith, the payments were also valid as between the assured and the insurer.[3] But where debts [16] in the hands of an agent are payable in a particular currency, he is not authorized to accept a different one, and cannot do so except at his peril. During the years 1861–2 a party placed in the hands of his agent for collection a number of notes and drafts by their terms payable in United States currency, with no instructions as to the currency in which the collections should be made; the agent was left to exercise his discretion as to the procedure to be taken to enforce payment; he accepted confederate currency in payment and surrendered the notes and drafts; it was held that his action was wrongful as to his

[1] Allen v. Brown, 51 Barb. 86; Kountz v. Gates, 78 Wis. 415; Meade v. Brothers, 28 id. 689.

[2] Story on Agency, § 96; Phillips v. Moir, 69 Ill. 155; 13 Petersdorff's Abr. 751, 752, and notes.

[3] Robinson v. International L. Ins. Co., 52 Barb. 450; Baird v. Hall, 67 N. C. 230; Rodgers v. Bass, 46 Tex. 505. See Turner v. Beall, 22 La. Ann. 490; Richardson v. Futrell, 42 Miss. 525; Bernard v. Maury, 20 Gratt. 434.

principal; without authority, actual or presumptive; he was liable to pay his principal the full amount of the notes and drafts in United States currency, although confederate money was at the time and place of payment the only currency in circulation.[1] If a factor be directed to sell for gold he cannot discharge his liability to his principal in a depreciated currency.[2] So a bank which receives an uncertified check in payment of a draft held for collection will be liable for the amount of the draft, whether the check is paid or not, the draft having been surrendered; and a local custom to receive such checks is no defense.[3] If an agent for the sale of logs allows the purchaser to scale them instead of employing the official scaler for that purpose, he must respond for the loss which results from an incorrect measurement.[4] If he falsely represents that the purchase price of property bought for his principal was more than he paid for it, he is liable for the difference between the amount in fact paid and the sum received from his principal, or if he has received compensation for making the purchase, the amount of it. The principal cannot, by surrendering the property to the agent, recover its value.[5]

§ 775. **Defaults in regard to commercial paper.** The same general rule as to the measure of damages which has been stated[6] applies to agents having in charge for the owners commercial paper or other securities for the payment of money. If through the negligence or unauthorized act of the agent the paper or security becomes worthless, or its value impaired, the principal will have a right of action against him for damages equal to the loss. In respect to checks and bills of exchange diligence is required not only to preserve the liability of the drawer and indorsers, but to have the advantage of such diligence as will be immediately productive. If [17] an agent to procure acceptance of a bill, or for collection of a bill, check, or note, by neglect seasonably to present the

[1] Poindexter v. King, 21 La. Ann. 697; Symington v. McLin, 1 Dev. & Bat. 291.

[2] Nunnemaker v. Lanier, 48 Barb. 234. But see Russell v. Hankey, 6 T. R. 12.

[3] Mangum v. Ball, 43 Miss. 288.

[4] Crawford v. Cockran, 2 Wash. Ty. 117.

[5] McMillan v. Arthur, 98 N. Y. 167.

[6] *Ante*, § 770.

paper to the drawee or maker discharges the other parties he is liable for the damages which ensue. Where the debt is thus lost the delinquent agent will be liable for the amount.[1] Where a debtor transferred a note as collateral security for the payment of a sum of money owing by him, the amount of the note, when paid, to be applied toward the satisfaction of the creditor's demand, and if not paid to be returned to the debtor, the latter was held entitled to maintain an action in his own name for breach of duty against a bank with which the note was left by the creditor for collection, the bank having neglected to give notice of non-payment, whereby the debt was lost, and he was held entitled to recover the whole amount of the note and interest.[2] The duty of the bank to exercise diligence in such a case need not be founded on any express contract with the person depositing the note for collection; it will be implied from the custom of banks in favor of such person as may be beneficially interested in having the duty performed.[3]

The owner of a bill has an interest in having it presented for acceptance without delay, although such presentment is not necessary in the case of a bill payable on a day certain, to enable him to retain his claim against the drawer or indorser of it; and if the agent who has been intrusted with the bill for the purpose of getting it accepted and paid, or accepted only, neglects to comply with the direction of the owner without unnecessary delay, he will be liable to him for the damage which he sustains by such negligence.[4] Nor does it require special instruction from the principal to impose this duty.[5] If protested for non-acceptance the holder is not obliged [18] to delay suit until the maturity of the bill; he may proceed

[1] First Nat. Bank v. Fourth Nat. Bank, 77 N. Y. 320 (see this case as to the measure of diligence required); S. C., 89 id. 412; Chapman v. McCrea, 63 Ind. 360; Bank of Washington v. Triplett, 1 Pet. 25; Tyson v. State Bank, 6 Blackf. 225; Allen v. Suydam, 20 Wend. 321; S. C., 17 id. 371; Montgomery Co. Bank v. Albany City Bank, 7 N. Y. 459; Smedes v. Bank of Utica, 20 Johns. 372; Bank of Utica v. Smedes, 3 Cow. 662; Fabens v. Mercantile Bank, 23 Pick. 330; Bidwell v. Madison, 10 Minn. 13; Hamilton v. Cunningham, 2 Brock. 367; Bank of Orleans v. Smith, 3 Hill, 560.

[2] McKinster v. Bank of Utica, 9 Wend. 46; affirmed, 11 id. 473.

[3] Id.

[4] Allen v. Suydam, 20 Wend. 321; S. C., 17 id. 371; Chit. on Bills, 273.

[5] Id.

at once against the drawer or indorser.[1] An immediate presentment not only determines the question whether the security of the drawees, or an acceptance *supra protest*, is to be added; but, on protest, it leads directly to inquiry and explanation, and enables the holder to take such prudential measures against all other parties as their character, circumstances or the general state of the times may demand.[2] There may, therefore, be a case where there is not such negligence of the agent as would discharge a drawer or indorser, and yet be such as would entitle the principal to damages. These are not necessarily the amount of the bill, for the recovery will be limited to compensation for the actual injury. *Prima facie*, if the parties to the bill are discharged, the debt is lost; it cannot be presumed to exist in any other available form, and in that case its amount is the measure of damages. If the fact is otherwise, of course it may be shown. Where A., being indebted to B., sent him C.'s bill on D. for the amount, and was not a party to it, and D., having no funds of C., refused acceptance, of which no notice was given by the negligence of B.'s agent, in an action by B. against his agent it was held that inasmuch as A. had not indorsed the bill he was not entitled to notice, and must still remain liable to B. for his debt, and that the drawer was not entitled to notice because he had no funds in the hands of the drawee; therefore B. was entitled to such damages as he had suffered, but was not entitled to recover the whole amount of the bill, but only such damages as he had sustained in consequence of having been delayed in the pursuit of his remedy against the drawer.[3] So if there is negligent delay by an agent in presenting a bill for acceptance, and the antecedent parties, though not thereby [19] discharged from their legal liability, in the meantime become insolvent, the amount of the bill is *prima facie* the loss.[4]

[1] Walker v. Bank of State, 9 N. Y. 582; Ballingalls v. Gloster, 3 East, 481; Allan v. Mawson, 4 Camp. 115; Mason v. Franklin, 3 Johns. 202; Robinson v. Ames, 20 id. 146; Watson v. Loring, 3 Mass. 557; Bank of Rochester v. Gray, 2 Hill, 227.

[2] Allen v. Suydam, 17 Wend. 371.

[3] Van Wart v. Woolley, 3 B. & C. 439. See Van Wart v. Smith, 1 Wend. 219.

[4] In Allen v. Suydam, *supra*, the action was brought against an agent for collection of a draft drawn July 21, 1833, payable sixty days after date, received by such agent August 16th. The agent retained it until September 2d, when he transmitted

It is competent for the defendant to mitigate the damages by showing either the insolvency of the maker or indorser or that the paper was partially or wholly secured, or any other fact that will lessen the actual loss to the plaintiff; the real loss

it to the cashier of a bank in another state, where the drawee was doing business, and it was received by such cashier on the 6th of September and presented for acceptance on the following day. The drawees said they were not ready to accept — that they did not accept for the drawer without instructions, and they had none, but expected to hear from the drawer soon. The cashier called again on the 10th, and the drawees were then instructed not to accept, and refused; whereupon the draft was protested. On the 9th of October the drawer died insolvent. When the draft was drawn he had funds in the hands of the drawees, but the amount was not shown; they testified, however, that the lateness of the day of presentment for acceptance made no difference in regard to acceptance, as it was an invariable rule with them not to accept without previous advice. It appeared that subsequent to the 16th of August the drawees accepted other drafts to the amount of $2,000; and it appeared also that the drawer conducted business as a merchant in the city of New York down to the time of his death; whilst on the other hand it was shown that on the 24th of July, 1833, his note to the plaintiffs for $606.77 was protested at Concord, and remained unprovided for until the draft in question was drawn for the amount. The trial court charged the jury in the action for negligence in not presenting the draft for acceptance, that the jury, having no other knowledge of the amount of the damage than from the proof of the amount of the draft, should find a verdict in favor of the plaintiffs for the amount of the draft and interest. The delay of the agent to present for acceptance was negligence. Cowen, J., said (17 Wend. 371): "I have examined Van Wart v. Woolley as reported in the different books referred to by Chitty. In 5 Dowl & Ryl. and 3 Barn. & Cress., Lord Tenterden, C. J., delivers the opinion of the court that mere delay of the agent to give notice to his principal, though the drawer were not therefore discharged, would subject him to damages. In Mood & Malk. N. P. reporters, the damages were assessed before the same judge at one shilling. The smallness of the sum was because, in the meantime, the plaintiff had recovered the full amount with damages and costs, by an action in this state against Irving & Co., who transmitted the bill to England. Campbell, for the defense, strenuously contended that the mere delay of the remedy against an insolvent drawer who never had funds, and that, too, where the amount of the whole bill had been recovered from another, would not maintain an action. Lord Tenterden, however, was clearly of a contrary opinion.

"We may certainly assume upon such authority that the object of notice is not confined to the saving of the ultimate legal remedy. Such a view, too, is justified by the nature of the business. And immediate [20] presentment not only determines the question whether the security of the drawees, or an acceptance *supra protest*, is to be added; but, on protest, it leads directly to inquiry and explanation, and enables the holder to take

occasioned by the improper conduct of the defendant being the fact for the jury to arrive at in measuring the plaintiff's damages.[1]

such prudential measures against all other parties as their character, circumstances, or general state of the times may demand. In the case at bar there was not only a want of funds in the hands of the drawees, but a positive fraud by the drawer, who countermanded the acceptance; neither of which was known to the plaintiffs below, nor could be, until the demand made at Concord. A demand before maturity, almost certainly leading to discoveries very important to the principal, is not so unusual as to leave agents in ignorance that an acceptance should be sought for through the earliest practicable means of communication. A knowledge of the truth, a few days or even a few hours earlier or later, is many times decisive. On the whole, we think the court below were right in holding, as a matter of law, that the delay of the defendants was unreasonable, and that they were therefore liable in this action."

The court of errors reversed the judgment below on the question of damages. At the maturity of the bill the drawer was insolvent, but he had continued to do business as a merchant. There was no actual proof that had the bill been presented without delay, after the defendant received it and notice of non-acceptance given, payment could have been obtained, and the question was not submitted to the jury; the liability of the defendant for the amount of the bill was decided as a matter of law. The negligence complained of, though it did not discharge the drawer, prevented any attempt to obtain payment or security; prevented the very endeavor that diligence in presentment of such paper is intended to afford opportunity for. Should it not devolve on the party whose negligence is the obstacle to exertion in the direction of obtaining payment to show that it would have been unsuccessful? Senator Verplanck, in his dissenting opinion (20 Wend. 334), said: "I can, therefore, find no sounder rule of damages, nor one better for protecting and reconciling all these claims of policy and justice, than that pointed out by the decisions in a large class of cases of agency, and by the analogy of the measure of damages in trover. In those cases the presumption is, in the first instance, to the full nominal amount of the loss, as it appears on the face of the transaction against the agent wanting in diligence, or the party guilty of the tortious conversion. Thus, where an agent or factor neglects to insure for his principal, according to order, he is held responsible for the default, *prima facie*, to the total amount which he ought to have covered by insurance. But at the same time he is allowed to put himself in the place of the underwriter and to prove fraud, deviation, or any other defense which would have been good, had the insurance been made, or which would go to show that nothing at all, or how much, was actually lost by the neglect. Delany v. Stoddart, 1 T. R. 22; Wallace v. Tellfair, 2 T. R. 188; Webster v. De Tastett, 7 T. R. 157. In the courts of this state, Rundle v. Moore, 3 Johns. Cas. 36;

[1] Borup v. Nininger, 5 Minn. 523; First Nat. Bank v. Fourth Nat. Bank, 77 N. Y. 320; 1 Dan. Neg. Inst., § 329.

§ 776. Same subject. It is not only the duty of an [25] agent employed to procure acceptance to apply promptly for it, and to give his principal notice of refusal, but also to obtain an absolute and valid acceptance, or to treat the bill as

and in the courts of the United States, Morris v. Summerl, 2 Wash. [21] C. C. 203. See, also, 1 Phil. on Ins. 521. So, too, in actions against sheriffs, where those official public agents become chargeable with the debt of another, by their own negligence or misconduct. When the default is established the amount due the plaintiff in the original suit is the *prima facie* evidence of the measure of damages. This presumption may be controlled or rebutted, and the sheriff may give in evidence any fact showing either that the party has not been actually injured, or to how much less amount. He may show, for instance, the insolvency of the original debtor. But the burden of proof is upon him; if he leaves the presumption uncontradicted, that establishes the measure of damages. This has been frequently ruled at our circuits, nor can I find that it has ever been questioned in our supreme court, and is substantially recognized in Potter v. Lansing, 1 Johns. 215; Russell v. Turner, 7 id. 189. The Massachusetts decisions are particularly full on this point. See 10 Mass. 470; 11 id. 89; id. 183; 13 id. 187. Similar decisions may be found in the reports of other states. So again in trover. In Ingalls v. Lord, 1 Conn. 240, in trover for a note, it was held that the *prima facie* measure of damages was the face of the note; but that evidence might be given to reduce the amount by proving payment in part, or the insolvency of the maker, or any other fact invalidating the note or lessening its value. It is true that Lord Tenterden, in Van Wart v. Woolley, . . . held that damages must be shown, and that the face of the bill is not the conclusive measure; but this, I think, is not in contradiction to the view that I have taken. I therefore take the cases before mentioned to point out the sound doctrine here. The face of the bill is the *prima facie* measure of damages. These may be reduced by any positive evidence proving the real damage to be less; but the burden of that proof must be upon that negligent agent, and not on the party who suffers by his negligence. Circumstances like those of the present case may often render it difficult or impossible for either party to prove or even to form a probable estimate of the precise damages incurred by the agent's neglect. In such cases is it not just that those chances of loss which must fall upon one or the other should be thrown upon the party in default and not upon the innocent sufferer? It was then for the defendants here to show that the debt would not have been paid had due diligence been used, or that there were any other circumstances to diminish the actual damages below the nominal amount."

In the majority opinion by the chancellor it was said: "In relation to the amount of damages, . . . I think the charge of the judge who tried the cause was clearly wrong, and that it has unquestionably produced great injustice in this case. . . . The relation between the drawer and indorser of the bill and the person to whom it is transferred for the mere purpose of negotiation or collection is not the relation of indorser and indorsee, so as to throw

dishonored. If he takes an acceptance which does not bind the drawee, reposes upon it, and gives no notice that acceptance has been refused, he will be held to the same responsibility as though he had presented the bill for acceptance, and

the loss of the whole amount of the bill upon the latter if he neglects to present the same for acceptance and payment in time, or to give notice of its dishonor to the indorser, as required by law. Nor will the payment of damages by the agent have the effect to subrogate him to all the rights and remedies of the person [22] from whom he received the bill, as against other parties who may be liable for the payment thereof; but it is a mere contract of agency which leaves the indorser to all his rights and remedies for the recovery of his debt as against other parties, and only renders the indorser liable as agent for the actual or probable damages which his principal has sustained in consequence of the negligence of such agent. This principle was distinctly recognized by the court of king's bench in England, in the case of Van Wart v. Woolley, 5 Dowl. & Ryl. 374, where the plaintiff had not lost his remedy against the drawers of the bill, or the person from whom he received it, by reason of the neglect of the agents to present it for acceptance in due time; the drawers of the bill in that case having drawn without authority when they had no funds in the hands of the drawees, and Irving & Co., who sent the bill to the plaintiffs in payment, not standing in the situation of indorsers of the bill, as their names did not appear upon it. In that case, however, if there had been any evidence to warrant the belief that the bill would have been accepted if an immediate acceptance or rejection of the bill by the drawees had been insisted on, according to the decision in the case of the Bank of Scotland v. Hamilton (Glen on Bills, 109), the loss which had arisen from the neglect of the defendants in not pressing for an acceptance, or in not giving due notice of the dishonor of the bill immediately, if it could then probably have been collected from the drawees, should have fallen upon Woolley & Co. instead of Irving & Co., who had remitted the same to Van Wart; and the plaintiff would then have been permitted to recover whatever damages had been sustained by such negligence for the benefit of Irving & Co. In that respect Irving & Co. stood in the same relative situation to Van Wart as Dunlop did to the Bank of Scotland in the case before referred to, and Woolley & Co. occupied the situation of Hamilton & Co., who were held liable in that case in exoneration of Dunlop's liability. The only difference in principle which I can see between the two cases is that in the Scotch case it was evident that the bill would probably have been accepted and saved if it had been presented for acceptance on *Saturday*, when it was received in Glasgow, instead of being kept back until *Tuesday* evening, when the news of the drawer's failure had reached that place; and, therefore, to exonerate Dunlop, who remitted the bill, the agents in Glasgow were very properly charged with the amount of the bill, the whole of which had been lost through their negligence, except the small amount of dividend which the bank would be entitled to out of the drawer's estate under the commission of bankruptcy against him;

on refusal had not given notice.[1] If a bill is duly accepted when presented, the duties of an agent for its collection are similar to those of an agent for the collection of a note. The holder in either case is entitled to have the paper presented

whereas, in the case of Van Wart v. Woolley, there was no reason to believe that the bill would have been accepted if the agent had insisted upon an answer immediately, and there was as little probability that anything would have been obtained from the drawers if Wan Wart or Irving & Co. had received notice of the dishonor of the bill immediately after it was received by the agents in London. In the latter case, therefore, the damage which either Van Wart or those who had transmitted him the bill in payment had sustained was merely nominal. Besides, the supreme court of this state [23] having decided that neither the drawer nor Irving & Co. were discharged from their liability to the plaintiff by this neglect of his agent, neither of them, in fact, having been injured by such neglect, the plaintiff, upon the second trial, was, of course, only held to be entitled to such damages as he had sustained, and which were nominal only. If the rule laid down by the judge who tried the present case was correct, that the principal was entitled to recover the whole amount of the bill and interest, because there was no other evidence to enable the jury to discover what the damage was, then the plaintiff in the case of Van Wart v. Woolley should have been permitted to retain his verdict upon the first trial, as it did not then appear whether he could actually succeed in collecting the money either from the drawers of the bill or from Irving & Co.; neither did it then appear whether, by the laws of this state, where they resided, they were not actually discharged from liability, so that no judgment could be recovered against them in consequence of the negligence of the agent.

"The granting of the new trial in that case, therefore, proceeded upon the principle that the agent was not liable for the whole amount of the bill, unless damages to that extent had been sustained by his neglect; and that to recover damages to that extent it was incumbent on the party claiming to give sufficient evidence to satisfy the court and jury that it was at least probable that he had sustained damages to that amount. Neither the Scotch nor the English case, therefore, is an authority to sustain the charge of the judge in relation to the amount of damages in the present case; on the contrary, the case of Van Wart v. Woolley is a direct authority to show that the agent ought not to be charged with the whole amount of the bill, unless there is sufficient evidence to render it at least probable that the whole amount of the debt would have been saved if the agent had discharged the duty which his situation imposed upon him. Where there is a reasonable probability that the bill would have been accepted and paid if the agent had done his duty; or where by the negligence of the agent the liability of a drawer or indorser who was apparently able to pay the bill has been discharged, so that the owner of the

[1] Walker v. Bank of the State, 9 N. Y. 582. See Wingate v. Mechanics' Bank, 10 Pa. St. 104; McKinster v. Bank of Utica, 9 Wend. 46.

at maturity to the party primarily liable for payment, and to prompt notice of non-payment to enable him to take immediate measures against that party on his own judgment of the exigencies, and to notify the indorsers and drawer to

bill cannot legally recover against such drawer or indorser, I admit the agent by whose negligence the loss has occurred is *prima facie* liable for the whole amount thereof with interest as damages; unless he is able to satisfy the court and jury that the whole amount of the bill has not been actually lost to the owner in consequence of such negligence. . . . Under the circumstances of this case, therefore, I think the jury should have been instructed that, upon the evidence, the plaintiffs were only entitled to nominal damages; or at least they should have been told to find only such damages as they should, from the evidence, believe it probable the plaintiff might have sustained by the delay in presenting the draft for acceptance immediately; for I do not see how it is possible for any one to believe, or even to suppose it probable from this evidence, that the whole amount of this draft was in fact lost to the plaintiff below by the delay of the Allens in presenting it to the drawees, and giving notice of the dishonor thereof immediately to the drawer, who never intended that it should be accepted and paid."

It is manifest that Van Wart v. [24] Woolley was correctly decided; for Irving & Co. were properly assumed to be still liable for the debt which the bill was remitted to pay; and there was no evidence to rebut the presumption of their ability to discharge that debt. Hence the delay of measures against the drawer in consequence of the agent's negligence did not endanger its ultimate collection. The exemption of Van Wart from loss did not depend on the acceptance of the bill, nor on his recourse to the drawer. Allen v. Suydam presents no such features; the holder's only dependence in that case for payment was immediate recourse to the drawer. It is therefore not a parallel case. If he had received the timely notice he was entitled to from the agents, there was a reasonable probability that he could have obtained payment or security from the drawer. As the agents' negligence precluded any effort of this kind at a time that was vitally important for that purpose, were they entitled to have their wrong qualified by what is equivalent to a presumption that had the agents' duty been performed, the same loss would have been sustained? As between the holder of commercial paper and antecedent parties, the law presumes damage from the omission to present for payment. Heylyn v. Adamson, 2 Burr. 669; Cowley v. Dunlop, 7 T. R. 581. This is so though the party to whom such presentment must be made is bankrupt or insolvent. Russel v. Langstaffe, 2 Doug. 515; Warrington v. Furbor, 8 East, 245; Nicholson v. Gouthit, 2 H. Bl. 609; Easdaile v. Sowerby, 11 East, 114; Bowes v. Howe, 5 Taunt. 30; Ex parte Bignold, 1 Deac. 712; Holland v. Turner, 10 Conn. 308; Jackson v. Richards, 2 Cai. 343; Crossen v. Hutchinson, 9 Mass. 205; Garland v. Salem Bank, id. 408; Sandford v. Dillaway, 10 id. 52; Farnum v. Foule, 12 id. 89; Groton v. Dallheim, 6 Me. 476; Shaw v. Reed, 12 Pick. 132; Greely v. Hunt, 21 Me. 455; Hunt v. Wadleigh, 26 Me. 271. Between such parties it is a conclusive pre-

preserve his right of recourse to them. Of course, where such presentment is not made for any of the reasons which in law constitute an excuse for non-presentment, the agent is not liable for neglect. But in such cases only is non-presentment excused; he is bound to the same diligence in notifying the principal of the facts to enable him to protect his rights as in other cases of dishonor.

The duties of a bank or other collecting agent receiving a check for collection are more exigent and complicated than in respect to other negotiable paper; and for negligence the same rule of damages applies,— that of making good any loss that ensues to the principal in respect to moneys for which [26] the check is drawn. A check is for money presently, and to

sumption, to the extent of the face of the paper, and discharges from liability to pay it; between the agent and the holder, whenever the former is guilty of actionable negligence in respect to the same acts, it would seem just that there should be a rebuttable presumption of a like amount of injury. See Murray v. Judah, 6 Cow. 484; Syracuse, etc. R. Co. v. Collins, 3 Lans. 29; Bradford v. Fox, 38 N. Y. 289; Hoard v. Garner, 3 Sandf. 179; Ingalls v. Lord, 1 Cow. 240; Caffrey v. Darby, 6 Ves. 496; Davis v. Garrett, 6 Bing. 716; Beardslee v. Richardson, 11 Wend. 25; Brown v. Arrott, 6 W. & S. 402; Beckman v. Shouse, 5 Rawle, 189.

In an action for the price of goods it appeared that the same were sold at York on Saturday, the 10th of December, 1825, and on the same day at 3 P. M. the vendee delivered to the vendor, as and for a payment of the price, certain promissory notes of the bank of D. & Co., at Huddersfield, payable on demand to bearer. D. & Co. stopped payment on the same day at 11 A. M., and never afterwards resumed; but neither of the parties knew of the stoppage or of the insolvency of D. & Co. The vendor never circulated the notes, or presented them to the bankers for payment. But on Saturday, the 17th, he required the vendee to take back the notes, and to pay him the amount, which the latter refused. Held, under these circumstances, that the vendor of the goods was guilty of *laches*, and had thereby made the notes his own, and consequently that they operated as a satisfaction of the debt. Camidge v. Allenby, 6 B. & C. 373. In this case Bayley, J., said: "The neglect . . . on the part of the plaintiff to give to the defendant notice of the insolvency of the bankers *may* have been prejudicial to the defendant. The law requires that the party on whom the loss is to be thrown should have notice of non-payment in order to enable him to exercise his judgment whether he will take legal measures against other parties to the bill or note. Now here, if the notes had been returned on the Tuesday to the defendant he might have taken steps against the bankers, and he had a right to exercise his judgment whether he would do so or not, although they had stopped; or he might have a remedy against the person who paid him the notes."

obtain it at once is the obvious right of the holder, and the clear intention of the drawer if it is made in good faith. This, as the primary purpose, can only be adequately subserved by diligence stimulated by this view; and it will sometimes exceed that required for the preservation of the liability of the drawer and indorsers.[1] The duty of a collecting agent devolves [27] on a party who receives, as collateral security for a debt, commercial paper or any securities for the payment of money from his debtor; he makes the paper his own, or subjects himself to equivalent damages by any act or negligence which deprives the debtor thereof, or involves a loss of the moneys represented by such collaterals.[2] In Roberts v. Thompson[3] Scott, J., said: "The general rule is that where a party receives a note as collateral security for an existing debt, without any special agreement, the party receiving such note must use ordinary care and diligence in collecting it; and if any loss should happen to the other party by reason of a want of such care and diligence, the law will compel him to make good the loss. Such cases are not governed by the strict rules of commercial law applicable to commercial paper, but fall under the general law of agency, which must determine the rights and liabilities of the parties." It was held that where a debtor assigned to his creditor as collateral security a negotiable note of a third person before maturity, and by the terms of the assignment waived demand and notice of non-payment, such creditor, acting in good faith, is not bound to demand or insist upon payment of the security before its maturity, though he may know at the time that payment would be made if insisted upon.

Where the defendant covenanted to take proper means to collect the amount secured by a mortgage of real estate, and was guilty of negligent delay, and still retained the security, Sandford, J., said, in answer to the position that the mortgage [28] was either good or bad, if bad he could collect nothing,

[1] 1 Morse on Banks, etc. (3d ed.), § 237.

[2] Phœnix Ins. Co. v. Allen, 11 Mich. 501; Little v. Phœnix Bank, 2 Hill, 425; 7 Hill, 359; Dayton v. Trull, 23 Wend. 345; Copper v. Powell, Anthon, 49; Jennison v. Parker, 7 Mich. 355; Bradford v. Fox, 39 Barb. 203; S. C., 16 Abb. Pr. 51; 38 N. Y. 289; Heartt v. Rhodes, 66 Ill. 351; Story on Prom. Notes, § 498; Palmer v. Holland, 51 N. Y. 416.

[3] 14 Ohio St. 1.

and if good the plaintiff had lost nothing: "This we think is not sound. The mortgage, however good it may be, avails the plaintiff nothing so long as the defendant retains and neglects to collect it. He sustained his damage, if it were good, two or three years since, when he was entitled to receive his share of the security, and received nothing. His injury is the same as if he held the defendant's note, payable at that time, and it had remained unpaid. As to the amount, the amount of the bond and mortgage is its presumptive value. It belongs to the defendant to prove it to be a doubtful or a worthless security."[1]

Where a debt was really lost by the negligence of the attorney, through the insolvency of the debtor, in an action for the negligence the court loosely told the jury they might find what amount of damages they pleased. As the debtor was not totally insolvent the jury found a verdict for a part of the plaintiff's demand.[2] An agent who negligently fails to collect notes due his principal is liable for their face value and interest if the makers are solvent.[3]

An express company having received from the drawer for collection with instructions to return it at once if not paid a draft for a sum overdue from the drawee to the drawer, with interest, presented it for payment, when the drawee declined to pay $1.20 included therein. Thereupon the company, without collecting anything on the draft, agreed with him that they would hold it until he could inquire of the drawer as to the disputed part; and the agent wrote the same day making such inquiry, and adding: "The parties will hold the draft until I hear from you." Upon receiving a reply in due course of mail from the drawer that the additional sum was for interest, the drawee was, and for two days continued to be, ready to pay the draft which the express company continued to hold but neglected again to present. The third day was Sunday, and on the fourth day he became insolvent. It was held that the express company were liable for the drawer's loss on the draft by the drawee's insolvency.[4] In New York, where the collecting bank is liable for the default of a notary

[1] Hoard v. Garner, 3 Sandf. 179; Grant v. Ludlow, 8 Ohio St. 1.

[2] Russell v. Palmer, 2 Wils. 325.

[3] Dickson v. Screven, 23 S. C. 212.

[4] Whitney v. Merchants' Union Exp. Co., 104 Mass. 152.

employed by it, the measure of damages which the holder of [29] the paper can recover from the bank on the ground of such default is the amount of the note and interest. If the holder has sued an indorser, and failed to recover by reason of the default of the notary, he cannot increase the damages by adding the expenses of that suit; for the action against the bank is based upon its implied undertaking to give the notice, and not upon any false representation that it has been duly given.[1]

Reference has already been made to cases illustrating the responsibility of agents in respect to the currency they collect for their principals, and losses afterwards by bank failures or depreciation.[2] An agent has no authority to receive anything but money unless authorized to do so.[3] If he is empowered to receive depreciated currency, and does so, the loss by depreciation is that of the principal.[4] But if on making collections the bank or other agent receiving the money merely gives the principal credit for the amount, and uses the funds or blends them with others of his own, he assumes the risk of subsequent depreciation.[5] So if he deposit it with his banker in his own name and a loss occurs from the banker's insolvency.[6] An agent to collect money is bound to make immediate payment to his principal.[7] He is not obliged to incur the risk, in the absence of instructions, of selecting the mode of remittance to a distant principal; but it is his duty in such case, when he has collected money on account of his principal, to give him prompt notice of the fact.[8] He will be chargeable

[1] Downer v. Madison Co. Bank, 6 Hill, 648; Morse on Banks and Banking (3d ed.), § 265.

[2] See *ante*, § 774.

[3] Drain v. Doggett, 41 Iowa, 682; Aultman v. Lee, 43 id. 404; Webster v. Whitworth, 49 Ala. 201; Turner v. Turner, 36 Tex. 41; Mudgett v. Day, 12 Cal. 139.

[4] Marine Bank v. Fulton Bank, 2 Wall. 252.

[5] Id.; Webster v. Pierce, 35 Ill. 158. See Bartlett v. Hamilton, 46 Me. 425; Pinckney v. Dunn, 2 S. C. 314.

[6] Story on Agency, § 208; Cartmell v. Allard, 7 Bush. 482; Hammon v. Cottle, 6 S. & R. 290; MacDonnell v. Harding, 7 Sim. 178; Webster v. Pierce, 35 Ill. 158; Wren v. Kirton, 11 Ves. 377; Caffrey v. Darby, 6 Ves. 496; Massachusetts, etc. Ins. Co. v. Carpenter, 2 Sweeney, 734; Norris v. Hero, 22 La. Ann. 605; Sargeant v. Downey, 49 Wis. 524. See Wood v. Cooper, 2 Heisk. 441; Hale v. Wall, 22 Gratt. 424; Bellinger v. Gervais, 1 Desaus. 174.

[7] Merchants' Bank v. Rawls, 21 Ga. 289; Lyle v. Murray, 4 Sandf. 590; Yon v. Blanchard, 75 Ga. 519.

[8] Id.

with interest if he unreasonably neglect or delay giving [30] such notice,[1] or if he converts the money to his own use.[2]

§ 777. **Same principles applied to factors.** In the absence of special directions as to price a factor must sell for the fair value or market price; if he disregards this duty and sells at a less price he will be compelled to account for the goods at the prices which his duty required him to realize for them.[3] He has a reasonable time to make sale, and in case of neglect is liable for the market value during that period; and this price the plaintiff has the burden of proving.[4] He thus makes himself responsible for the goods at the price for which it was his duty to sell them, when a reasonable time for making a sale has elapsed.[5] He is, however, only bound to ordinary diligence. When his instructions leave the management of the property to his discretion he is bound only to good faith and reasonable conduct.[6] He is required to act with reasonable care and prudence; to exercise his judgment after proper inquiry and precaution.[7]

§ 778. **Sales at unauthorized price.** Like other agents, a factor must obey the orders of his principal, and is liable for losses which result from any deviation. If he is directed to hold for sale till a particular day and then sells and disobeys by selling before, he is liable for the difference between the price on that day and the price obtained;[8] and if directed not to sell below a certain price, and he does sell for a less price, for the actual damage sustained.[9]

[1] Dodge v. Perkins, 9 Pick. 368; Clark v. Moody, 17 Mass. 145.

[2] Hill v. Hunt, 9 Gray, 66.

[3] Bigelow v. Walker, 24 Vt. 149; Linsly v. Carpenter, 4 Robt. 200.

[4] Graham v. Maitland, 37 How. Pr. 307.

[5] Atkinson v. Burton, 4 Bush, 299; Whelan v. Lynch, 60 N. Y. 469.

[6] Evans v. Potter, 2 Gall. 13. See Guy v. Oakley, 13 Johns. 332.

[7] Leverick v. Meigs, 1 Cow. 645; Gheen v. Johnson, 90 Pa. St. 38.

[8] Brown v. McGran, 14 Pet. 479; Evans v. Root, 7 N. Y. 186; Courcier v. Ritter, 4 Wash. C. C. 549; Johnson v. Wade, 2 Baxt. (Tenn.) 280; Hornsby v. Fielding, 10 Heisk. 367. See Kelly v. Smith, 1 Blatchf. 290.

[9] Hinde v. Smith, 6 Lans. 464; Taylor v. Ketchum, 5 Robt. 507; White v. Smith, 6 Lans. 5; Thompson v. Gwyn, 46 Miss. 522; Loraine v. Cartwright, 3 Wash. C. C. 151; Gray v. Bass, 42 Ga. 270; Porter v. Wormser, 94 N. Y. 431. See Knowlton v. Fitch, 48 Barb. 593; S. C., 52 N. Y. 288.

The breach of an agreement to order goods only when they could be sold at a designated price makes the factor liable for the difference between the best market price for

[31] It was once held in New York that where an agent sells below the limit fixed in his instructions the measure of damages is the difference between the price obtained on the sale and the minimum price fixed by the instructions.[1] This decision was reversed, the appellate court holding that the principal was only entitled to compensation for the injury actually sustained; that it was competent for the factor to show in reduction of damages that the goods at the time of sale and down to the time of trial were worth no more than the price at which they were sold; that he takes the risk by such a sale of a rise in their value at any time before the action is brought, and perhaps down to the time of trial. The invoice price, or that fixed by the principal in the instructions, is *prima facie* their value; and as to articles having no market value the principal may insist on the price annexed to the instructions.[2] In a Massachusetts case, where a factor agreed he would not sell a consignment of tobacco for less than forty cents a pound, but did sell for less, the trial court refused to charge that the defendant would not be liable above its fair market value at the time it was sold, but was liable on the basis of its value when a return of it was demanded. This ruling was affirmed. The court said: "The sale of the tobacco below the limit of their authority was a breach of their agreement, and they cannot restrict the damages to the market value at that precise point of time. The injury may have consisted not in selling below the existing market price, but in choosing a time for sale when the market was depressed and a favorable price could not be realized. The consignor had a right to insist that his goods should be held until his

which they could have been sold and what the principal in fact received. Rollins v. Duffy, 18 Ill. App. 398.

[1] Blot v. Boiceau, 1 Sandf. 111; Switzer v. Connett, 11 Mo. 88.

[2] Blot v. Boiceau, 3 N. Y. 78; Hinde v. Smith, 6 Lans. 464.

This measure of damages is approved in Massachusetts (Dalby v. Stearns, 132 Mass. 230), and was established in New Hampshire at an early day. Chief Justice Parsons said: "Had these goods been destroyed by the negligence of the plaintiffs, they would have been answerable for their value, and the damages could not have been extended beyond that merely because the defendant had ordered them to sell for a certain price, and not for less. If, instead of a loss by negligence, the loss be by a disobedience of orders, without fraud, the result must be the same." Frothingham v. Everton, 12 N. H. 239.

price could be obtained. We do not find it necessary to decide what rule of damages is absolutely correct. It has sometimes been said that the highest market price before action brought is the standard; at others, that the highest value before the trial may be awarded. It is safe to say that the factor is at least liable for the highest market value of the goods within a reasonable time after the sale in violation of instructions."[1] This measure of damages has recently been applied by the supreme court of the United States,[2] and after much discussion by the court of appeals of New York.[3] The subject is more particularly considered in the chapter on conversion.[4]

§ 779. **Same subject.** The limit by agreement or in- [32] structions may be fixed with reference to the selling price of other similar goods; when, in case of a sale for less, damages will be given on the basis of that limit; such selling price may be determined either by offers to sell the goods referred to in the ordinary course of business, or by actual sales.[5] In Brown v. McGran[6] it is laid down as a general doctrine that "whenever a consignment is made to a factor for sale the consignor has a right generally to control the sale thereof according to his own pleasure from time to time, if no advances have been made or liabilities incurred on account thereof; and the factor is bound to obey his orders. This arises from the ordinary relation of principal and agent. If, however, the factor makes advances, or incurs liabilities on account of the consignment, by which he acquires a special property therein, then the factor has a right to sell so much of the consignment as may be necessary to reimburse such advances or meet such liabilities, unless there is some existing agreement between himself and consignor which controls or varies this right. Thus, for example, if contemporaneous with the consignment and advances or liabilities there are orders given by the consignor, which are assented to by the factor, that the goods shall not be sold until a fixed time, in such a case the consignment is

[1] Maynard v. Pease, 99 Mass. 555; Anstell v. Crawford, 7 Ala. 335.

[2] Galigher v. Jones, 129 U. S. 192.

[3] Baker v. Drake, 53 N. Y. 211; Gruman v. Smith, 81 id. 25; Colt v. Owens, 90 id. 368; Wright v. Bank of Metropolis, 110 id. 237.

[4] *Post*, ch. 28.

[5] Harrison v. Glover, 72 N. Y. 451.

[6] 14 Pet. 479.

presumed to be received by the factor subject to such orders; and he is not at liberty to sell the goods to reimburse the advances or liabilities until after that time has elapsed. The same rule will apply to orders not to sell below a fixed price; unless, indeed, the consignor shall, after due notice and request, refuse to provide any other means to reimburse the factor. And in no case will the factor be at liberty to sell the consignment contrary to the orders of the consignor, although he has made advances, or incurred liabilities thereon, if the consignor stands ready and offers to reimburse and discharge such advances and liabilities. On the other hand, where the consignment is made generally without any specific orders as to the time or mode of sale, and the factor makes advances or incurs liabilities on the footing of such consignment, then the legal presumption is that the factor is intended to be clothed with the ordinary rights of factors to sell in the exercise of a [33] sound discretion at such time and in such mode as the usage of trade and his general duty require; and to reimburse himself for his advances and liabilities out of the proceeds of the sale; and the consignor has no right by any subsequent orders, given after advances have been made, or liabilities incurred by the factor to suspend or control this right of sale, except so far as respects the surplus of the consignment, not necessary for the reimbursement of such advances or liabilities." This doctrine was approved in Field v. Farrington.[1] The rule in New York is that a factor is bound to obey the subsequent instructions of his principal as to the sale, although he has made advances, unless the principal, after reasonable notice, fails to reimburse him.[2] The fact that advances have been made will not protect a factor from the consequences of neglecting to sell according to orders, unless compliance therewith would have prejudiced him.[3]

[1] 10 Wall. 141. See Weed v. Adams, 37 Conn. 378; Whitney v. Wyman, 24 Md. 134; Marfield v. Douglass, 1 Sandf. 360 (reversed, 3 N. Y. 70); Phillips v. Scott, 43 Mo. 86; Blair v. Childs, 10 Heisk. 199; Beadles v. Hartmus, 7 Baxter, 476; Butterfield v. Stephens, 59 Iowa, 596.

[2] Marfield v. Goodhue, 3 N. Y. 62; Hilton v. Vanderbilt, 82 id. 591; Casson v. Field, 52 N. Y. Super. Ct. 196.

[3] Howland v. Davis, 40 Mich. 545; Butterfield v. Stephens, 59 Iowa, 596.

§ 780. Duty to sell at certain time. Where a factor is directed to sell at a particular time, it is his duty to sell then or within a reasonable time thereafter for the best price he can then obtain. If he omits to do so the principal may treat the property as appropriated by the factor, and is entitled to recover the amount the goods could have been sold for if the order had been complied with.[1] In such a case the principal is obviously entitled to the price which would have been received if the agent had followed the instructions. So where the instructions are to hold until a certain price can be realized and the market advances to that price, but the agent has sold before, it is manifestly just to hold the agent for the difference between what he received and the limit fixed. But where the instructions fix a limit which is at the time and continues to be in advance of the market value; where the agent sells after his power to sell has ceased, and when it was his duty to forward the goods to another market, or merely to hold them, and therefore by selling in violation of instructions he may be charged with a conversion, the question at what time the value shall be estimated in the assessment of damages is one of considerable difficulty, on which there is a conflict of decision. Such cases will often differ from ordinary cases of trover in the circumstance that the defendant knew the owner's intentions and was under obligation to obey instructions to effectuate them; hence the profits or ulti- [34] mate advantage which the principal had in view, and which subsequent events showed would have been realized, were in a legal sense contemplated by the parties. But it is a question whether this should place an agent in a situation to answer by a severer standard than any wrong-doer who tortiously converts another's property, ignorant and reckless of the owner's intentions. The violation of an agent's conventional duty is no more culpable than is the violation of the owner's right of property by the other; it was the duty of

[1] Whelan v. Lynch, 65 Barb. 326; S. C., 60 N. Y. 469; Allen v. McConihe, 124 id. 342. The principal is not bound, on learning that his direction to sell has not been executed, to notify the factor that he abandons all claim to the property and will hold him responsible for its value, nor to take the property and pay the purchase price of it in order to protect the factor. Allen v. McConihe, *supra*, distinguishing Whelan v. Lynch, *supra*.

the agent to obey instructions of his principal; and it is no less the solemn duty of others to abstain from the violation of the rights of ownership. Where a factor was instructed by his principal to sell wheat on consignment at a specified price on a given day, and if not sold on that day to ship the same to New York, he was held bound to obey the instructions or be liable as for a conversion. On the day mentioned for the sale in the instructions the factor, by giving a refusal until the morning of the following day, and then perfecting the sale for the required price, was held to have violated his instructions and to have incurred that liability.[1] Upon these facts Hogeboom, J., said: "The question is one of complete indemnity to the party injured. It is not stated in terms, and perhaps not in effect, that the sale by the defendant was fraudulent or in bad faith; and therefore no damages founded specially on that ground ought to be recovered. But it is stated that the sale was without authority and in violation of instructions, and therefore every damage consequent upon such a sale should be allowed. It is not stated that the instructions to ship to New York were with a view to the *immediate* sale of the wheat on its arrival at New York, and therefore the plaintiff should not be limited to the price of the wheat immediately after it would have arrived in New York, if forwarded according to the plaintiff's instructions. But it is stated, inferentially at least, that the order to ship to New York was with a view to an ultimate sale there. . . . Perhaps, if this would involve a more restricted rule of damages than would otherwise obtain, the plaintiff is not limited to it, inasmuch as there is in the complaint an allega- [35] tion of an illegal conversion of the property entitling the plaintiff to such damages as belong to such a cause of action. . . . There is nothing in the case or in the evidence by which we can precisely ascertain what the plaintiff would have done with the property if he had retained it; and this presents one of the chief difficulties in ascertaining, in point of fact, the damages which the plaintiff has sustained. If he designed an immediate sale thereof on its arrival in New York, the price at which he could have sold it at that

[1] Scott v. Rogers, 31 N. Y. 676.

time as compared with the price which the defendant got for it, and which from a stipulation in the case we are authorized to infer has been paid over to the plaintiff, would show the loss sustained by him. But, as before stated, neither the allegations in the complaint nor the evidence in the case discloses any clear proof of an intent to make an immediate sale; and I think, as well under well settled rules of law as the reason and spirit of the case, the plaintiff ought not to be limited to such damages. He may be supposed to be reasonably conversant with the market and with the prospects of a rise in the price, which subsequent events verified. . . . If at some subsequent time, within a reasonable period after the conversion, he had notified the defendants of his election to adopt the price at that period, I think that would have fixed a reasonable and lawful standard for the estimate of damages. It would have been saying, in substance, I elect to consider the property as mine up to this period; I now elect to make a sale of it, and I hold you responsible for the present value of the property. But no such course was taken. . . . No suit was commenced until years afterwards; and it is now claimed to be the legal rule, that the aggrieved party may make price at any time after the conversion and before the trial of the cause, or, at least, that he may do so, provided the suit is commenced within a reasonable time after the conversion. . . . It is obviously a rule of doubtful justice to give to the plaintiff the whole period until the statute of limitations would attach for the commencement of his action, and the whole period intervening between the conversion and the trial to select his standard of price, without ever having given notice of his intention to adopt the price of any particular period. A much more just and equitable rule, independent of adjudications upon this question, would seem to be to allow the plaintiff some reasonable period within [36] the statute of limitations for fixing the price of the property, provided he notifies the adverse party *at the time* of such act on his part; but never to allow him unlimited liberty of selection as to the price of which he will avail himself at the trial of the cause. If he does not make and notify his election of time, then to fix the time by the day of the commencement of the action."

§ 781. Same subject. The rule adopted in this case was based on the assumed fact that the plaintiff did not intend to sell his wheat in New York at once after its arrival, and the legal right to the benefit he had impliedly reserved to himself, by his instructions, of any rise in that market which might take place in the near future; and this was construed to embrace the remainder of the season, from July 13th to November 29th, when navigation closed. The fact that he did not intend to sell immediately after the arrival of the wheat in New York was inferred apparently from the absence of proof that he intended an immediate sale. As the fact was important on the question of damages, it may admit of question whether the party asserting it, and claiming an increase of damages in consequence of it, should not have been required to prove it. The injury to the plaintiff by the sale made by the defendant was *prima facie* the difference between the amount obtained by that sale and the value of the wheat in New York when it should have arrived there, after deducting the cost of transportation.[1] Since the opinion was given from which the above extract was taken, there has been an important change declared in New York in the rule of damages for conversion, as well as for non-delivery of goods on a contract of sale where the price has been paid. In the absence of special circumstances, it is now the value of the property at the time and place of conversion, or breach of the contract, or a reasonable time after the owner has knowledge of the wrongful act, with interest.[2] And this is believed to [37] be the general rule in this country, though it does not prevail uniformly in all the states. The same rule ought to govern between principal and agent; there are the same considerations to support it.[3]

[1] Bell v. Cunningham, 3 Pet. 69; Schmertz v. Dwyer, 53 Pa. St. 335; Eby v. Schumacher, 29 id. 40; Sturgess v. Bissell, 46 N. Y. 462; Magnin v. Dinsmore, 62 id. 35; Sisson v. Cleveland, etc. R. Co., 14 Mich. 489.

[2] Baker v. Drake, 53 N. Y. 211; Ormsby v. Vermont Copper M. Co., 56 id. 623; Merchants' & T. Bank v. Farmers' & M. Nat. Bank, 60 id. 40; Wehle v. Haviland, 69 id. 448; Matthews v. Coe, 49 id. 57; Tyng v. Commercial Warehouse, 58 id. 308; Whelan v. Lynch, 60 id. 469; Wintermute v. Cooke, 73 id. 107; *ante*, § 777.

[3] See Wagner v. Peterson, 83 Pa. St. 238; Pinkerton v. Manchester R., 42 N. H. 424; vol. 1, § 105.

The special circumstances which warrant an increase of damages beyond the value at the time and place of conversion are those which on general principles justify the allowance of consequential damages; and sometimes the courts proceed on principles analogous to those which a court of equity applies to unfaithful trustees. Where property is disposed of by an agent contrary to instructions, or without authority, it is often property purchased and directed to be held for a particular purpose. When that happens, and the object is thwarted by the act or omission complained of, the injury is properly estimated with reference to the special value of the property for the particular use intended.

§ 782. Terms of sale. The acceptance of a consignment is an implied acceptance of the accompanying terms stated by the consignor. Thus where the consignor informed his factor that he had made a consignment to him, and should anticipate the avails by drawing certain bills of exchange on him, by accepting the consignment it was considered that he became bound to pay the bills; that, having failed to pay them, he was liable to the drawer for the damages and costs which he had necessarily paid by reason of the bills having been protested.[1] A factor is authorized to sell on credit where it is justified by the usages of trade, and the credit is not beyond the usual period.[2] If his instructions are to sell for cash,[3] or the sale is made on credit contrary to the usage of the place, the factor makes himself liable for the purchase price.[4] Where the principal consigns for sale without instructions and the factor sells for cash on delivery without giving credit, it is his duty to obtain payment before he allows the property to go out of his control. If, through any negligence or carelessness on his part, or as a matter of favor to the vendee, he is allowed to get possession without making pay-

[1] Urquhart v. McIver, 4 Johns. 103.

[2] Byrne v. Schwing, 6 B. Mon. 199; De Lazardi v. Hewitt, 7 B. Mon. 697; Greely v. Bartlett, 1 Me. 172; Clark v. Van Northwick, 1 Pick. 343; Forrestier v. Bordman, 1 Story, 43; Daylight Burner Co. v. Odlin, 51 N. H. 56; Story on Agency, §§ 60, 110; Mechem on Agency, § 990; Pinkham v. Crocker, 77 Me. 563. In this case the rule applied is that it will be presumed, nothing appearing to the contrary, that a credit sale is according to usage.

[3] Hall v. Storrs, 7 Wis. 253; Catlin v. Smith, 24 Vt. 85; Sheffield v. Linn, 62 Mich. 151.

[4] Hardin v. Ely, 68 Cal. 522.

[38] ment, the factor is liable to the consignor for the price.[1] So if, on the expiration of a credit, he extends it without the assent of his principal, he is responsible for any loss which results from such extension.[2] In selling on credit the factor must exercise skill and prudence; and if without consulting his principal he gives credit to a customer known to be, or whom due inquiry would have shown to be, of doubtful responsibility, he will be chargeable with any consequent loss.[3] Factors may conduct business either wholly or in part without disclosing their principals, take notes, judgments and insurance policies in their own names, without being chargeable with conversion, or those forms having the effect to exclude their principals.[4] They are entitled to a general lien on the goods or their proceeds in their hands for their demands against the principal, not only for commissions, advances and disbursements, but for their liabilities in behalf of their principals not yet matured.[5]

§ **783. Guaranty commission.** Where a factor receives a *del credere* or guaranty commission there is a diversity of views as to his undertaking: whether it is absolute, as that of the primary debtor, to pay the principal the amount to which he is entitled for the goods sold on the expiration of the buyer's credit, irrespective of his solvency or insolvency;[6] or whether it is a guaranty which binds the factor like a surety to pay on the purchaser's default.[7] On either view when the event tran-

[1] Deshler v. Beers, 32 Ill. 368. See Stollenwerck v. Thacher, 115 Mass. 224; Phillips v. Moir, 69 Ill. 155; Morrison v. Cole, 30 Mich. 102; Johnson v. Totten, 3 Cal. 343; Lubert v. Chauviteau, id. 458; Fick v. Runnels, 48 Mich. 302.

[2] Hairston v. Medley, 1 Gratt. 98; Amory v. Hamilton, 17 Mass. 103.

[3] Ernest v. Stoller, 5 Dill. 438; Howe v. Sutherland, 39 Iowa, 484; Foster v. Waller, 75 Ill. 464; Burrill v. Phillips, 1 Gall. 360; Housel v. Thrall, 18 Neb. 484. See Gorman v. Wheeler, 10 Gray, 362.

[4] Story on Agency, § 111.

[5] Stevens v. Robins, 12 Mass. 180; Story on Agency, §§ 351, 377, 378.

[6] Sherwood v. Stone, 14 N. Y. 267; Wolfe v. Koppel, 2 Denio, 368; 5 Hill, 458; Cartwright v. Greene, 47 Barb. 9; Grove v. Dubois, 1 T. R. 112; Bize v. Dickason, id. 285.

[7] Gall v. Comber, 7 Taunt. 558; Hornby v. Lacy, 6 M. & S. 566; Peele v. Northcote, 7 Taunt. 478; Morris v. Cleasby, 4 M. & S. 566; Story on Agency, § 215; Thompson v. Perkins, 3 Mason, 232; Mechem on Agency, § 1014. See Bradley v. Richardson, 23 Vt. 721; S. C., 2 Blatch. 343; Lewis v. Brehme, 33 Md. 412; Muller v. Bohlens, 2 Wash. C. C. 378; 1 Pars. on Cont. 92.

spires which entitles the principal to apply to the factor for payment, recovery may be had against him for the goods [39] sold, of the amount which would be recoverable in an action for money had and received if the purchaser had in fact paid.[1] If the money be paid to the factor that generally fulfills the guaranty, which does not extend to assure its safe arrival to the hands of the principal, though such factor is bound to the care and prudence due from an agent in sending it.[2] But if the guaranty evinces an intention to cover a safe remittance the responsibility may be thus enlarged.[3]

§ **784. Rendering accounts.** Keeping and rendering accounts, and giving the principal seasonable information concerning his interests, are especially duties of this class of agents,[4] and they are very strictly responsible for the [40] truth of their accounts and reports.[5] In Pennsylvania it has been held that where the information transmitted is such as may induce the principal, in the adaptation of his operations to his means, to rely on an outstanding debt as a fund on which he may confidently draw, the agent makes the debt his own. The representation has the effect of an estoppel.[6] In that case the agent credited the principal in his annual account current with a debt outstanding that afterwards proved bad, and because the agent neglected to give notice of that fact within a reasonable time he was held responsible as an insurer of it. There would seem to be none of the qualities of an estoppel in the facts of such a case, and no ground for making the agent so liable. He incurred no liability for selling on credit, because he sold to a purchaser then in good

[1] Swan v. Nesmith, 7 Pick. 220; Wolfe v. Koppel, 5 Hill, 458; S. C., 2 Denio, 368. See Dunnell v. Mason, 1 Story, 543.

[2] 1 Pars. on Cont. 92; Lucas v. Groning, 7 Taunt. 164; Muller v. Bohlens, 2 Wash. C. C. 378; Heubach v. Rother, 2 Duer, 227; Leverick v. Meigs, 1 Cow. 654. But see Lewis v. Brehme, 33 Md. 412.

[3] McKenzie v. Scott, 6 Bro. P. C. 280.

[4] Arrott v. Brown, 6 Whart. 9; Brown v. Arrott, 6 W. & S. 402; Elliott v. Walker, 1 Rawle, 126; Forrestier v. Bordman, 1 Story, 43; Clark v. Moody, 17 Mass. 145.

[5] If a factor informs his principal of the sale of his property and does not comply with a request for details, he thereby raises a presumption which authorizes the strictest construction of the evidence against him as to amount, value and price. Bate v. McDowell, 49 N. Y. Super. Ct. 106.

[6] Harvey v. Turner, 4 Rawle, 223; Arrott v. Brown, 6 Whart. 9. See *ante*, § 769.

credit, or apparently so; he credited the debt as one against such a purchaser, but not acting on a guaranty commission he did not insure its collection. His omission to give notice of a subsequent failure was mere negligence, as the insolvency is not considered as impeaching the good faith or prudence of the sale. Such negligence, on general principles, rendered him liable for the actual injury resulting there- [41] from,[1] by the principal not having early information to warn him against any operations proceeding upon that credit as a fund. The existence of the credit is a circumstance in the situation requiring greater diligence in communicating any fact affecting it; it is also a fact material on the question of damages, if in the absence of notice the principal was subjected to any sacrifice by acting upon such credit as real. The assumption that such negligence caused a loss equal to the amount of the debt, and that the agent should therefore be responsible for it as an insurer, independent of the consequences in the particular case, is treated as an exception in that state to the general rule and has been criticised as such.[2] Whether a factor assumes an uncollected debt on report of which he gives the principal credit, assumes liabilities, or makes payments, is a question of intention. When the factor pays or gives his note or a credit to his principal for such a debt in a final account, it has been considered that he intended to make the debt his own.[3] But giving credit to the principal for unmatured debts in an account current, or giving notes made payable when funds from such debts are expected, is not a conclusive assumption of them by the factor; such credit is but a liquidation of the account, and does not alter his responsibility.[4] He is entitled to charge back to the principal such of the credited debts as prove bad,[5] or to defend against the principal's action on a note given for such credits in the same event on the ground of a failure of consideration.[6]

[1] Elliott v. Walker, 1 Rawle, 126.

[2] 1 Am. L. Cases, 661, note to Goodenow v. Tyler.

[3] Oakley v. Crenshaw, 4 Cow. 250. See Hapgood v. Batcheller, 4 Met. 573; Robertson v. Livingston, 5 Cow. 473; Harvey v. Turner, 4 Rawle, 223.

[4] Robertson v. Livingston, 5 Cow. 473; Reily v. Lamar, 2 Cranch, 343; Hapgood v. Batcheller, 4 Met. 573.

[5] Reily v. Lamar, *supra*.

[6] Hapgood v. Batcheller, *supra*.

§ **785. Remitting funds.** A factor or consignee, after apprising his principal of the sale of goods consigned to him, may wait to receive directions as to the mode of remitting the net proceeds; he is not liable to an action until he is in some default in remitting or paying according to the orders of his principal.[1] He is not liable for interest until he is [42] in default.[2] He must make remittance in the manner directed by the principal. If instructed to remit by draft, and he remits in a different manner, and the money is lost, he must bear the loss.[3] In February, 1837, S., a resident of New York, received a sum of money of H., who resided in Liverpool, and was directed to remit by purchasing and forwarding a bill of exchange. S. thereupon purchased a bill on his own credit at a premium of eleven and one-half per cent., which he forwarded to H. at ten per cent., that being the rate at which similar bills were then selling for cash. H. kept the bill until November, 1839, having in the meantime made various unsuccessful efforts to collect it, and was then first informed that it had not been purchased with his money. He immediately wrote to S. that the bill would not be regarded as payment, and shortly afterwards brought an action for money had and received, and it was held that the action was maintainable.[4] If a factor refuses to deliver goods in his possession on the termination of his agency he is chargeable with their market value at the time of his refusal.[5]

§ **786. Liability of brokers.** Brokers constitute a distinct class of agents, and are employed in a great variety of commercial transactions. Breaches of their duty are compensated on the same fundamental rules as apply between principal and agent generally. Though, strictly, a broker is a mere negotiator of bargains between other parties, without any trust or bailment of the subject of his agency, still the name is sometimes applied to agents who have actual or symbolical possession of the thing which is the subject of their negotia-

[1] Ferris v. Paris, 10 Johns. 285; Halden v. Crafts, 4 E. D. Smith, 490; Cooley v. Betts, 24 Wend. 203; Brink v. Dolsen, 8 Barb. 337; Greentree v. Rosenstock, 61 N. Y. 583.

[2] Ellery v. Cunningham, 1 Met. 112; Pope v. Barrett, 1 Mason, 117. See Fulkerson v. White, 22 Tex. 674.

[3] Foster v. Preston, 8 Cow. 198; Kerr v. Cotton, 23 Tex. 411.

[4] Hays v. Stone, 7 Hill, 128.

[5] Monnet v. Merz, 127 N. Y. 151.

tions.[1] A broker must make full satisfaction to his principal for any loss sustained by his fault; the principal has recourse upon him for damages which will be equivalent in amount to the advantages which would have resulted from a due discharge of duty. Thus, a loan broker who undertook to obtain ample security for his principal's money by mortgage of real estate, and took a mortgage which proved insufficient in [43] consequence of prior incumbrances, was held liable for the loss.[2] So we have seen an insurance broker who neglects his duty to effect insurance, or performs that duty defectively, is made liable in respect to the loss in place of the insurance as the insurer would have been had the policy been duly effected.[3] A house agent who charges a commission to a landlord for letting his house is bound to due and reasonable care in ascertaining the solvency of the tenant; and if in default in this respect, to make compensation for the rent lost by the tenant's insolvency.[4]

Stock brokers are employed in respect to stocks, bonds and things of that nature to make sales and purchases very nearly as factors are in respect to merchandise, and their liabilities are governed by the same principles. They are as agents bound to obey the instructions of their customers, and must not only answer for any loss or damage which results from any deviation, but may be made liable as for conversion whenever they make any disposition of the subjects of their agency contrary to their duty. Where a certificate of shares in a corporation was intrusted to a broker with directions to sell under circumstances specified, it was held that he had no right to transfer the shares for any other purpose to the name of another person or to his own name; and that evidence of a custom or usage among brokers so to do was not admissible; that the owner might treat such a transfer as a sale, and recover the market price of the shares on the day of the transfer, although the broker afterwards tendered to him another certificate of an equal number of such shares.[5] And he

[1] See Story on Agency, § 32; Mechem on Agency, § 13.

[2] Shipherd v. Field, 70 Ill. 438; McFarland v. McClees, 5 Atl. Rep. 50; Bank of Owensboro v. Western Bank, 13 Bush, 526; Bannon v. Warfield, 42 Md. 22; Whitney v. Martine, 88 N. Y. 535; Rochester v. Levering, 104 Ind. 562, 576.

[3] *Ante*, § 772.

[4] Heys v. Tindall, 1 B. & S. 296.

[5] Parsons v. Martin, 11 Gray, 111;

is subject to the same rule of damages if he convert stock or bonds deposited with him as a pledge or security.[1] Where a broker undertakes to sell stock short for a customer and to carry it on the payment of margin and commission, he is bound to make both a sale and a purchase. Every short sale is made by the seller with the contemplation of covering it by a purchase when the market shall have declined; and for the purpose of making a profit by the decline. When [44] the broker has made the short sale, delivered the stock to the purchaser and received the price, he is said to carry it for his principal until he is bound by his contract to purchase stock to cover it, and the margin is the broker's security against any loss by advance in the market during that time. If this time is not fixed by the contract, the law implies from his agreement to make a short sale for his customer on a commission, that it is part of the bargain that the broker shall carry the stock for a reasonable time, for in no other way can the object of the parties be effectuated. A short sale to be covered immediately would be a very idle proceeding. The broker can, however, close the transaction at any time if the margin upon his demand and notice is not kept good. After he has carried the stock for a reasonable time, thus affording his customer an opportunity to realize his expectations, he may, upon proper notice, terminate his relations with him. He is his agent, and must obey his orders both in making the sale and covering it. If he acts without orders, or against orders, he commits a breach of duty, and becomes liable, like any other agent, for the loss he may occasion his principal. Where a broker, after a short sale of stock made for his principal, without notice to him, or any default on his part, or any authority from him, bought in the stock and covered the short sale, and afterwards, on receiving the principal's direction to cover the short sale, did not, as he could not, comply, having previously disabled himself from doing so by his own purchase, he was held liable to his principal for this breach of duty for the difference between the price at which the stock was sold short and the market price on the day when the or-

Taylor v. Ketchum, 35 How. Pr. 289; S. C., 5 Robt. 507; Taussig v. Hart, 49 N. Y. 301.

[1] Wagner v. Peterson, 83 Pa. St. 238; Neiler v. Kelly, 69 id. 403.

der was received to purchase with interest, deducting commissions and revenue stamps.[1] If a broker violates his contract to carry grain for his principal by selling without notice or demand for margins and at a sacrifice, he cannot recover his commissions and advances in an action upon the contract, even subject to the principal's right to recoup damages,[2] and the latter may, under the common counts in *assumpsit*, recover all moneys advanced as margins.[3]

A broker purchased stock for a customer, not as an investment, but upon speculation; the latter furnishing a small amount as a margin, and the former supplying the residue. It was held that if, upon being advised of an unauthorized sale of the stock, the principal desires further to prosecute the adventure, [45] he has a right to disaffirm the sale and to require the broker to replace the stock, and upon failure or refusal to do this the remedy of the principal is to replace it himself; and the advance in the market price from the time of the sale up to a reasonable time to replace it, after notice of the unauthorized sale, affords a complete indemnity and is the proper measure of damages.[4] This rule applies whether the broker neglects to execute orders for the sale or the purchase of stocks.[5] In California it is held that if a broker binds himself to make a sale of property at a specified price and sells for less, he is liable for the difference between the value of the property at the expiration of the time in which the sale was to be made and the price he was to sell for.[6] But in Illinois the damages are measured by the difference between the

[1] White v. Smith, 54 N. Y. 522; Knowlton v. Fitch, 48 Barb. 593; 52 N. Y. 288; Cothran v. Ellis, 107 Ill. 413; Denton v. Jackson, 106 id. 433.

In Campbell v. Wright, 118 N. Y. 594, brokers sold wheat short for a customer on a margin and bought in without authority on his account. He repudiated the purchase and directed them to buy for him at a price specified, which they did not do. The purchase might have been made at the price named. It was ruled that plaintiff's damages were the amount the brokers would have owed him had they made the purchase.

[2] Ball v. Clark, 28 Fed. Rep. 179.

[3] Larminie v. Carley, 114 Ill. 196; Jones v. Marks, 40 id. 313.

[4] Baker v. Drake, 53 N. Y. 211; Markham v. Jaudon, 41 id. 235; Gruman v. Smith, 81 id. 25; Colt v. Owens, 90 id. 368; Wright v. Bank of Metropolis, 110 id. 237; Galigher v. Jones, 129 U. S. 193.

[5] Galigher v. Jones, 129 U. S. 193.

[6] Dunn v. Mackey, 80 Cal. 104.

highest attainable selling price and the amount guarantied, with interest from the time the sale was to have been made.[1]

§ 787. Damages for acting as agent without or in excess of authority. A party may suffer injury from the assumption by another to act as his agent without authority, as well as by acts of an agent contrary to private instructions, but in the exercise of such apparent authority that the principal cannot repudiate the acts done. In such cases the pretended or disobedient agent is liable to the principal for the loss he suffers from such misconduct. Where a person falsely pretending to be the agent of the owner of land to sell the same executed a contract for its sale, which was recorded, and upon which the purchaser brought suit for specific performance, thereby putting the owner to trouble and expense, he was held liable to the latter in an action on the case for the damages sustained by him in defending the suit.[2] So where an agent so misconducted that his principal was obliged to go into chancery to be relieved from his act, the agent was required to pay the costs.[3] But where the principal is not bound and has the op-

[1] Plumb v. Campbell, 129 Ill. 101, 110.

[2] Philpot v. Taylor, 75 Ill. 309.

If an agent delivers a deed in violation of his instructions, and the land is conveyed to an innocent purchaser, the former is liable for the value of the land at the date of such delivery, and interest thereon to the time of trial. Triggs v. Jones, 46 Minn. 277.

[3] Respass v. Morton, Hard. (Ky.) 226.

In a recent English case the plaintiff was seized in fee-simple of hereditaments; he employed the defendant as his solicitor to procure money on a mortgage thereof. A first mortgage was given a third person, and the defendant took a second mortgage which he himself prepared, and which contained a power of sale without the usual condition that the sale should not be made except in default of payment. A sale was made without notice to the mortgagor, although at a price which was not inadequate. The court found that there was no proof that the plaintiff had had the peculiarity of the form of the power of sale properly explained to him; and awarded him damages which included, first, such costs as he had been put to by reason of the sale being made without his knowledge; second, a sum estimated to cover the costs which he would be put to in making new investments of the money realized from the sale in property of a similar description to that which was sold; third, a sum to represent the probable prospective increase of value of the hereditaments since the time of sale to the trial; fourth, the difference between the solicitor and client costs which he incurred and the party and party costs which he was entitled to recover from the defendant. Cockburn v. Edwards, 16 Ch. Div. 393 (1880).

tion to repudiate the act done in his behalf, he will ratify it as to the agent by ratifying the act as to the other party, and will thus exonerate the agent from liability for acting without or in excess of his authority.[1] An agent who has employed a sub-agent under such circumstances that the latter is responsible directly to him, instead of the principal, is as to such sub-agent a principal; he may sue in his own name for any breach of [46] duty by such sub-agent; he will be entitled to recover for the benefit of his principal such damages as he has suffered or will suffer therefrom; or to an amount which will indemnify himself if the principal has recovered from him the damages resulting from such sub-agent's fault,[2] including costs where it was reasonable to defend and the defense was conducted in a judicious manner.[3]

Section 2.

AGENT AGAINST PRINCIPAL.

§ 788. Agent's rights. An agent is not only entitled to compensation for his services in the business of the agency, but also to be reimbursed moneys paid by him therein, and to be indemnified in respect to any liabilities he has incurred within his authority to third persons in behalf of his principal, or by obeying his lawful orders. The subject of compensation for services has been sufficiently discussed in the chapter on that subject.[4]

§ 789. Reimbursement of expenditures. The agent's right to be repaid moneys he has expended for his principal pursuant to his authority rests upon a clear legal ground: they are paid at the principal's request and the law implies a duty and [47] promise to refund.[5] Thus where a principal orders his

[1] Winpenny v. French, 18 Ohio St. 469; Woodward v. Suydam, 11 Ohio, 360; Ætna Ins. Co. v. Sabine, 6 McLean, 393; Bray v. Gunn, 53 Ga. 144; Towle v. Stevenson, 1 Johns. Cas. 110; Beall v. January, 62 Mo. 434; Nesbitt v. Helser, 49 Mo. 383; Bean v. Drew, 15 La. Ann. 461; Watson v. Bigelow, 47 Mo. 413.

[2] Van Wart v. Woolley, 5 Dowl. & R. 374; Story on Agency, § 201; Mainwaring v. Brandon, 8 Taunt. 202. See Allen v. Suydam, 20 Wend. 321, 328.

[3] Mors le Blanch v. Wilson, L. R. 8 C. P. 227. See vol. 1, § 82; Baxendale v. London, etc. Ry. Co., L. R. 10 Exch. 35; Richardson v. Dunn, 8 C. B. (N. S.) 655.

[4] Vol. 2, § 440 *et seq.*

[5] Ramsay v. Gardner, 11 Johns. 439; Packard v. Lienow, 12 Mass. 11;

agent to purchase a commodity and to draw on him for the amount, when the agent has complied with such direction the principal is bound to accept and pay his bills; if he fails to do so, the agent is entitled to recover from him not only the amount of the bills, but damages and costs of protest. If the agent has paid these he may recover upon a count for money paid and the bills may be given in evidence on that count.[1] This right of action will not be affected if the agent sells the commodity without orders after the protest of the bills, although he has rendered no account of the sales.[2] An agent who insures his principal's property may recover the premiums paid, although the policies were voidable because issued by himself as the agent of the insurer.[3]

§ 790. Factor's right to reimburse himself by sales. Where the goods or assets of the principal in the hands of the factor or agent are a primary fund for the payment of moneys due him, it is necessary for him to show that such fund is exhausted, and the remedy against the principal personally is limited to the deficiency.[4] But in Massachusetts it has been held [5] that advances made by a factor on receipt of goods consigned to him for sale are presently due, and suit may be brought therefor without waiting for the avails of the consignment. The principal consigned to a factor parcels of

Ruffner v. Hewitt, 7 W. Va. 585; Powell v. Newburgh, 19 Johns. 284; Elliott v. Walker, 1 Rawle, 125; D'Arcy v. Lyle, 5 Bin. 441; Brown v. Clayton, 12 Ga. 564; Warren v. Hewett, 45 id. 501; Wade v. Roberts, 6 Humph. 124; Shearman v. Akins, 4 Pick. 283; Yeatman v. Corder, 38 Mo. 339; Bastable v. Denegre, 22 La. Ann. 124; Greely v. Bartlett, 1 Me. 172; Vandyke v. Brown, 8 N. J. Eq. 657; Sentance v. Hawley, 13 C. B. (N. S.) 458; Capp v. Topham, 6 East, 392; Blackmar v. Thomas, 28 N. Y. 67; Hidden v. Waldo, 55 N. Y. 294; Gihon v. Stanton, 9 N. Y. 476; Monnet v. Merz, 127 N. Y. 151; Story on Agency, § 335.

In Moore v. Remington, 34 Barb. 427, it was held that where an agent is entitled to charge for expenses he may recover for the fair worth of his board, even though he actually paid nothing for it. But the better authority is to the effect that an agent has no claim for reimbursement until he has actually made payment. Brand v. Henderson, 107 Ill. 141.

[1] Riggs v. Lindsay, 7 Cranch, 500.

[2] Id.

[3] Rochester v. Levering, 104 Ind. 562, 572.

[4] Corlies v. Cumming, 6 Cow. 181; Montgomerie v. Ivers, 17 Johns. 38; Gihon v. Stanton, 9 N. Y. 476; Hidden v. Waldo, 55 N. Y. 294. See Peisch v. Dickson, 1 Mason, 9; Barrill v. Phillips, 1 Gall. 360.

[5] Beckwith v. Sibley, 11 Pick. 482.

cotton for sale, and immediately drew drafts on him which were accepted and paid. The cotton was sold by him to persons in good credit for their notes payable to him on time. Before their maturity some of the makers became insolvent, and the factor brought suit for the moneys advanced on the drafts. The court said, by Shaw, C. J., that "the payment of the drafts by the plaintiffs, and the time of their payment, were not at all dependent upon the sale of the cotton. The [48] consignment of the cotton for sale, upon which the plaintiffs would have a *lien*, not only for the repayment of the amount of the particular drafts, but for their general balance, no doubt emboldened the consignors to draw more freely upon their correspondents than they otherwise would, and operated as an inducement to the latter to accept and pay their drafts. But that circumstance has very little tendency to prove that the plaintiffs relied exclusively upon that fund, or had agreed to await reimbursement until such particular fund was realized or had failed. . . . The legal relation of the parties then was this: The defendants were indebted to the plaintiffs for money due presently; they had a lien on the cotton before the sale and on the notes taken for it after the sale as security for the debt due them. And although they took the notes in their own name, it was in trust for the consignors; the property in the notes remained beneficially in the defendants and the plaintiffs had only a lien.[1] But where a creditor has a collateral security for his debt he is not confined to rest exclusively upon such security for repayment; but notwithstanding the pledge or collateral security may look to the general credit of the debtor; and have his action unless there is some agreement or contract, express or implied, to give time or to look to a particular fund. In the present case the burden is upon the defendants, and no such agreement is proved, and no usage, course of dealing or other circumstances from which such a contract can be implied." In a later case[2] the defendant applied to the plaintiffs to make and they made sundry advances in cash and in their acceptances to enable him to purchase sheepskins upon an agreement that he would

[1] Denston v. Perkins, 2 Pick. 86; Chesterfield Manuf. Co. v. Dehon, 5 Pick. 7.

[2] Upham v. Lefavour, 11 Metc. 174.

pull the wool and consign the same as security for such advances, and for sale upon a guaranty commission. Hubbard, J., said: "The facts, as they are stated, do not furnish evidence that the plaintiffs agreed to give the defendant credit until the property consigned to them was sold. The plaintiffs stand like other commission merchants. They have no right, in the absence of directions, immediately to sell the goods consigned to them, if the interest of the consignors will be sacri- [49] ficed by such a sale. The receiving of the goods under an agreement like the present carries with it, also, the obligation to give a reasonable credit; and to force the goods into market as soon as received, without regard to the interests of the owner, and merely to turn them into money as early as practicable, would be such a breach of duty as to expose them to a claim of damages if the goods were sacrificed by the sale. On the other hand, they are only required to give a reasonable time, and then, if the goods are not sold, they may call for payment or further security, and may sue for the amount due them."

§ 791. Agent may charge for exchange. Under an agreement to collect debts and apply the proceeds to the payment of a principal's indebtedness to the agent, he is entitled to deduct the rate of exchange between the place of collection and the place where the debt from the principal is payable, and also his reasonable commissions.[1]

§ 792. How right to reimbursement affected by mode of doing business. Where an agent employed to subscribe stock in a railroad company for his principal and in his name subscribed and paid calls in his own name, it was held that the principal was not bound; and on tender of a transfer of the certificate the agent was not entitled to recover the money paid; he should have pursued the instructions and subscribed in his principal's name.[2] But where the order was general to buy stock for the principal, and the brokers bought, paid for it, and took the certificate in their own names, after an offer to transfer the certificate, a demand of payment and neglect by the principal to pay, they were held entitled to recover the price paid, and not merely the difference between that and

[1] Howe v. Wade, 4 McLean, 319. [2] Shrack v. McKnight, 84 Pa. St. 26.

the market value of the stock on the day of their demand.[1] Where the principal is liable for moneys paid by the agent, he is liable also for interest, if a stipulation therefor exists or may be presumed from the nature of the business or the usage [50] of trade; or if he is in default in the performance of his obligation to reimburse the agent.[2] To give rise to this obligation to reimburse on the part of the principal the disbursement must be within the agent's authority, and the money must have been reasonably and in good faith paid.[3] He should pursue his principal's instructions, and cannot recover for extra expenses caused by departing therefrom.[4]

§ 793. Agent's right to indemnity. An agent is entitled to indemnity for losses or damages sustained in transacting the business of his agency, and against liabilities incurred therein. Where an agent acting *bona fide* and without fault in the proper service of the principal is subjected to expense, or sued on any contract made by him, or for any act done pursuant to his authority, the law implies that the principal will indemnify and reimburse him.[5] This is the general principle arising from the relation of the parties, and applies not

[1] Giddings v. Sears, 103 Mass. 311. See Dodge v. Tilston, 12 Pick. 328.

[2] Story on Agency, § 338; vol. 1, §§ 326, 329.

[3] Ruffner v. Hewitt, 7 W. Va. 585.

In Fuller v. Ellis, 39 Vt. 345, the plaintiff had hired the defendant, who was skilled in the management of horses, to take two horses to Richmond, Va., for exhibition at the state fair, and to sell them, if possible, for the most he could get for them. While at Richmond he sold one, and after ineffectual efforts to dispose of the other, without consulting his principal, he took it to Charleston, S. C., and finally succeeded in selling it; but his expenses amounted to $145.23. On account of the unsettled state of the country, it was impossible for the defendant to bring back the horse after he reached Wilmington, N. C. It was held that the defendant exceeded his instructions, and he was not entitled to pay for his expenses after he left the place to which his instructions directed him to go. And regarding him as a general agent he did not exercise a sound discretion and act with common prudence, and on that ground was not entitled to recover. Brown v. Clayton, 12 Ga. 564; Story on Agency, § 336.

[4] Ranger *v.* Harwood, 39 Tex. 139; Keys v. Westford, 17 Pick. 273; Carr v. Hills Archimedian Lawn Mower Co., 12 Daly, 332; Godman v. Meixsel, 65 Ind. 32; Maitland v. Martin, 86 Pa. St. 120.

[5] Powell v. Newburgh, 19 Johns. 284; D'Arcy v. Lyle, 5 Bin. 441; Stocking v. Sage, 1 Conn. 519; Saveland v. Green, 36 Wis. 612; Whitehead v. Darling, 5 S. W. Rep. 356 (Ky.); Guirney v. St. Paul, etc. Ry. Co., 43 Minn. 496. See Evansville, etc. Ry. Co. v. McKee, 99 Ind. 519.

only to entitle him to recover full compensation where the loss has already happened, but also, *quia timet*, in giving him the right to retain funds or securities as indemnity for outstanding liabilities which have not matured or been enforced.[1] To afford ground for compensation the loss must occur [**51**] without the agent's fault,[2] naturally and directly from the execution of the agency; this must be the cause and not merely the occasion of the damage.[3] Thus, if he is compelled to pay damages to a third person for a false representation of the quality of the principal's goods, made innocently in pursuance of directions from the principal, and in consequence of a deception practiced by him,[4] or for converting the property of a third person by direction of the principal, claiming to be the owner, the agent having no notice of any adverse title,[5] or to pay the price of property purchased for his principal and the expenses of a suit consequent upon the purchase,[6] the injury proceeds from the execution of the agency, and the agent is entitled to indemnity from the principal. An agent may pay damages for which he is clearly liable without being sued therefor, and recover to the extent that they were actually sustained, but no further, although he may have paid more.[7] He may also discharge a liability for which his principal is liable without compulsion and recover therefor.[8]

§ **794. No indemnity for unlawful act.** If one request or direct another to do an act which he knows at the time will be a trespass, and promise to indemnify him, the promise is void; but if the person who does the act at the instance or by the command of another does not know at the time that he is committing a trespass, the promise of indemnity is valid.[9]

[1] Id.; Story on Agency, § 339; Bastable v. Denegre, 22 La. Ann. 124; Drummond v. Humphreys, 39 Me. 347; Poole v. Adkisson, 1 Dana, 115; Yeatman v. Corder, 38 Mo. 337; Howe v. Buffalo, etc. R. Co., 37 N. Y. 297; Mechem on Agency, § 653.

[2] Elliott v. Walker, 1 Rawle, 126.

[3] Duncan v. Hill, L. R. 8 Exch. 242.

[4] Paley on Agency, 152, 301.

[5] Adamson v. Jarvis, 4 Bing. 66; Coventry v. Barton, 17 Johns. 142; Avery v. Halsey, 14 Pick. 174; Allaire v. Ouland, 2 Johns. Cas. 54.

[6] Clark v. Jones, 16 Lea (Tenn.), 351.

[7] Saveland v. Green, 36 Wis. 612.

[8] Curry v. Curry, 87 Ky. 667.

[9] Coventry v. Barton, 17 Johns. 142; Betts v. Gibbins, 2 A. & E. 57; Adamson v. Jarvis, 4 Bing. 66, 72; Ives v. Jones, 3 Ired. L. 538; Hays v. Stone,

§ 795. Measure of recovery. If a third person has recovered a judgment against the agent which he has satisfied, the amount which he has been so compelled to pay is the measure of damages in his action for recovery over against the principal.[1] In such case, if the third person so recovering judgment against the agent accepts his note in discharge of it, it is equivalent to payment for the purpose of recovery against the principal.[2]

Section 3.

THIRD PERSONS AGAINST AGENT.

[52] **§ 796. When agent liable to third persons.** In matters of contract a third person may in many cases recover against one who is in fact an agent acting within the scope of his authority, as well as against one exceeding his authority, or acting as agent without being such at all. Where one who is in truth an agent does not disclose his principal, but makes a contract in his own name; or discloses his principal, and yet contracts in his own name because credit is given to him personally, or his personal responsibility is relied upon, he becomes the principal, and his agency in no way affects his liability. There is another class of cases where written contracts are made by persons assuming to be agents, but who have not the requisite authority, and the contract is so framed that when the name of the principal and the words indicating agency are rejected because not used or inserted by authority, a complete contract remains in the name of the agent. In such cases the pretended agent has been held liable as the principal. The cases, however, are in conflict on the question whether the agent can be made liable as principal on such an instrument.[3] But where he is treated as such, and liable accordingly, the element of agency is wanting as in the preceding class.

7 Hill, 128; Howe v. Buffalo, etc. R. Co., 37 N. Y. 297.

An agent employed to buy "futures" cannot recover his advances if the dealings are void as gambling transactions. Kirkpatrick v. Adams, 20 Fed. Rep. 287; National Bank of Augusta v. Cunningham, 75 Ga. 366; Irwin v. Williar, 110 U. S. 499.

[1] Howe v. Buffalo, etc. R. Co., 37 N. Y. 297; Kip v. Brigham, 6 Johns. 158; Blasdale v. Babcock, 1 id. 17. See vol. 1, § 83.

[2] Howe v. Buffalo, etc. R. Co., *supra*.

[3] Story on Agency, § 204*a* and notes.

A person who assumes to act as an agent without authority, or in excess thereof, is liable in some form of action to the person with whom he deals in that assumed character.[1] And he is responsible not only where he so assumes to [53] act, and fraudulently asserts that he has authority, but also where he misleads by knowingly acting without authority, although intending no fraud.[2] So, also, where he undertakes to act as an agent in good faith believing that he has due authority when he has not, and acts under an innocent mistake.[3] Mr. Baron Alderson, in Smout v. Ilbery, said: "There is no doubt that in the case of a fraudulent misrepresentation of his authority with an intention to deceive, the agent would be personally responsible. But, independently of this, which is perfectly free from doubt, there seems to be still two other classes of cases in which an agent who, without actual authority, makes a contract in the name of his principal, is personally liable even where no proof of such fraudulent intention can be given. First, where he has no authority and knows it, but nevertheless makes the contract as having such authority. In that case, on the plainest principles of justice, he is liable. For he induces the other party to enter into the contract on what amounts to a misrepresentation of a fact peculiarly within his knowledge; and it is but just that he who does so should be considered as holding himself out as having competent authority to contract, and as guarantying the consequences arising from the want of such authority. But there is a third class in which the courts have held that where a party making the contract as agent *bona fide* believes that such authority is vested in him, but he has in fact no such authority, he is still personally liable. In these cases, it is true, the agent is not actuated by any fraudulent motives; nor has he made any statement which he knows to be untrue. But still his liability depends on the same principles as before. It is wrong, differing only in degree, but not in its essence, from the former case,

[1] Kroeger v. Pitcairn, 101 Pa. St. 311; Baltzen v. Nicolay, 53 N. Y. 467; Mechem on Agency, § 543; Paley on Agency, by Dunlop, p. 387; Story on Agency, § 264.

[2] Id.; Downman v. Jones, 9 Jurist, 454–458.

[3] Story on Agency, § 264; Smout v. Ilbery, 10 M. & W. 1, 9, 10; 2 Sm. Lead. Cas. 222–227, in note to Thompson v. Davenport, 9 B. & C. 78; McCurdy v. Rogers, 21 Wis. 197; Mechem on Agency, § 545; Trust Co. v. Floyd, 47 Ohio St. 525.

to state as true what the individual making such statement does not know to be true, even though he does not know it to be false, but believes, without sufficient grounds, that the statement will ultimately turn out to be correct. And, if that wrong [54] produces injury to a third person who is wholly ignorant of the grounds on which such belief of the supposed agent is founded, and who has relied on the correctness of his assertion, it is equally just that he who makes such assertion should be personally liable for its consequences. On examination of the authorities, we are satisfied that all the cases in which an agent has been held personally responsible will be found to arrange themselves under one or the other of these classes. In all of them it will be found that he has either been guilty of some fraud, has made some statement which he knew to be false, or has stated to be true what he did not know to be true; omitting, at the same time, to give such information to the other contracting party as would enable him, equally with himself, to judge as to the authority under which he proposed to act."[1]

A public officer who does not interpose his own credit is not liable on a contract executed by him on behalf of the state, even in cases where he might have been liable had he represented an individual. Where it is sought to charge him personally the facts and circumstances ought to show clearly that both parties acted upon the assumption that a personal liability was intended.[2] Such liability does not attach when he contracts ostensibly for his principal without authority, the want of power being known to the other party.[3] If an agent's authority is given by statute all who contract with him are conclusively presumed to know its extent and limitations.[4] But if such an officer executes a contract ostensibly in behalf of the public, and it is known to him and the other party, as a matter of fact and law, that he was not authorized to execute it, and that he was at the time acting as the representa-

[1] Collen v. Wright, 8 El. & Bl. 647; Weeks v. Profert, L. R. 8 C. P. 427.

[2] Gill v. Brown, 12 Johns. 385; King v. Butler, 15 id. 281; Murray v. Kennedy, 15 La. Ann. 385; Parks v. Ross, 11 How. 362; Sanborn v. Neal, 4 Minn. 126.

[3] Newman v. Sylvester, 42 Ind. 106; Murray v. Carothers, 1 Met. (Ky.) 71; Baltimore v. Reynolds, 20 Md. 1; State v. Hastings, 10 Wis. 518; Hull v. Marshall Co., 12 Iowa. 142.

[4] Perry v. Hyde, 10 Conn. 329; Murray v. Carothers, 1 Met. (Ky.) 71; McCurdy v. Rogers, 21 Wis. 199; Ogden v. Raymond, 22 Conn. 384.

tive of another, he will be considered the real principal and cannot avoid liability because he assumed to contract in his public capacity.[1]

The general rule is, as we have seen, that an agent does not incur liability to third persons so long as he acts within the scope of his authority, and where he does incur it he has recourse to his principal. Hence an agent who, pursuant to instructions, pays away his principal's money with knowledge, when he pays it, but without when he received it, that the payment will amount to an act of bankruptcy on his principal's part, is not liable to the trustee, on the subsequent bankruptcy of the principal, for the money so paid.[2]

§ **797. Agent liable on implied warranty of authority.** He is liable as upon a warranty of his authority;[3] and for the reason that, where he exceeds his authority or acts without any, and so has not bound his principal, he has misled the party with whom he has dealt. Therefore, the rule does not apply where it appears that he fully communicated his authority before the dealings in question were concluded. In that case the other party acts upon his own judgment of the agent's power.[4] And so where an agency had existed but had been determined by the death of the principal abroad unknown to either party.[5] The liability rests upon fraud or warranty, and extends to the whole loss or injury which the party dealt with sustains in consequence of the contract as made not being binding upon the supposed principal. Thus where an agent employed to purchase property at auction at a limited price exceeded his authority, he was considered as purchasing on his own account.[6] So where an agent of a bank, by means of false representations as to his au- [55]

[1] New York & C. S. S. Co. v. Harrison, 16 Fed. Rep. 688.

[2] Ex parte Helder, 24 Ch. Div. 339.

[3] In re National Coffee Palace Co., 24 Ch. Div. 367; White v. Madison, 26 N. Y. 117; 26 How. Pr. 481; Collen v. Wright, 8 El. & Bl. 647; Baltzen v. Nicolay, 53 N. Y. 467.

[4] Barry v. Pike, 21 La. Ann. 221; Aspinwall v. Torrance, 1 Lans. 381; Clark v. Foster, 8 Vt. 98; Ogden v. Raymond, 22 Conn. 379; Sinclair v. Jackson, 8 Cow. 585; Hall v. Lauderdale, 46 N. Y. 70; Jefts v. York, 10 Cush. 392; Story on Agency, § 265; Michael v. Jones, 84 Mo. 578; Mechem on Agency, § 546. See Lander v. Castro, 43 Cal. 497.

[5] Smout v. Ilbery, 10 M. & W. 1.

[6] Hampton v. Specknagle, 9 S. & R. 212.

thority to employ attorneys for his principal, secured professional services for the bank in sundry attachment proceedings, and on suit against the bank by the attorney for the value of his services it turned out that the agent had no such authority as represented, and so the bank could not be made responsible, it was held that the attorney had his action against the agent personally for the value of his services as attorney, together with the actual amount of his costs incurred in the suit against the bank.[1] The same doctrine has been applied in other cases. The damages proper include the value of the property sold, or of the services rendered by the procurement of the agent unqualified to bind the supposed principal; and if an abortive suit has been prosecuted on the contract on the faith of its being binding against such principal, the costs of it are recoverable as part of the damages.[2]

[1] Wright v. Baldwin, 51 Mo. 269.

[2] Eckstein v. Whitehead, 10 Up. Can. C. P. 65; Randell v. Trimen, 18 C. B. 786; 37 Eng. L. & Eq. 275; Spedding v. Nevell, L. R. 4 C. P. 212; Goodwin v. Francis, L. R. 5 C. P. 295; Collen v. Wright, 7 El. & Bl. 301. In this case W. signed a written agreement describing himself in the signature as agent of G., whereby he agreed with C. that a lease should be granted to C. of a farm belonging to G. C. and W. both believed that W. had authority from G. to make the agreement; but in fact W. had no such authority. G. refusing to grant the lease, C. filed a bill against him for specific performance, and, after G. had put in his answer denying W.'s authority, C. gave W. notice of the suit and ground of defense, and that C. would proceed with the suit at W.'s expense unless W. gave him notice not further to proceed; and that C. would bring an action against W. for damages in the event either of the bill being dismissed on the ground of the defense set up or of W. requiring C. not to further proceed. W. answered repudiating his liability to C. The bill was dismissed on the ground of the defense set up. It was held that C. was entitled to maintain an action against W. as for breach of a promise that W. had the authority; and that C. might recover in such action damages for the expense of the chancery proceedings, it not appearing that he had instituted them incautiously, and they being therefore damages naturally resulting from the misrepresentation made by W. Lord Campbell, C. J., said: "We are to consider whether the plaintiff is entitled to recover in respect of the expenses of the chancery suit. I think he is. He acted as a reasonable man would who gave faith to the representation that a contract had been made by the alleged principal; he required that that contract should be specifically performed. The case cannot differ from that of a sale of goods by a party alleging himself to be a broker. The purchaser says that the alleged broker's contract is broken, because he had no authority to sell. If, before the action was brought, the alleged

§ **798. The measure of damages.** The same sum [56] which the agent without authority had agreed for in behalf of his solvent principal will be the sum recoverable against him,[1] or, as it has been otherwise expressed, "the person who contracts with the agent is entitled to be put in the same position as if the representations" made by the agent concerning his authority were true.[2] In other words, where upon an executed consideration a certain sum would be due from the supposed principal if he had been bound by the contract and solvent, that sum is recoverable from the unqualified agent.[3]

Where the agent has exceeded his authority, the party with whom the contract is made is not bound to look to the principal for so much of the contract as the agent was authorized to make, but may hold the agent responsible to the amount of the contract.[4] It seems, however, that the holder of such a contract may resort to the principal for so much as the agent had authority to promise in his behalf, where it is severable.[5] If one pretending to be an agent has contracted as such without authority from the principal, the party contracted with on learning the facts has the right to repudiate the contract and hold the person who assumed to be agent immediately responsible for damages on his warranty of authority without waiting for the time when an action might be maintained on the contract itself. Damages in such a case, it is said, are measured not by the contract but by the injury

broker had explained the mistake, the purchaser could not have recovered damages incurred by subsequently prosecuting the action. But if the assertion was made and never retracted, I could not blame him for bringing the action. If the purchaser could not know that the alleged broker had no authority to make the contract, the loss arising from the contract seems to me naturally to result from the allegation. I cannot distinguish the case of such an action from the case of a bill for specific performance filed in the belief that the contract was authorized on the part of the alleged principal."

[1] Kroeger v. Pitcairn, 101 Pa. St. 311; Sumner v. Williams, 8 Mass. 162; Meech v. Smith, 7 Wend. 315; Dusenbury v. Ellis, 3 Johns. Cas. 70; Palmer v. Stephens, 1 Denio, 471; Pitman v. Kintner, 5 Blackf. 250; Bowen v. Morris, 2 Taunt. 385; Polhill v. Walter, 3 B. & Ad. 114; Woodes v. Dennett, 9 N. H. 55; Grafton Bank v. Flanders, 4 N. H. 239; Feeter v. Heath, 11 Wend. 477.

[2] In re National Coffee Palace Co., 24 Ch. Div. 367.

[3] Cases cited in note 1.

[4] Feeter v. Heath, 11 Wend. 477.

[5] Johnson v. Blasdale, 1 Sm. & M. 17. See Gordon v. Buchanan, 5 Yerg. 71; 1 Par. on Cont. 69.

resulting from the agent's want of power.[1] But these dam- [57] ages must ordinarily be such as could be recovered against the party for a total breach or a breach co-extensive with the principal's repudiation of the supposed agent's act. The auctioneer who sells real property without sufficient authority so that the purchaser can get no title will be liable to pay his expenses of investigating the title with interest on the deposit and also on the purchase-money if kept in readiness and unproductive.[3] If a special agent employed to sell, with orders not to warrant, nevertheless does so, the principal would not be bound and the agent will be answerable; for otherwise the buyer would be without remedy.[3] By the contract so far as the agent is concerned, the other contracting party is entitled to the same compensation as upon a total breach of a valid contract. If the principal is not bound by and does not adopt the contract, the consequential loss to the other party is the same that he would suffer if the principal had bound himself according to the tenor of the contract and then refused to fulfill. In the latter case the injured party may obtain his damages by action directly upon the contract; this may not always or generally be done in an action against the agent; but in an action on his express or implied warranty of authority or for the deceit, the same rule of compensation which would be applicable to the defaulting party would be the only adequate measure of redress against the agent who had caused the same injury through a want of assumed power to bind the party who refuses to ratify and perform. This is well illustrated by a series of English cases. In Spedding v. Nevell[4] the defendant falsely assumed to be the agent of his brother, and made a contract with the plaintiff for the renewal of her lease for a term of twenty-one years. Subsequently the plaintiff made an agreement to dispose of her interest in the property at a profit. The owner refused to recognize the brother's authority and declined to renew the lease. The plaintiff's vendee, who had been put in possession

[1] White v. Madison, 26 How. Pr. 481; S. C., 26 N. Y. 117. See Hall v. Crandall, 29 Cal. 567; Wallace v. Bentley, 77 id. 19; Senter v. Monroe, id. 347, particularly referred to *infra*.

[2] 2 Sedgw. Dam. (8th ed.), § 838.

[3] Paley on Agency, by Dunlop, 386; Fenn v. Harrison, 3 T. R. 757.

[4] L. R. 4 C. P. 212.

at the expiration of the original term, was turned out and a lease made out to another person. Plaintiff and her vendee brought a suit against the owner to enforce specific performance of the agreement to lease. Until the trial of that suit plaintiff had no knowledge of the agent's lack of authority. After it was dismissed plaintiff's vendee brought an action against her upon the agreement made between them and recovered damages and costs. In the case against the assumed agent it was ruled that plaintiff was entitled to recover the costs which she was compelled to pay in the suit brought for specific performance, and damages commensurate with the value of the lease which she would have had if the defendant had authority to enter into the agreement he made. A recovery of the costs incurred and damages assessed in the action brought against the plaintiff by her vendee was denied on the ground that it could not be taken to be in the contemplation of the parties to this action at the time the agreement for the renewal of the lease was made that the lease should be sold; and besides that resale was made without entering into any communication with the defendant, and without his knowledge or the knowledge of the owner of the reversion. In another case[1] one of four joint owners of an estate which they advertised for sale represented that he was authorized to sell it, and made a contract of sale, and sent the plaintiff an abstract of the title. The co-owners repudiated the contract and sold at a greater price to another person. Plaintiff brought suit against them all for breach of the contract and continued it until the three swore that the agreement was made without authority. In an action against him who made the contract it was held that the proper measure of damages was the cost of investigating the title; the costs incurred and paid by the plaintiff down to the time when it became apparent that the defendant was not authorized to act in the way he did; the difference between the contract price and the market price of the land, and that the sum for which it was afterwards sold was *prima facie* evidence of the latter. Damages incurred by the resale of animals bought for the purpose of use on the land, without notice to the defendant and before the title had been investigated or possession given, were too

[1] Godwin v. Francis, L. R. 5 C. P. 295.

remote. A further illustration of the application of the rule of damages stated is furnished by a later English case,[1] the facts of which were that a broker was instructed to obtain fifty shares of stock at $1 each in a designated company. By his mistake the shares were allotted to the principal in another company; the allotment was repudiated, but the proper

[1] In re National Coffee Palace Co., 24 Ch. Div. 367 (1883); followed in Meek v. Wendt, 21 Q. B. Div. 126 (1888). In Simons v. Patchett, 7 El. & Bl. 568, the action was against the agent for breach of implied warranty that in purchasing a ship from the plaintiff he had authority to make the contract for the supposed principal. It appeared at the trial that the principal having refused to adopt the defendant's contract, the plaintiff resold the ship at less than the contract price. The resale was taken to be reasonably made for the best price that could be obtained, and it was taken that the principal was perfectly solvent, and it was held that a verdict was properly taken for damages measured by the difference between the contract price and that obtained on the resale. Lord Campbell, C. J., said: "What was the contract in this case? That the defendant had authority from . . . (his principals), . . . so that the bargain he had made in their name was binding on them. What, then, has the plaintiff suffered from this bargain not being binding on . . . (them) . . ? It is not disputed that, if the bargain had been binding, and had not been fulfilled, the plaintiff would have recovered against . . . (the principals) . . . damages for not fulfilling the contract; and if they had fulfilled the contract, the plaintiff would would have had from them the full price. The loss of the damages, therefore, which he would have recovered from . . . (the principals) . . . is the direct consequence of the breach of the defendant's contract. Viewing the matter in another light, the result is much the same. It is not to be disputed that, if direct evidence had been given of a fall in the market price of ships between the time of the making of the supposed bargain and the time at which the plaintiff might reasonably resell the ship, that fall in the price would be recoverable. Might not the jury reasonably infer such a fall in price from the difference in price actually obtained in this case? If so, the case would be brought within the general rule as to the measure of damages for not accepting goods." This case proceeded upon the assumption of the solvency of the principal. On that assumption the same rule was applied which would have applied to the principal if he had been bound by the contract and refused to accept and pay for the property. The damages to be recovered against the false agent, however, are what was lost by the plaintiff by not having the valid contract which the agent warranted he had. Though if there had been such a binding contract, the purchaser would have been liable to the plaintiff in damages, yet if the purchaser was not solvent, the jury would say that the loss in consequence of not having a binding contract was not the sum for which he would in that case have had judgment against the purchaser. Simons v. Patchett, *supra*, per Crompton, J.

entry was previously made on the company's register. The shares were in fact unsalable in the market, and soon after the order was placed the company was wound up and the principal was released from liability as a contributor. The official liquidator claimed the value of the shares from the broker by way of damages for his misrepresentation of authority. Referring to the cases already considered, Brett, M. R., said: "In all these cases the court laid down that the measure of damages was what the plaintiff actually lost by losing the particular contract which was to have been made by the alleged principal if the defendant had had the authority he professed to have; in other words, what the plaintiff would have gained by the contract which the defendant warranted should be made. If that be the measure of damages it does not depend upon the amount which would have been awarded to him in an action against the alleged principal if the contract had been broken by him; that may not be the same amount as what the plaintiff has entirely lost. We may test it in this way. If the action were brought against the principal because he had broken the contract, the amount actually recovered would be quite different if he were solvent and if he were insolvent; if he were solvent the plaintiff would recover the whole loss; if he were insolvent he might not recover a shilling. Therefore it is what the plaintiff actually lost, not what the verdict of the jury would have given him, for the execution might have produced nothing. Again, the defendant might be in such a position that you would not have to consider the question of breach of contract at all. In the present case [the brokers] are probably people who would never break their contracts, and therefore you must come back to consider what the plaintiff has actually lost by losing this particular contract. What then did the company lose? . . . In this particular case what would they have got by the contract [with the alleged principal] if he had given authority to make it? If he had been insolvent they would not have got a farthing; but he was not insolvent, and therefore in this particular case they would have got £50 from him on the allotment of his shares and they would not have given him anything; it would not have been like an ordinary vendor handing over goods. They would only have

handed over a piece of paper. In return for his £50 in money they would only have given him a phantasy. The company had a nominal capital of two hundred and fifty thousand shares, of which they had only allotted a very small number; therefore the phantasy which they gave him cost them nothing. The sum of £50 was *prima facie* the measure of damages and there is nothing to displace it."

A rule of liability prevails in California which varies very materially from that laid down in the cases stated. It is there held that one who undertakes to sell land for the owner without authority from him, if the contract does not contain apt words to charge the agent personally, is not liable for the loss of the bargain. His liability does not extend beyond the recovery of money paid him, or for labor performed under the contract, or special damages resulting to the plaintiff by reason of the defendant's wrong. The failure of the intended purchaser of land to negotiate with the owner is not a necessary consequence of the assumed agent's representation of his authority to make the sale of it.[1]

§ **799. Recovery of money from agent.** An agent will be liable on his contracts, though made as agent, where there is no responsible principal to resort to; that is, where he repre- [59] sents a principal not suable, other than the government.[2] So where money has been paid to an agent for the use of his principal under such circumstances that the party paying it might recover it from the latter, as long as the money has not been paid over by the agent, nor his situation altered, as by giving his principal fresh credit upon the faith of it, it may be recovered from the agent.[3]

An action may be brought against an agent who has received money to which his principal has no right if the agent has had notice not to pay it over; and in some cases without such notice, if it has not been actually paid over.[4] Where an agent has settled with his principal by retaining his own fees

[1] Wallace v. Bentley, 77 Cal. 19; Senter v. Monroe, id. 347; Hall v. Crandall, 29 id. 567.

[2] Paley on Agency, 374; Story on Agency, § 280; Hills v. Bannister, 8 Cow. 31.

[3] Mechem on Agency, §§ 561, 562; Paley on Agency, 388; Buller v. Harrison, 2 Cowp. 565; Cox v. Prentice, 3 M. & S. 344; Hearsey v. Pruyn, 7 Johns. 179; Langley v. Warner, 1 Sandf. 209; Mowatt v. McClelan, 1 Wend. 173; Story on Agency, § 300. See Bank of United States v. Bank of Washington, 6 Pet. 8, 18.

[4] Hearsey v. Pruyn, *supra*.

and costs, and paying over the balance, he has so closed his account as not to be liable to repay the money paid to him by mistake.[1] But it is not sufficient that he has passed the sum received to the principal's account, giving him credit for it in discharge of a debt to himself.[2] Where the payment to the agent has been compulsory, and not expressly for the use of the principal, or has been obtained by the agent fraudulently or illegally, no notice not to pay it over to the principal is necessary; and the action may be maintained against the agent notwithstanding he may have paid the money over to his principal.[3]

§ **800. Agent liable for his torts.** An agent is also liable for torts committed by himself, although done in the business of another;[4] that is, for acts of affirmative misfeasance, whether done intentionally or ignorantly, in pursuance [60] of the agency, he is directly liable to the person injured; and the latter is not limited to an action against the principal.[5] But for negligence of duty imposed by his employment an agent or servant is not liable to a third person, but only to the employer. There is no privity of consideration between the servant and the person who employs his master; and nonfeasance alone will not support an action without consideration.[6]

[1] Mowatt v. McClelan, 1 Wend. 173.

[2] Buller v. Harrison, 2 Cowp. 565; Paley on Agency, by Dunlop, 389. See Frye v. Lockwood, 4 Cow. 454; La Farge v. Kneeland, 7 id. 456; Carew v. Otis, 1 Johns. 418.

[3] Snowdon v. Davis, 1 Taunt. 359; Ripley v. Gelston, 9 Johns. 201; Edwards v. Hodding, 1 Marsh. 377; 5 Taunt. 815; Hardacre v. Stewart, 5 Esp. 103; Miller v. Aris, 1 Selw. N. P. 103. See Elliott v. Swartwout, 10 Pet. 137.

[4] Horner v. Lawrence, 37 N. J. L. 46.

[5] Crane v. Onderdonk, 67 Barb. 47; Erwin v. Davenport, 9 Heisk. 44; Elmore v. Brooks, 5 id. 45; McPheters v. Page, 83 Me. 234.

[6] Paley on Agency, by Dunlop, 396, 399; Delaney v. Rochereau, 34 La. Ann. 1123; Carey v. Rochereau, 16 Fed. Rep. 87. See Baird v. Shipman, 33 Ill. App. 503; S. C., 132 Ill. 16; Mechem on Agency, § 569 *et seq.*

A solicitor who neglects to make an investment of money paid into court pursuant to an order acts as an officer of the court, and is liable to the party for whose benefit the order was made for the loss of interest. If there has been a decline in the price of the securities in which the investment was to be made between the time the order was made and that at which the solicitor was called to account, the amount of the decline will be deducted from the interest which would have been received. Batten v. Wedgwood Coal & Iron Co., 31 Ch. Div. 346.

CHAPTER XIX.

INSURANCE.

§ 801. Growth and importance of insurance contracts.
802. Kinds of insurance.

SECTION 1.

MARINE INSURANCE.

803. Cause of damage must be proximate.
804. Extent of injury; manner of ascertainment.
805. Interpretation of contract.
806. Valued policies.
807. What constitutes a total loss; "wholly destroyed."
808. Contract methods for fixing damages.
809. When proofs of loss a condition precedent.
810. Manner and time of making proofs.
811. Preliminary proofs for information only.
812. Pleadings.
813, 814. Rule of damages on open policies.
815. Loss in excess of sum fixed in policy.
816. Damages in case of partial loss.
817. Losses adjusted on the principle of indemnity.
818, 819. General average.

SECTION 2.

FIRE INSURANCE.

820. Nature of contract; how made.
821. General rule of damages.
822. Contribution if more than one policy.
823. Mitigation of liability.
824. What jury may consider.
825. Proof of damages.
826. General average in fire insurance.
827. Recoveries in special cases.
828. Insurance on commission goods.
829. Insurance by mortgagee.
830. Contracts to replace or rebuild.

SECTION 3.

LIFE AND ACCIDENT INSURANCE.

831. Definition of life insurance.
832, 833. Character of the contract.
834. When life insurance a collateral security.
835. Accident policies.

§ 836. Difference between English and American decisions as to scope of recovery.
837. Restatement of the measure and elements of damage.
838. Insurer's liability for terminating the contract.
839. Refusal to issue paid-up policy.
840. Liability of re-insurer.

§ 801. Growth and importance of insurance contracts. The law of insurance has now arrived at such a condition [61] of importance that it occupies a very large share of the attention of the courts and the legal profession. A hundred years ago it had scarcely an existence, and its growth has been entirely out of proportion to that of other branches of the commercial law, great as these have been. A glance at the modern reports reveals the fact that the adjudged cases involving the consideration of the law of insurance are very numerous. And when we reflect that not a ship hoists her anchor for a voyage on the ocean, nor a river steamer casts her lines loose from her wharf, without this protection from the results of disaster; that not a village on the continents of Europe and America has failed to take its "bonds of fate" against the ravages of flood and fire equally with the great commercial cities of the world; and that solicitous affection has in many thousands of instances demanded provision against the edicts of death itself by a ransom in favor of the living, we need not be surprised at the almost overshadowing proportions to which this topic of the law has grown in so short a period. Against the perils of storm and wreck, treachery and public enemies on sea and river; against accidents by fire, whether kindled by God in the lightning's flash or by the imprudence or viciousness of men on land or ocean; against the inevitable decree of death itself, to whose hand all must yield, the law of insurance has provided indemnity, if not consolation. The business itself demands and absorbs an amount of capital and capacity commensurate with the vastness of the field it occupies, and the discussions to which it has given rise are second in magnitude to none that claim the attention of the forum. The comparatively restricted portion of this vast field appropriate for consideration in this [62] treatise would seem to lighten the writer's labors; but a very little reflection will satisfy the reader that the extent and ap-

plication of the remedies for wrongs can never be thoroughly explained or understood until the elements of the broken contract have been carefully studied and analyzed; and while the remedy is but an insignificant part of the whole subject its useful presentation presupposes a careful examination of all that precedes it. While, therefore, the present chapter will be devoted to the question of the damages arising upon contracts of insurance, the preparation for that discussion is necessarily drawn from a somewhat careful survey of the wider field embracing the entire subject.

§ 802. **Kinds of insurance.** There are three main classes of insurance, viz.: marine, fire, and life. The first is defined to be a contract by which one party, called the underwriter or insurer, for a stipulated sum, called a premium, undertakes to indemnify the other, called the insured, against all or certain enumerated perils of the sea to which the ship, cargo or freight, called the subject of insurance, may be exposed during a certain voyage or for a period of time. The second is defined to be contracts of insurance against accidents or loss by fire, and is applicable to all species of property subject to injury or destruction thereby. The third class is contracts upon the life of some particular person, which are to the effect that upon the death of the person whose life is insured during the time for which it is so insured, or if generally upon his life, that upon the occurrence of his death the insurer will pay the amount of the policy to the person holding the same. The instrument when executed, as it usually is, in writing by the parties contains the terms of the contract and is denominated a policy of insurance.[1]

[1] Unless required by statute the contract of insurance need not be in writing. Commercial Ins. Co. v. Union Ins. Co., 19 How. (U. S.) 318; Trustees of Baptist Church v. Brooklyn F. Ins. Co., 19 N. Y. 305; Angell v. Hartford Ins. Co., 59 N. Y. 171; Sanborn v. Firemen's Ins. Co., 16 Gray, 448; Baxter v. Massasoit Ins. Co., 13 Allen, 320; Putnam v. Home Ins. Co., 123 Mass. 324; Relief Ins. Co. v. Shaw, 94 U. S. 574; Hening v. United States Ins. Co., 2 Dill. 26; Davenport v. Peoria Ins. Co., 17 Iowa, 276; Home Ins. Co. v. Adler, 71 Ala. 516; Revere F. Ins. Co. v. Chamberlain, 56 Iowa, 508; Emery v. Boston Marine Ins. Co., 138 Mass. 398; Roger Williams Ins. Co. v. Carrington, 43 Mich. 252.

If the insurer's charter requires that its policies shall be written, equity will direct that a policy be made and delivered after a loss has occurred and a valid parol agreement for insurance has been made. Franklin F. Ins. Co. v. Taylor, 52 Miss. 441.

Section 1.

MARINE INSURANCE.

§ 803. Cause of damage must be proximate. Prelim- [63] inary to entering upon the general question of the measure of damages in marine insurance, there is one branch of the subject affecting the right of recovery that deserves specific notice. It is a maxim in marine insurance "that the direct, not the remote, cause of the damage" is to be considered.[1] The existence of this rule is not controverted, but there have been difficulties in its application. The United States supreme court thus applied it:

1. When two causes of loss concur, one at the risk of the assured and the other insured against, or one cause insured against by A. and the other by B., if the damage caused by each peril can be discriminated from the other it must be borne proportionately. 2. But if the damage caused by the two perils cannot be distinguished from each other, then the party responsible for the predominating efficient cause, or which set in operation the other, is liable for the loss.[2] It was therefore held in the particular case that when an insurance

[1] Davis v. Garrett, 6 Bing. 716; Ionides v. Universal Ins. Co., 14 C. B. (N. S.) 260; Insurance Co. v. Transportation Co., 12 Wall. 194, 201. The following cases illustrate the doctrine of proximate cause as understood in the law of insurance: Bondrett v. Hentigg, Holt, N. P. 147; Mercantile Steamship Co. v. Tyser, 7 Q. B. Div. 73; Dudgeon v. Pembroke, L. R. 9 Q. B. 581; 1 Q. B. Div. 96; L. R. 2 App. Cas. 284; Redman v. Wilson, 14 M. & W. 476; Sarquy v. Hobson, 2 B. & C. 7; Cory v. Burr. L. R. 8 App. Cas. 393; 9 Q. B. Div 463; 8 Q. B. Div. 313; Orient Mut. Ins. Co. v. Adams, 123 U. S. 67; Dyer v. Piscataqua Ins. Co., 53 Me. 118; Potter v. Ocean Ins. Co., 3 Sumn. 27; Magoun v. New England Ins. Co., 1 Story, 157; Merchants' Mut. Ins. Co. v. Butler, 30 Md. 41; Peters v. Warren Ins. Co., 14 Pet. 99; Greenwich Ins. Co. v. Raab, 11 Ill. App. 636; New York, etc. Express Co. v. Traders' Ins. Co., 132 Mass. 377; Georgia Ins. etc. Co. v. Dawson, 2 Gill, 365; Rice v. Homer, 12 Mass. 230; Mathews v. Howard Ins. Co., 11 N. Y. 9; Nelson v. Suffolk Ins. Co., 8 Cush. 477; Cincinnati & F. Ins. Co. v. May, 20 Ohio, 223; Knight v. Eureka, etc. Ins. Co., 26 Ohio St. 664; Norwich, etc. Transportation Co. v. Western Mass. Ins. Co., 34 Conn. 561; General Mut. Ins. Co. v. Sherwood, 14 How. 351; American Ins. Co. v. Durham, 12 Wend. 463; Street v. Augusta, etc. Ins. Co., 12 Rich. L. 13; Neilson v. Commercial Ins. Co., 3 Duer, 455; Phœnix Ins. Co. v. Cochran, 51 Pa. St. 143.

[2] Insurance Co. v. Transportation Co., 12 Wall. 194.

upon a steamboat against fire excepted "any fire happening by means of any invasion, insurrection, riot or civil commotion, or of any military or usurped power," it is an insurance against fire caused by a collision, and that the underwriters [64] against fire were responsible for a loss occasioned by the sinking of a vessel caused by fire, though the fire was occasioned by a collision not insured against, if the effect of the collision without the fire would have been only to cause the vessel to settle to her upper deck, and that was such a condition as that she could have been saved.[1]

In Ionides v. Universal Ins. Co.[2] Erle, C. J., said: "The conclusion I have come to, after an attentive consideration, is that the plaintiff is entitled to recover in respect of a loss of a part of the insurance. The policy was for £3,000 upon six thousand five hundred bags of coffee, valued at £25,000, and it contained an exception in the following words: 'Warranted free from capture, seizure and detention, and all consequences thereof or any attempt thereat, and free from all consequences of hostilities, riots or commotions.' The insured ship, with the coffee on board, on her voyage from Belize to New York, had to pass Cape Hatteras. The captain intending to shape his course north northeast until he had rounded the cape, and then to steer due north, being out of his reckoning, and conceiving that he had passed the cape, when he was in fact about thirty miles south and ten miles west of it, ran the ship on shore at Hatteras Inlet, where she was eventually lost. If these had been the only facts it would have been a clear case of loss by perils of the sea. But it appears that at Cape Hatteras, until the secession of the southern states of America, there had always been a light maintained, and that the light had been extinguished for hostile purposes by the confederate or southern party, who were at the time in possession of North Carolina. It may be taken as a fact, for the purpose of the present judgment, that if the light had still been there, the captain would have seen it, and might have put about in time and saved the ship. The great contention on the first part of the case was whether the loss so brought about was a loss 'by the consequence of hostilities,' within the meaning of

[1] Ionides v. Universal Ins. Co., 14 C. B. (N. S.) 260.

[2] 14 C. B. (N. S.) 260.

the policy. The extinguishment of the light was undoubtedly an act of hostility upon the part of the confederates towards the federals; but was the loss the consequence of hostilities? I agree with the learned counsel that the question is entirely one of construction, and that the intention of [65] the parties is to be gathered from the contract itself, taking it with the surrounding circumstances. . . . I agree with the learned counsel who suggested that the words of the exception in this policy are to be construed as they would be if the assured had reassured his cargo against the perils which are excepted by the warranty now in question, so that to make the policy attach, the court must in that case have held that the consequence of hostilities was so connected with the loss of the ship as to make the underwriters liable. The maxim '*causa proxima non remota spectatur*' is peculiarly applicable to insurance law. The loss must be immediately connected with the supposed cause of it. Now, the relation of cause and effect is matter which cannot always be actually ascertained; but if, in the ordinary course of events, a certain result usually follows from a given cause, the immediate relation of the one to the other may be considered to be established. Was the putting out of the light at Cape Hatteras so immediately connected with the loss of the ship as to make the one the consequence of the other? Can it be said that the absence of the light would have been followed by the loss of the ship, if the captain had not been out of his reckoning? It seems to me that these two events are too distantly connected with each other to stand in the relation of cause and effect. I will put an instance of what I conceive to be a 'consequence of hostilities' within the meaning of this policy. Suppose there was a hostile attempt to seize the ship, and the master in seeking to escape capture ran ashore and the ship was lost: there the loss would be a loss by the consequences of hostilities within the terms of this exception. Or, suppose the ship chased by a cruiser, and, to avoid seizure, she gets into a bay where there is neither harbor nor anchorage, and in consequence of her inability to get out she is driven on shore by the wind and lost: that loss would be a loss resulting from an attempt at capture, and would be within the exception. But I will suppose a third case,—the ship chased

into a bay where she is unable to anchor or to make any harbor, and getting out again on a change of wind, but in pursuing her voyage encounters a storm which, but for the delay, she would have escaped, and being overwhelmed was lost: [66] there, although it may be said that the loss never would have occurred but for the hostile attempt at seizure, and that the consequence of the attempt at seizure was the cause without which the loss would not have happened, yet the *proximate* cause of loss would be the perils of the sea, and not the attempt at seizure. Take another instance. The warranty extends to loss from all the consequences of hostilities. Assume that a vessel is about to enter a port having two channels, in one of which torpedoes are sunk in order to protect the port from hostile aggression, and the master of the vessel, in ignorance of the fact, enters this channel and his ship is blown up; in that case the proximate cause of the loss would clearly be the consequences of hostilities, and so within the exception. But, suppose the master, being aware of the danger presented in the one channel, and, in order to avoid it, attempts to make the port by the other, and by unskilful navigation runs aground and is lost,— in my opinion that would not be a loss within the exception, not being a loss proximately connected with the consequences of hostilities, but a loss by a peril of the sea, and covered by the policy. Applying these principles to the facts of the present case, I am of the opinion that, the captain having missed his reckoning, and either not keeping a sufficient lookout, or not lying to when his position was doubtful, and so running on shore, it cannot be said that the absence of the light was proximately the cause of the loss; but that the loss was not within the exception contained in the warranty, but was within the general terms of the policy; and that, as the wreck of the ship brought about the loss of the cargo, the insurers are liable." Perhaps the most useful and satisfactory decisions of recent date on the question are found in the cases of Insurance Co. v. Boon,[1] and Insurance Co. v. Express Co.,[2] to which the practitioner is referred.

[1] 95 U. S. 117.

[2] Id. 227. See New York & B. Express Co. v. Traders' & M. Ins. Co., 132 Mass. 377, and cases therein stated.

§ 804. Extent of injury; manner of ascertainment. Assuming that a contract has been made between the underwriter and the insured, and that a breach of the former's undertaking has occurred, the first questions of interest to the parties are as to the extent of the injury, and how it shall be made good. And the first observation is that when- [67] ever the policy by its terms provides a particular manner of ascertaining the damages that must be followed. Insurance policies are to be interpreted in the same way and by the same general rules which apply to other contracts. The state of the existing law, the effect of usage and custom, the usual course of business, the intention of the parties, the technical and popular meaning of words, the effect of warranties, special representations, of conditions, exceptions and limitations in the contract,— none of these call for special observation, save that they are to be expounded as in all other contracts, to effectuate the purposes had in view when made.

§ 805. Interpretation of contract. It is perhaps fair to say that in marine insurance particularly the policy or written contract is a less perfect guide to the real engagement of the parties to it than almost any other species of contract; for the subject-matter is such that in the nature of it the stipulations must often be general in order to cover a variety of details, and thus leave much to interpretation by the judicial tribunals. In alluding to this class of instruments Chief Justice Marshall observed[1] that "policies of insurance are generally the most informal instruments which are brought into courts of justice; and there are no instruments which are more liberally construed in order to effect the real intention of the parties, if that intention can be clearly ascertained." While doubtless the growing importance of insurance has led to greater precision than when this criticism was made there is no doubt still justice and truth in it.[2]

[1] Yeaton v. Fry, 5 Cranch, 342.

[2] Parkhurst v. Gloucester Mut. F. Ins. Co., 100 Mass. 301; Oliver v. Mutual Com. Ins. Co., 2 Curt. C. C. 290–1; Rankin v. Potter, 5 Moak's Eng. Rep. 40; L. R. 6 H. L. 83. See 1 May on Ins. (3d ed.), §§ 172–177.

An insurance for the voyage round at and from B. to C., with the privilege of one other port in the same island with C., and at and from either of them back to B. on freight laden or to be laden, valued at the sum insured, is upon separate and distinct voyages, during the prosecution of which distinct freights were at risk,

§ 806. Valued policies. One very common means of fixing the amount of the underwriter's liability in cases of loss is by [68] what is known as a "valued policy." This is where the amount to which the underwriter is bound is for a sum fixed in the agreement by the parties to it at the time it is made, and is usually not open to evidence to vary it; when such a contract is made it can only be impeached for fraud.[1] But if upon a valued policy there is only a partial loss of the subject of insurance, the insured can only recover the proportion which the loss bears to the whole amount fixed therein. The valuation in the policy is conclusive in case of partial loss by the general current of authority, though it has been held otherwise in Massachusetts and Mississippi.[2] The court is not, however, precluded from inquiring whether the assured had any interest in the property valued, or whether it or any part of it has been at risk.[3] If the contract furnishes the rule of determination, other evidence will not be admissible, as, for instance: the parties by the policy agreed upon an estimate of $9,600 as the value of three hundred and eighty kegs of a particular kind of tobacco. The loss was of one hundred and fifty-seven kegs, and the court held that the insurer was bound by his contract to pay for the partial loss at the same rate he would have paid for the whole, if the whole had perished, and evidence of the value was excluded.[4] In Forbes v. Aspinall[5] the principle of the above case was in part denied: but as the facts were not parallel the case can scarcely be construed as

and to each of which, as they successively came into existence, the whole valuation in the policy ought to be applied, and a total loss on the homeward voyage part paid for accordingly. Patapsco Ins. Co. v. Biscoe, 7 Gill & J. 293; Insurance Co. v. Mordecai, 22 How. (U. S.) 111.

[1] Harris v. Eagle Ins. Co., 5 Johns. 368; Lewis v. Rucker, 2 Burr. 1167; Cushman v. Northwestern Ins. Co., 34 Me. 487; Lycoming Ins. Co. v. Mitchell, 48 Pa. St. 367; Forbes v. Aspinwall, 13 East, 323; Sturm v. Atlantic Mut. Ins. Co., 63 N. Y. 77.

The valuation is not conclusive for purposes collateral to the contract, as where the insured attempts to hold the insurer to it for the purpose of any indemnity or right he may have by way of subrogation. Burnan v. Rodocanachi, L. R. 7 App. Cas. 333.

[2] Clark v. United Ins. Co., 7 Mass. 365; Brewer v. American Ins. Co., 123 id. 78; Natchez Ins. Co. v. Buckner, 4 How. (Miss.) 63.

[3] 14 Am. & Eng. Ency. of Law, 339.

[4] Harris v. Eagle Ins. Co., 5 Johns. 374.

[5] 13 East, 323.

denying the rule or as materially qualifying it. Shawe v. Felton[1] applies the rule in a very extreme case. The syllabus is to this effect: "That on an insurance on ship and goods, valued at so much, on a voyage to Africa and the West Indies, the assured is entitled to recover the whole sum on a total loss which happened in the latest period of the voyage, although a considerable part of the estimated value consisted originally in stores and provisions for the purchase and sustenance of slaves during the voyage, and the slaves were brought to a profitable market at the final place of the ship's destination, where she arrived in port a mere wreck and soon after foundered. Where a ship insured arrived in port a mere wreck, and was obliged to be lashed to a hulk to avoid sinking, and in attempting to remove her to the shore a few days afterward she sunk, held, that the assured might recover as for a total loss, though her cargo was saved and brought [69] to a profitable market." It was said in that case that to open the policy and order an inquiry would take away all the certainty which valued policies were intended to have, and to nullify the deliberate agreement of the parties, which had been made to avoid the necessity of an investigation into the damages actually occurring.

The rule that the value fixed in the policy shall be conclusive when real estate has been insured and is wholly destroyed has been adopted by statute in some states, and it has been held that under such a statute a stipulation inserted in the policy providing that if differences arise there should be an arbitration before any suit could be maintained was void.[2] The right to recover the full sum named in the policy is not affected by any contract between the parties.[3] In some states the statutes express that the sum insured shall be the measure of damages when the property is destroyed. The effect of this language is to make an insurer who has consented to other insurance liable for the amount of its policy, and dis-

[1] 2 East, 109.

[2] Reilly v. Franklin Ins. Co., 43 Wis. 449, quoting White v. Connecticut Mut. L. Ins. Co., 5 Cent. L. Jour. 486; S. C., 4 Dill. 177, and disapproving Farmers' Ins. Co. v. Curry, 10 Ch. L. N. 43; S. C., 13 Bush, 312.

[3] Sun Mut. Ins. Co. v. Holland, 2 Texas Civil Cas. 391; Insurance Co. v. Leslie, 47 Ohio St. 409.

ables it from having its liability reduced to a *pro rata* share of the whole insurance.[1]

If the same risk, interest and subject-matter are covered by more than one policy, each underwriter is nevertheless liable for the loss, and has a right to contribution from his co-insurers.[2] But under the operation of policies which contain the "American clause" the rule is different; the later underwriter is only liable for such loss as is not covered by prior policies.[3] Where there are several policies each for a part only of the amount at which the subject of insurance is valued and together the parts so insured do not aggregate more than the stated value, the risk, interest and subject-matter are not the same. Each is a valued policy for the same proportion of the loss that it covers of the whole valuation.[4] On a marine policy the liability of the underwriter for the loss, whether total or partial, is to pay that proportion which the amount underwritten bears to the whole amount at risk, unless there is some stipulation therein to the contrary. Thus, in a policy on a ship she was valued at $22,000; the amount insured was $7,400; the loss suffered was $2,187. By the above rule the underwriter was liable for $\frac{7400}{22000}$ of the loss.[5] Under a valued policy if only part of the property is put at risk and there is a total loss, there can be a recovery of only a proportionate part.[6] A part owner insuring in his own name only and without mentioning any other owner or person interested can recover only the amount of his own interest.[7]

[1] Barnard v. National F. Ins. Co., 38 Mo. App. 106; Oshkosh Gas Light Co. v. Germania F. Ins. Co., 71 Wis. 454; Queen Ins. Co. v. Jefferson Ice Co., 64 Texas, 578.

[2] 1 Arnould, Mar. Ins. (6th ed.) 331; Thurston v. Koch, 4 Dall. 348; Minturn v. Columbian Ins. Co., 10 Johns. 75; American Ins. Co. v. Griswold, 14 Wend. 461; Hogan v. Delaware Ins. Co., 1 Wash. C. C. 419; Cromie v. Kentucky & L. Mut. Ins. Co., 15 B. Mon. 432; Murray v. Insurance Co., 2 Wash. C. C. 186; Wiggin v. Suffolk Ins. Co., 18 Pick. 145; Kane v. Commercial Ins. Co., 8 Johns. 229; Godin v. London Ass. Co., 1 Burr. 492. See Bruce v. Jones, 1 H. & C. 769; Morgan v. Price, 4 Exch. 615; Irving v. Richardson, 1 Mood. & R. 153.

[3] Lewis v. Manufacturers' F. & M. Ins. Co., 131 Mass. 364; Ryder v. Phœnix Ins. Co., 98 id. 185. See Bank of British N. A. v. Western Ass. Co., 7 Ont. 166.

[4] Whiting v. Independent Mut. Ins. Co., 15 Md. 397.

[5] Id.

[6] Wolcott v. Eagle Ins. Co., 4 Pick. 429.

[7] Finney v. Warren Ins. Co., 1 Met. 16.

§ 807. What constitutes a total loss; wholly destroyed. Such a loss necessarily occurs when there is an actual destruction of the subject of the insurance by one of the causes or perils insured against, or when it is wholly lost to the owner by capture, seizure or an authorized sale by the master by reason of a peril covered by the policy.[1] It occurs when the subject is so damaged that it cannot be repaired, or is not repairable except at an expense greater than the value of the subject being repaired.[2] A perusal of the opinion of Justice Miller in Insurance Co. v. Fogarty [3] will disclose the fact that a more liberal interpretation has been given the phrase "total loss" in recent cases than in the earlier ones. The previous decisions of the supreme court of the United States are there reviewed, and a departure from the earlier ones made. The extreme rule of an absolute extinction or destruction of the thing insured is pronounced not to be the true doctrine. The principle of Judah v. Randel,[4] where a carriage was insured and all was lost but the wheels, which held that the thing insured was lost totally, was approved. In the case before it the insurance was upon machinery. It was said: "The circuit court was right in holding that what was insured was machinery — pieces or parts of a machine — pieces made and shaped to unite at points with other pieces, so as to make a sugar-packing machine. If parts of them were absolutely lost, and every piece recovered had lost its adaptability to be used as part of the machine; had lost it so entirely that it

[1] Marine Ins. Co. v. Tucker, 3 Cranch, 357; Gordon v. Bowne, 2 Johns. 150; Delano v. Bedford Ins. Co., 10 Mass. 347; Dorr v. New Eng. Ins. Co., 11 id. 1; Cambridge v. Anderton, 2 B. & C. 691; Fleming v. Smith, 1 H. L. Cas. 513; Prince v. Ocean Ins. Co., 40 Me. 481; Dunning v. Merchants' Mut. Mar. Ins. Co., 57 Me. 108; Graves v. Washington Mar. Ins. Co., 12 Allen, 391; McCall v. Sun Mut. Ins. Co., 66 N. Y. 505; Hall v. Ocean Ins. Co., 37 Fed. Rep. 371; Brown v. Phœnix Ins. Co., 4 Bin. 445; Francis v. Ocean Ins. Co., 6 Cow. 404.

[2] Graves v. Washington Mar. Ins. Co., 12 Allen, 291; Irving v. Manning, 1 H. L. Cas. 287; 6 C. B. 391; California Nav. & Exp. Co. v. State Investment & Ins. Co., 70 Cal. 586; Carr v. Providence, etc. Ins. Co., 38 Hun, 86; Bryant v. Commonwealth Ins. Co., 13 Pick. 543; Orrok v. Commonwealth Ins. Co., 21 Pick. 456; Mutual Safety Ins. Co. v. Cohen, 3 Gill, 459.

[3] 19 Wall. 640.

[4] 2 Caines' Cas. 324; Wallerstein v. Columbian Ins. Co., 44 N. Y. 204. See Globe Ins. Co. v. Sherlock, 25 Ohio St. 50.

would cost as much to buy a new piece just like it as to repair or adapt that one to the purpose, then there was a total loss of the machinery. If no piece recovered was of any use, or could be applied to any use connected with the machine of which it was a part, without more expense on it than its original cost, then there was no part of the *machinery* saved, however much of rusty iron may have been taken from the wreck. The court went quite as far in behalf of the defendant as the law justified, when it told the jury that the plaintiff could not recover if any piece or portion of the machinery insured arrived at its destination in a condition so perfect that it could have been used with its corresponding or connecting pieces had they also arrived in good condition." The question being whether a building was "totally destroyed," the trial court instructed the jury thus: "Although you may find the fact that after the fire a large portion of the four walls were left standing and some of the iron-work still attached thereto, still if you find that the fact is that the building has lost its identity and specific character as a building, you may find that the property was totally destroyed within the meaning of the policy." Upon the principle that a policy on a building insures it as such and not the materials of which it is composed,[1] the quoted instruction was approved.[2] This case has been followed in Texas;[3] and the same rule has been applied in Missouri[4] and Wisconsin.[5] The cases in the states named hold that "wholly destroyed," as these words are used in valued policy statutes, are equivalent to "total loss."[6]

[1] Nave v. Home Mut. Ins. Co., 37 Mo. 430.

[2] Williams v. Hartford Ins. Co., 54 Cal. 442, 450.

[3] Hamburg-Bremen F. Ins. Co. v. Garlington, 66 Texas, 103.

[4] Barnard v. National F. Ins. Co., 38 Mo. App. 107, 117. See Ampleman v. Citizens' Ins. Co., 35 id. 308.

[5] Oshkosh Packing & P. Co. v. Mercantile Ins. Co., 31 Fed. Rep. 200; Seyk v. Millers' Nat. Ins. Co., 74 Wis. 67; Harriman v. Queen Ins. Co., 49 id. 71. An accident policy provided for the payment of a principal sum if the insured, from a violent and accidental injury which should be externally visible, should "suffer the loss of the entire sight of both eyes, or the loss of two entire hands, or two entire feet, or one entire hand and one entire foot." The loss of the use of the members named as part of the body, so that they will not perform their functions, entitled the insured to a full recovery. Sheanon v. Pacific Mut. L. Ins. Co., 77 Wis. 618.

[6] See Wallerstein v. Columbian Ins. Co., 44 N. Y. 204.

A constructive total loss is such a loss as entitles the assured to claim the whole amount of the insurance on giving due notice of abandonment.[1] It is covered by a policy limited to "total loss only."[2] In England the loss must be too great to justify repairs;[3] but in this country the loss must only equal one-half the value of the subject to be abandoned to the insurer.[4] The right to abandon proceeds on the ground that the insured has actually lost more than one-half the capital employed in the adventure.[5] The loss of a vessel insured should be deemed effectual and certain from the time she was so injured that her destruction became inevitable, and the claim for damage must be deemed to have then attached, although she was kept afloat for some time after the injury; and a subsequent sale will not affect the right of the insurers to recover for such injury.[6]

§ 808. Contract methods for fixing damages. It is a common provision in fire insurance policies to stipulate for a settlement of losses insured against by arbitrators or umpires to be selected in a manner pointed out therein. It is also very generally required that the insured shall furnish certain proofs of the loss within an arbitrary fixed period after the occurrence, or "immediately," as "soon as possible," or "within a reasonable time."

It may be remarked that no stipulation, the effect of which would be to deny the jurisdiction of the courts to determine upon the liability or non-liability of the insurer, is regarded as valid. And as we have already seen,[7] a stipulation for ascertaining the cash value of the loss by proofs and umpire, before any suit can be instituted against the insurer, when the stat-

[1] 2 Arnould, Mar. Ins. (6th ed.) 1024.

[2] Heebner v. Eagle Ins. Co., 10 Gray, 131; O'Leary v. Stymest, 6 Allen (N. B.), 289; Greene v. Pacific Ins. Co., 9 Allen (Mass.), 217; Snow v. Union & Mut. Mar. Ins. Co., 119 Mass. 592; Adams v. McKenzie, 32 L. J. (C. P.) 92; Forwood v. North Wales Mut. Mar. Ins. Co., 9 Q. B. Div. 732.

[3] Benson v. Chapman, 6 M. & G. 810; Grainger v. Martin, 4 Best & S. 9.

[4] Gordon v. Ins. Co., 2 Pick. 249; Smith v. Ins. Co., 7 Met. 448; Marmaud v. Melledge, 123 Mass. 173; Bradlie v. Md. Ins. Co., 12 Pet. 378; Hubbell v. Great Western Ins. Co., 74 N. Y. 246; Taber v. China Mut. Ins. Co., 131 Mass. 239; Globe Ins. Co. v. Sherlock, 25 Ohio St. 50.

[5] Pezant v. National Ins. Co., 15 Wend. 453, 457.

[6] Duncan v. Great Western Ins. Co., 5 Abb. (N. S.) 173.

[7] *Ante*, § 806.

ute provides that the sum fixed in the policy should be the measure of damages, is invalid.[1] Any contract that deprives the courts of the power to determine the right to recover is void, no matter what substitute may be provided to pass upon that question.[2] There is practical unanimity in holding that any agreement as to the mode of adjustment or of settling the amount of the loss or the time for paying it, or any particulars of that nature which do not go to the root of the action, but are preliminary to or in aid thereof — as, for instance, an agreement that at the trial of the action it shall not be lawful for either party to enter into the question of the amount of the loss, but that it shall be settled by reference, and that the only question to be tried at law shall be the right to recover — is valid.[3] A distinction is made between an agreement to refer every matter in dispute to arbitration, and one to pay such a sum as the damage shall be found by a third party to amount to, which latter operates to reduce the policy from a contract to pay the amount of damage absolutely, and to substitute the arbitrator for the jury to ascertain its [70] amount.[4] Subject to these limitations on the power of parties to make a binding contract not to resort to the judicial tribunals, which are imposed as a matter of public policy, any lawful means of ascertaining the loss and arriving at an adjustment of the amount is valid and binding.

When certain proofs of loss are required by the contract to be made by the insured before the loss is payable, these proofs are a condition precedent to a right of action against the insurer.[5] And no action can be maintained on the policy, unless

[1] Thompson v. St. Louis Ins. Co., 43 Wis. 459; Hughes v. Vinland F. Ins. Co., 43 Wis. 323; Kill v. Hollister, 1 Wils. 129; Insurance Co. v. Morse, 20 Wall. 445.

[2] Scott v. Avery, 5 H. L. Cas. 811; Thompson v. Charnock, 8 T. R. 139; Stephenson v. Piscataqua F. & M. Ins. Co., 54 Me. 70; Reed v. Washington Ins. Co., 138 Mass. 575; German-American Ins. Co. v. Etherton, 25 Neb. 505.

[3] 2 May on Ins., § 493; Old Saucelito Land & Dry Dock Co. v. Commercial Union Ass. Co., 66 Cal. 253; Carroll v. Girard F. Ins. Co., 72 id. 297; Chippewa Lumber Co. v. Phenix Ins. Co., 80 Mich. 116; Wolff v. Liverpool, L. & G. Ins. Co., 50 N. J. L. 453.

[4] 2 May on Ins., § 493.

[5] Columbian Ins. Co. v. Lawrence, 10 Pet. 507; Wright v. Hartford Ins. Co., 36 Wis. 522; Edgerly v. Farmers' Ins. Co., 43 Iowa, 587; Gauche v. London, L. & G. Ins. Co., 4 Woods, 102; S. C., 10 Fed. Rep. 347.

it is averred that these conditions have been complied with, and the proof shall sustain the allegations.[1]

§ 809. When proofs of loss a condition precedent. When these proofs of loss are to be furnished within a given time after the occurrence of the casualty the insured must comply with the requirement.[2] It occurs to the writer that such a provision, based simply on an arbitrary fixed time, ought to be construed only as directory, and that when a reasonable and substantial compliance with the requirement is shown, it should be sufficient. When by the contract the proofs are to be made in a reasonable time, what is such is a question of fact to be determined upon evidence, if disputed, and is therefore a question for the jury,[3] or a mixed question of law and fact.[4]

§ 810. Manner and time of making proofs. These proofs must be furnished in the *form* specified in the contract, but if none is specified then it is sufficient that they furnish satisfactory evidence of the loss.[5] In the New York case cited the court observed that the provision in policies of insurance requiring notice and proof of loss is to be expounded lib- [71] erally in favor of the assured; and its requirements are satisfied by furnishing such reasonable evidence as the party can command at the time, to give assurance to the underwriters of his right to receive the money and of their liability for the loss. This opinion was pronounced in a case where the insurance had been effected by one for the benefit of himself and other owners, and all the parties had not united in the preliminary notice and proofs, and the changes in some of the interests were not noted therein. The manner of making proofs is discussed in a large number of cases, of which those cited below may be found instructive.[6] The requirements of

[1] Ibid.

[2] Smith v. Haverhill Mut. F. Ins. Co., 1 Allen, 297; Scammon v. Germania Ins. Co., 101 Ill. 621; McDermott v. Lycoming F. Ins. Co., 44 N. Y. Super. Ct. 221; Home Ins. Co. v. Lindsey, 26 Ohio St. 348.

[3] Wightman v. Western Ins. Co., 8 Rob. 482; Edwards v. Baltimore Ins. Co., 3 Gill, 176.

[4] Swan v. Liverpool, L. & G. Ins. Co., 52 Miss. 704; Fire Ins. Co. v. Felrath, 77 Ala. 194.

[5] Phœnix Ins. Co. v. Taylor, 5 Minn. 492; Germania F. Ins. Co. v. Curran, 8 Kan. 9; Walsh v. Washington Marine Ins. Co., 32 N. Y. 427; Taylor v. Ætna Ins. Co., 13 Gray, 434.

[6] Keeler v. Niagara F. Ins. Co., 16

the policy concerning preliminary proofs may be waived either expressly, or by conduct from which a waiver may be implied.[1] There is probably no difference in the construction to be placed upon marine contracts of insurance and those against fire on land in the matter of making the proofs and estimates of loss, and the cases of both classes are referred to as equally in point.

While mere silence on the part of the insurer is not a waiver of proofs of loss in accordance with the contract, still any act which has the effect to mislead the insured into the belief that the proofs will not be required or that those furnished are sufficient is proper evidence to the jury of a waiver; and the question as to whether there has been a waiver is one of fact.[2]

[72] § **811. Preliminary proofs for information only.** All these proceedings relating to notice, proof of loss and so forth are for the protection and information of the insurer, and do not fix the amount of the damages or limit the right of the insured to recover. They clearly cannot bind the insurer, however formally they may be made, and upon the same

Wis. 523; Kernochan v. New York Bowery Ins. Co., 17 N. Y. 428; Works v. Farmers' Ins. Co., 57 Me. 281; Frost v. Saratoga Mut. Ins. Co., 5 Denio, 154; Pratt v. New York C. Ins. Co., 55 N. Y. 505; Ayres v. Hartford Ins. Co., 17 Iowa, 176.

[1] In addition to the cases cited in the preceding note, the following will be found in point on the subject of waiver of the sufficiency of preliminary proofs of loss: Charleston Ins. Co. v. Neve, 2 McMull. (S. C.) 237; Post v. Ætna Ins. Co., 43 Barb. 351; Ætna Ins. Co. v. Tyler, 16 Wend. 385; O'Neil v. Buffalo F. Ins. Co., 3 N. Y. 122; Heath v. Franklin Ins. Co., 1 Cush. 257; Tayloe v. Merchants' Ins. Co., 9 How. (U. S.) 390. See 27 Am. L. Reg. 197–203. And it is said that when strict compliance with the terms of the contract has become impossible, it will be excused if the party furnishes the best attainable proof and shows good faith. Hynds v. Schenectady Ins. Co., 11 N. Y. 554; Norton v. Rensselaer Ins. Co., 7 Cow. 645; Lycoming Ins. Co. v. Schollenberger, 44 Pa. St. 259; Patrick v. Farmers' Ins. Co., 43 N. H. 621; Clark v. New England Ins. Co., 6 Cush. 342; Cornell v. Le Roy, 9 Wend. 163.

[2] Atlanta Ins. Co. v. Manning, 3 Colo. 224; Williamsburg City F. Ins. Co. v. Cary, 83 Ill. 453; Planters' Mut. Ins. Co. v. Engle, 54 Md. 468; Butterworth v. Western Ass. Co., 132 Mass. 489; Mercantile Ins. Co. v. Holthaus, 43 Mich. 432; Swan v. Liverpool, L. & G. Ins. Co., 52 Miss. 704; Johnston v. Columbian Ins. Co., 7 Johns. 315; Great Western Ins. Co. v. Staaden, 26 Ill. 365; O'Brien v. Commercial F. Ins. Co., 63 N. Y. 111.

principle the other party is not bound. Although these proofs seem to be treated in some sort as admissions by the insured, and may be properly regarded as evidence, it is hardly consistent to give a greater effect to them as against one party than the other. They are really intended for the protection and benefit of both; they in fact ought to bind neither. Like a coroner's inquest in a case of homicide, they are purely for information, and any attempt to give them a *quasi*-judicial consequence is as unfair to one party as to the other.[1] When the books and accounts of the insured have been lost or destroyed, the preliminary proofs which they might furnish are not required.[2] The following cases on the question of proofs of loss, what are in time and what are not, what is a waiver by the insurer and what is not, may be profitably consulted by the practitioner.[3] Where the pleadings contained an allega-

[1] Standard F. Ins. Co. v. Wren, 7 Ill. App. 242; German F. Ins. Co. v. Gauten, 13 id. 593; Sibley v. Prescott Ins. Co., 57 Mich. 14; Lebanon Mut. Ins. Co. v. Kepler, 106 Pa. St. 28; Ætna Ins. Co. v. Stevens, 48 Ill. 31; McMartin v. Insurance Co. of N. A., 55 N. Y. 222.

[2] Mechanics' F. Ins. Co. v. Nichols, 16 N. J. L. 410; Wightman v. Western M. & F. Ins. Co., 8 Rob. (La.) 442.

[3] Peoria Marine & F. Ins. Co. v. Lewis, 18 Ill. 553; Edwards v. Baltimore Ins. Co., 3 Gill, 176; Kimball v. Howard Ins. Co., 8 Gray, 33; Knickerbocker Ins. Co. v. Gould, 80 Ill. 388; Duncan v. Topham, 8 Man., Gr. & Scott, 229; Waterman v. Dutton, 6 Wis. 265; Hall v. Delaplaine, 5 Wis. 206; Killips v. Putnam F. Ins. Co., 28 Wis. 472; O'Conner v. Hartford F. Ins. Co., 31 Wis. 161; Blossom v. Lycoming F. Ins. Co., 64 N. Y. 166; Palmer v. St. Paul F. & M. Ins. Co., 44 Wis. 201; O'Brien v. Phœnix F. Ins. Co., 76 N. Y. 459; Rokes v. Amazon Ins. Co., 51 Md. 512; Hicks v. Empire F. Ins. Co., 6 Mo. App. 254; Underwood v. Farmers' Joint Stock Ins. Co., 57 N. Y. 500; Bunstead v. Dividend Mut. Ins. Co., 12 N. Y. 81; Worsley v. Wood, 6 T. R. 710; Craig v. Parkis, 40 N. Y. 181; Inman v. Western Ins. Co., 12 Wend. 452; Diehl v. Adams Co. Mut. Ins. Co., 58 Pa. St. 452; Trask v. Insurance Co., 29 Pa. St. 198; Patrick v. Farmers' Ins. Co., 43 N. H. 621; Brink v. Hanover F. Ins. Co., 70 N. Y. 593; Smith v. Commonwealth Ins. Co., 49 Wis. 322; Chandler v. Commerce F. Ins. Co., 88 Pa. St. 223; Hibernia Ins. Co. v. O'Connor, 29 Mich. 241; Aurora F. & M. Ins. Co. v. Kranick, 36 Mich. 289; Harriman v. Queen Ins. Co., 49 Wis. 71; Franklin F. Ins. Co. v. Chicago Ice Co., 36 Md. 102; Home Ins. Co. v. Baltimore W. Co., 93 U. S. 527; Levy v. Peabody Ins. Co., 10 W. Va. 560; Young v. Hartford F. Ins. Co., 45 Iowa, 377; Home Ins. Co. v. Lindsey, 26 Ohio St. 348; Farmers' Ins. Co. v. Frick, 29 Ohio St. 466; Jones v. Michigan Ins. Co., 36 N. J. L. 29; Basch v. Humboldt Ins. Co., 35 id. 429; Taylor v. Roger Williams Ins. Co., 51 N. H. 50; Hibernia Mut. F. Ins. Co. v. Meyer, 39 N. J. L. 482; Heath v. Franklin Ins. Co., 1 Cush. 257; Clark v. New England Mut. F.

[73] tion that the condition in the policy that preliminary proofs should be made had been complied with, it was held supported by evidence that the insurer waived the proofs.[1]

§ 812. **Pleadings.** When the preliminary proofs of loss have been made according to contract, or waived by the insurer, expressly, or by such conduct as will relieve the insured from the duty of making them, and there is a refusal to pay the indemnity provided, resort must be had to the judicial tribunals. In stating his case for recovery the party must present all the facts upon which his right depends. The contract should be either set out at length or in legal effect, with full allegations of the breach or breaches, the loss, the compliance of plaintiff with its requirements, if any, subsequent to the loss, or a waiver of them by defendant, or the impossibility of compliance when that would operate to excuse, an allegation of the injury and its extent, demand, when the same is necessary, and refusal to pay. Upon the joinder of issue and the settlement of incidental questions affecting the right of recovery comes the more important consideration of the amount of damages.

§ 813. **Rule of damages on open policies.** We have already seen that in the case of a valued policy the amount of recovery is fixed, and evidence of the loss is not admissible [74] beyond or *aliunde* the contract.[2] But assuming that the policy is an open one, i. e., the value in case of loss has not been fixed by provision in it, then the rule as to the measure of damages is *the actual loss sustained by the insured at the time of the accident or loss, to be determined by evidence*, as in other cases of damage, controlled or varied only by the terms of the contract.[3] For adjusting partial as well as total losses

Ins. Co., 6 id. 342; Francis v. Somerville Ins. Co., 25 N. J. L. 78; State Ins. Co. v. Todd, 83 Pa. St. 272; Mason v. Citizens' F. & M. Ins. Co., 10 W. Va. 572; Post v. Ætna Ins. Co., 43 Barb. 357; Peoria Ins. Co. v. Whitehill, 25 Ill. 466.

[1] Pine v. Reid, 6 Man. & Gr. 1; Atlantic Ins. Co. v. Manning, 3 Colo. 224.

[2] *Ante*, § 807.

[3] Commonwealth Ins. Co. v. Sennett, 37 Pa. St. 205; Portsmouth Ins. Co. v. Brazee, 16 Ohio, 82; Insurance Co. v. Transportation Co., 12 Wall. 194–203; Snell v. Delaware Ins. Co., 4 Dall. 430; Carson v. Marine Ins. Co., 2 Wash. C. C. 468; American Ins. Co. v. Griswold, 14 Wend. 399; Savage v. Corn Ex. Ins. Co., 36 N. Y. 655; State Ins. Co. v. Taylor, 14 Colo. 499.

the contract may modify the rules of law; as in case of a stipulation that no partial loss or memorandum articles shall be compensated,[1] or no partial loss less than a specified per centum of the amount insured, or the value of the property insured.[2] The same effect was given to a stipulation that in determining whether a constructive total loss has occurred the cost of repairs shall be estimated as in adjusting the amount of a partial loss by deducting one-third new for old.[3] The original cost, or the cost of reproduction, is not a necessary element of the value.[4] And when the insurance is upon a limited interest, for example, a mortgage on property, and not upon the property itself, the actual loss will control the amount of the recovery;[5] and the value of any remaining interest is not admissible to depreciate the amount of the limited interest for which recovery is sought.[6] The application of this rule has resulted in establishing other rules for the ascertainment of damages on this principle; and to some of the more prominent we will now refer. The insured offered to prove the actual cash value before the injury from which the damage caused by collision might be inferred, and thus the cash value of the property, when attacked by the fire, ascertained; and it was held that the evidence was rightly excluded; the only way to establish the damage was by ascertaining the cost of restoring the vessel to the condition she was in before the fire.[7] It is proper to observe of this case that the insured had two policies on the vessel: one covering accidents by collision, the other a fire policy, and the cause was tried on the refusal of the insurers to pay the latter loss.

[1] Biays v. Chesapeake Ins. Co., 7 Cranch, 415.

[2] Hagar v. New England, etc. Ins. Co., 59 Me. 460; Hagg v. Augusta, etc. Ins. Co., 7 How. 595; Ogden v. General Mut. Ins. Co., 2 Duer, 204; Lord v. Neptune Ins. Co., 10 Gray, 109; Morgan v. United States Ins. Co., 1 Wheat. 219; Heebner v. Eagle Ins. Co., 10 Gray, 131; Wadsworth v. Pacific Ins. Co., 4 Wend. 33; Bradford v. Boylston, etc. Ins. Co., 11 Pick. 161; Allegre v. Insurance Co., 6 H. & J. 408.

[3] Wallace v. Thames & Mersey Ins. Co., 22 Fed. Rep. 66.

[4] Ætna Ins. Co. v. Johnson, 11 Bush, 587; Commonwealth Ins. Co. v. Sennett, 37 Pa. St. 205; Carson v. Marine Ins. Co., 2 Wash. C. C. 468.

[5] Hadley v. Insurance Co., 55 N. H. 110.

[6] Carpenter v. Providence, etc. Ins. Co., 16 Pet. 496; Clark v. Wilson, 103 Mass. 219.

[7] Insurance Co. v. Transportation Co., 12 Wall. 201, citing Heebner v. Eagle Ins. Co., 10 Gray, 143.

The evidence as to the value of the vessel, which was excluded, went to show its condition, not at the time of the [75] accident by fire, but before. The decision is a very clear recognition of the principle of the general measure of damages, and the strict application of it to the contract; and it was observed by the court that there was no other way of ascertaining such damages except to find "the cost of restoring the vessel to the condition she was in before the fire, and not her condition before the collision, which preceded and caused the fire;" and that if, in restoring her, the repairs covered the injuries by collision, as well as by the fire, the former should be excluded in fixing the amount of the loss by fire.[1] If goods are jettisoned, their value may be ascertained by the prime cost;[2] but while this is proper evidence, it is held that it is not conclusive; the insured may prove and recover the actual amount of his loss.[3] In this case the vessel had been purchased by the insured at a condemnation sale for a low figure, and the insurers insisted that this price should govern the amount of the damage; but the court was clearly of opinion that the insured "was entitled to prove and to recover the actual value of the vessel;" and Mr. Justice Washington observed, in the case of Carson v. Marine Ins. Co.[4] (a case involving insurance on cargo), that he could see no reason for establishing this rule which would not equally apply to the case of goods insured.

§ 814. Same subject. The cases cited apply this rule under various circumstances. In one policy it was stipulated that "the said loss or damage be estimated according to the true actual cash value of the said property at the time the loss shall happen." The court below instructed the jury "that the value as estimated in the manufacture of each machine, and before it was tried in the field, would be the standard of valuation." This instruction the supreme court held to be error, and said that the true rule was "what were the machines worth at the time the fire happened, and this must be ascertained by testimony."[5] In ascertaining the value of the prop-

[1] See Dows v. Faneuil Hall Ins. Co., 127 Mass. 346.

[2] Le Roy v. United Ins. Co., 7 Johns. 344.

[3] Snell v. Delaware Ins. Co., 4 Dall. 430.

[4] 2 Wash. C. C. 472.

[5] Commonwealth Ins. Co. v. Sen-

erty insured the premium on the policy is to be added[1] [76] as part of the value. So also it is held that the value insured is estimated upon the proof of value with charges upon the goods added.[2] But in a case where the insured abandons the property to the insurer, who refuses to accept the abandonment, the insured cannot recover for any but necessary expenses. And if in such case, instead of selling the ship, as he may do, or laying her up and discharging the crew, the insured continue the crew in service under wages, he cannot make that expense a charge on the underwriter. The latter is answerable for the loss of the subject insured, with the necessary expenses incurred in laboring for the recovery and safety of it, but his contract reaches no other charge.[3] The actual value of the property lost will furnish the measure of damages in all cases where there is an open policy and the amount named in it is equal to the loss.[4] In an action brought for the breach of an agreement to insure certain property the court held the measure of damages to be the value of the property upon proof of its loss.[5] And where the liability of the insurer, by the terms of the policy, could not exceed one-

nett, 37 Pa. St. 205. A policy on a boat contained such a clause as is quoted in the text. The court said: "We do not consider that a depression in the value of steamers generally, from circumstances which may be only temporary, and which have no reference to the original cost or actual condition of the boat, can be taken into account to the extent that plaintiff insists upon." McCuaig v. Quaker City Ins. Co., 18 Up. Can. Q. B. 130.

[1] Louisville, etc. Ins. Co. v. Bland, 9 Dana, 143.

[2] *Ante*, § 806; Le Roy v. United Ins. Co., 7 Johns. 344.

[3] Frothingham v. Prince, 3 Mass. 563; Lawrence v. Van Horne, 1 Caines, 276; Henshaw v. Marine Ins. Co., 2 id. 274; McBride v. Marine Ins. Co., 7 Johns. 430; Barker v. Phenix Ins. Co., 8 id. 307.

[4] Wolfe v. Howard Ins. Co., 7 N. Y. 583; Savage v. Corn Ex. F. & Inland Ins. Co., 36 N. Y. 655; Lewis v. Burlington Ins. Co., 80 Iowa, 259.

The insured may recover above the sum insured for the expense of labor and travel for the defense and recovery of the property insured; and where expenses are incurred for the recovery of the ship, the insured may recover the whole amount against the insurer of the ship, though the freight and cargo should be incidentally benefited, and ought to contribute a proportion; leaving the insurer of the ship to recover, if he can, of the owner or insurer of the freight and cargo for their contributory share. Watson v. Marine Ins. Co., 7 Johns. 57; Maggrath v. Church, 1 Caines, 215.

[5] Ela v. French, 11 N. H. 356.

half of the value of the property destroyed, it was held that its value at the time of the loss furnished the basis upon which the damages were to be calculated. The cases on the subject are too numerous to cite, but they support the general proposition stated with practical uniformity.[1] Where the loss exceeds the amount of the insurance the insured has the right to recover the whole amount of the policy;[2] and although it contains a stipulation "that in all cases of other insurance the [77] insured shall not be entitled to demand or recover on this policy any greater portion of the loss or damage than the amount truly insured bears to the whole amount insured on said property," if the property exceeds in value the amount of the insurance the insurer is liable for the sum contained in the policy.[3] The loss is usually estimated in cases of marine insurance by the value at the time and place where the cargo was to be sold.[4] The value of the property in such case may be ascertained by its original value at the port where the voyage commenced, deducting the wear and tear; and the value of the goods is usually that which they had at the place of lading;[5] the exception to this being, that where they are placed on board for a particular market, the value at that point is taken to be the real value — the general rule being, that gains and profits must be insured as such, and are not included unless in the particular case specified in the general loss.

§ 815. Loss in excess of sum fixed in policy. The rule which limits the liability of the insurer to the amount designated in its policy does not apply in all cases of marine insurance. Independently of any particular clause in that in-

[1] Fried v. Royal Ins. Co., 47 Barb. 127; S. C., 50 N. Y. 243 — a case of life insurance; Wills v. Wells, 8 Taunt. 264; Atwood v. Union Mut. F. Ins. Co., 28 N. H. 234.

[2] Etna Ins. Co. v. Tyler, 16 Wend. 385; Strong v. Manufacturers' Ins. Co., 10 Pick. 40; Commonwealth v. Hide & L. Ins. Co., 112 Mass. 136; Andes Ins. Co. v. Fish, 71 Ill. 620.

[3] Etna Ins. Co. v. Tyler, 16 Wend. 385; Haley v. Dorchester Ins. Co., 1 Allen, 536; Richmondville Union Seminary v. Hamilton Mut. Ins. Co., 14 Gray, 459.

[4] Rogers v. Mechanics' Ins. Co., 2 Story, 173; Lee v. Grinnell, 5 Duer, 400, 430.

[5] Brewer v. American Ins. Co., 123 Mass. 78; Clark v. United F. & M. Ins. Co., 7 id. 345; Warren v. Franklin Ins. Co., 4 id. 518; Coffin v. Newburyport M. Ins. Co., 9 Mass. 436; Minturn v. Columbian Ins. Co., 10 Johns. 75.

strument or of local usage, the insurer may be obliged to respond in a larger sum. The rule is thus stated by Gray, C. J.: "If the subject is once totally lost, either actually or constructively, it ceases to exist for the purposes of the policy, and, even if it is not entirely destroyed, the underwriter, by paying that loss, fulfills his contract and is exempt from liability for any subsequent injury to it. If a partial loss occurs, and before it is repaired a total loss ensues during the term of the policy, the underwriter is liable for the amount of the total loss only because that is equivalent to the whole damage which the assured has sustained and affords him a full indemnity. But if the partial loss is repaired by the assured, the undertaking of the underwriter to indemnify him to the amount specified continues throughout the term of the insurance, and he may therefore be charged for the amount of a partial loss as well as of a subsequent total loss, although the amount of the two sums which he is thereby obliged to pay exceeds the amount named in the policy. This was judicially stated to be the law as long ago as 1810 in this commonwealth and in England."[1] After stating the points decided in the cases referred to, the writer of the opinion continued: "A rule recognized so long and so often by such a weight of authority, and not contradicted or doubted by any judge in England or America for sixty years, is too firmly established to be shaken by the *obiter dicta* in the very recent case of Lidgett v. Secretan,[2] the still later decision of the commission of appeals in Alexandre v. Sun Ins. Co.,[3] or the doubts expressed" in Phillips on Insurance.[4]

§ 816. Damages in case of partial loss. While the rules already stated and examples given in illustration are sufficient to furnish a guide to the measure of damages in cases of entire loss of the subject insured, they do not fully apply in a class of instances which are complicated by the fact of only a

[1] Matheson v. Equitable Marine Ins. Co., 118 Mass. 209, 211. The judge referred to Wood v. Lincoln & K. Ins. Co., 6 Mass. 479, 486; Livie v. Janson, 12 East, 648, 655; Le Cheminant v. Pearson, 4 Taunt. 367, 380; Potter v. Providence W. Ins. Co., 4 Mason, 298; Brooks v. MacDonnell, 1 Y. & C. (Exch.) 500, 515; Stewart v. Steele, 5 Scott, N. R. 927.

[2] L. R. 6 C. P. 616.

[3] 51 N. Y. 253.

[4] Vol. 2 (4th ed.), § 1743. See, also, § 1267.

partial destruction. It becomes important, therefore, to inquire when there is a total loss, and when it may be so treated, though the loss is only in fact of a part. The American rule is, when in marine insurance the cost of repairs exceeds half the value of the property insured, the loss is regarded as total, and the insured by an abandonment becomes entitled to damages in the full amount of the insurance.[1] In the case last cited, the vessel having been condemned by the French government, a formal abandonment was not regarded as neces- [78] sary to perfect the right to recover for a total loss. If such loss *actually* occurs the assured may recover for it without an abandonment; if the loss is, however, only constructively total, a formal abandonment is necessary to complete the right to recover. But the insured is never required to abandon and claim for a total loss unless the subject is totally destroyed. He has his election to claim for a partial loss and retain that which is preserved from the peril.[2] Assuming that a case exists which entitles him to claim as for a partial loss, and, when it not being total, he elects to receive his insurance on that part which has been lost, what is the rule? In cases where the value is fixed by the policy, the rule, as already stated,[3] is that the insured is entitled to recover the proportion which the loss bears to the whole amount fixed in the policy, and no evidence in such cases is admissible as to the value — the policy being conclusive as to that, while the evidence is admitted to fix the proportion of the loss to the whole amount insured. But it must be understood that a mere specification of value will not convert an open into a valued policy, when either through repugnant conditions, such as a limitation to the amount necessary to replace, the actual value is made the basis of indemnity, or when, in case of partial loss, there is no apparent means of determining the amount of indemnity apart from the actual damages. When the part lost is of a specified number of valued articles of equal worth the damage is that proportion of the valued sum.[4] A very

[1] Smith v. Manufacturers' Ins. Co., 7 Met. 448; Gracie v. New York Ins. Co., 8 Johns. 237.

[2] See Gracie v. New York Ins. Co., 8 Johns. 237; Snow v. Union Ins. Co., 119 Mass. 592, and cases cited in the opinion.

[3] *Ante*, § 806; Harris v. Eagle Fire Co., 5 Johns. 374.

[4] Brown v. Quincy Mut. F. Ins. Co.,

common device of insurers, for their own protection, is to insert in the contract a provision giving the right to elect to replace the loss — in fire insurances, to rebuild — or pay the insurance; but all such arrangements are unknown to the general law of insurance, except as they are made a part of the contract by express stipulation of the parties. In such cases it is held that the contract, after the exercise of the right of election, is not simply one of insurance, but is, to use the language of the court in a New York case, a "building con- [79] tract," and is to be interpreted like any other of that kind.[1] In the case referred to the insured, after a loss by fire, commenced to rebuild, and the insurance company concluded to avail itself of its option to "replace," and offered to do so. The insured declined to recognize the right of the company to refuse to pay the insurance, completed his building, and then brought suit on the policy for the value of the property destroyed. The court held that the plaintiff's policy had become a contract to "rebuild," and nonsuited him because the defendant was not permitted to do so. While such clauses in contracts are common, and are a good means by which the insurer retrieves his misfortune, they are but inventions to escape liability or restrict it, and are hardly within the pale of legitimate insurance. When the partial loss complained of is upon an open policy the damages follow the rule — the actual cash value of the goods where laden, with interest and charges added. Profits are excluded because they are themselves the subject of separate insurance; the exception being that when a ship is loaded and insured for a particular market[2] the value at the port of destination is taken as the true value for which the insurer is liable in cases of contribution by way of average.

§ 817. Losses adjusted on the principle of indemnity. In adjusting these partial losses the guiding principle is that the contract of insurance is based on the idea of indemnity to the insured; hence all means which the law supplies, independently of the contract, for ascertaining the amount of the injury

105 Mass. 396; Cushman v. Northwestern Ins. Co., 34 Me. 487.

[1] Beals v. Home Ins. Co., 36 N. Y. 522; Good v. Buckeye Ins. Co., 43 Ohio St. 394; Fire Ass'n v. Rosenthal, 108 Pa. St. 474.

[2] *Ante*, § 814.

have their origin in the idea of indemnity. So, while it is true that where there has been a total loss of the subject of insurance, and the price has been fixed by the contract, that value must be taken; if the value has not been fixed, and the subject has been lost, its actual cash value, to be ascertained by competent evidence, must be accepted by the insured. On the same principle, where an insurance is effected on an entire cargo, or on all goods to which it attaches, if part of the cargo or goods is safely delivered on shore, and the balance lost, [80] a proportionate reduction must be made from the amount of the insurance; and it makes no difference whether the policy be a valued or open one, because by the delivery of part so much has been withdrawn from the liability insured against;[1] and where there is insurance on the charter of a ship, or the freight of a full cargo, if less than a full freight would have been insured, had there been no loss, the insured must submit to a proportionate deduction in the event of loss.[2] Where there is an open policy on the freight, the manner of arriving at the indemnity is to ascertain the loss by computing the entire amount of freight payable, deducting what is saved, and the balance will constitute the amount to be paid. No deduction is made for expenses in this calculation.[3] Whilst this rule seems to be a departure from the strict doctrine of indemnity, it is supported on the ground that it is the universal usage, and is analogous to the rule of fixed damages in valued policies.[4] Where the injury occurs to the ship, and the question is as to its extent, the reasonable rule is to ascertain what has been the actual cost of repairs, where they have been made, or the estimated cost, if they have not been made, and these will constitute the loss to be paid.[5] If the ship has been sold without repairs, under circumstances which do not entitle the owner to claim for an entire loss, the insured is entitled to recover the difference between the price she brought and her value at the inception of the risk. In order to limit the effect of this general rule, where repairs are made, the insurer is not charged with their entire cost, but one-third of the cost of the

[1] Tobin v. Harford, 13 C. B. (N. S.) 791; affirmed, 17 id. 528; Brooke v. Louisiana Ins. Co., 4 Mart. (N. S.) (La.) 640, 681.

[2] Forbes v. Aspinall, 13 East, 323.

[3] Palmer v. Blackburn, 1 Bing. 61.

[4] Moss v. Smith, 9 C. B. 104.

[5] 2 Arnould, Mar. Ins., p. 1047.

new is deducted in his favor. It would be inequitable for the owner to retain the renewed vessel without making some deduction, because he would be placed in a better position than he occupied before the loss occurred.[1] But this rule is again limited, so that where he has derived no benefit, as where the vessel was new and on her first voyage, or where she has been broken up or sold, the reduction is not [81] made.[2] In argument in the court of exchequer in this last case, Sir F. Pollock said, in reply to the attempt to procure a reduction on account of repairs to a ship on her first voyage, that "a policy of insurance is a contract of indemnity, which is not to be put aside by any rule not as plain as that which makes a bill payable after three days' grace," and Lord Abinger, C. B., agreed with him. Whether charges incurred in the preservation of vessel and cargo are recoverable as average loss, or under the provision for "suing, laboring and traveling," seems as yet uncertain. Such charges have been recovered where they were incurred before a loss, because, as the vessel became afterwards a total loss and the underwriters had to take her and pay the insurance, they took her *cum onere* — taking the place of the owner who would have been liable.[3] While the insurer is not liable for provisions or traveling expenses of a ship, and they are not recoverable from him *as insurer*, where he succeeds the owner by reason of his contract, which permits the latter to abandon to him, he becomes liable in his new character of owner.[4]

§ 818. General average. Intimately connected with the question of damages in marine insurance is the law of "general average." When, owing to stress of weather, or other great peril to which the ship and cargo are subject, extraordinary sacrifices are made of some portion of the latter or

[1] Poingdestre v. Royal Exchange, R. & Mood. 378; Savage v. New York Ins. Co., 4 Cow. 248; Sanderson v. Marine Ins. Co., 2 Cranch, 218; Fisk v. Commercial Ins. Co., 18 La. 77; Brooks v. Oriental Ins. Co., 7 Pick. 259; Eager v. Atlas Ins. Co., 14 id. 141; Hall v. Ocean Ins. Co., 21 id. 472; Orrok v. Commonwealth Ins. Co., id. 456; Lincoln v. Hope Ins. Co., 8 Gray, 22; Paddock v. Commercial Ins. Co., 104 Mass. 521; Hagar v. New England, etc. Ins. Co., 59 Me. 460; Kerr v. Quaker City Ins. Co., 33 Mo. 158.

[2] Fenwick v. Robinson, 3 C. & P. 323; Pirie v. Steele, 8 C. & P. 200.

[3] Livie v. Janson, 12 East, 648; Le Cheminant v. Pearson, 4 Taunt. 367.

[4] Thompson v. Rowcroft, 4 East, 34.

unusual expenses are necessarily incurred for their benefit, this loss is held as a lien on the balance remaining of either, to be made good to whoever has been the particular sufferer.[1] The term "general average" signifies a contribution made by all parties concerned or interested in either ship or cargo towards reimbursing the individuals whose particular loss was incurred for the common benefit. Whatever is done deliberately and voluntarily under circumstances of great peril and distress for the preservation of the ship and remaining cargo may be brought into general average, and [82] must be made good by the insurers against the peril insured against in proper proportion.[2] And the adjustment of the general average, though made in a foreign country, and upon a basis which would not be recognized where the insurance contract was made, is held to be conclusive on the insurer.[3] The English rule is less strict, and requires "clear proof" that the foreign adjustment could have been enforced where it was made.[4] To entitle the loss to be brought into general average the sacrifice must not be chargeable to the fault of the owner, and must be voluntary and intended for the common benefit.[5] Jettison of deck cargo cannot be claimed for general average, nor a loss wholly due to a sea peril.[6] When the duty to contribute by way of general average is settled the next question is as to the sources of the contribution; and here it should be observed that goods which are sacri-

[1] Marsh. on Ins. 544; Abbott on Ship. 296; Strong v. New York F. Ins. Co., 11 Johns. 334; Louisville, etc. Ins. Co. v. Bland, 9 Dana, 147; The Congress, 1 Biss. 42; Albany City Ins. Co. v. Whitney, 70 Pa. St. 218; Fowler v. Rathbones, 12 Wall. 102; Columbian Ins. Co. v. Ashby, 13 Pet. 331; Barnard v. Adams, 10 How. 270; Wilson v. Cross, 33 Cal. 61.

[2] Russ v. Ship Active, 2 Wash. C. C. 226; Strong v. New York F. Ins. Co., 11 Johns. 333; Louisville, etc. Ins. Co. v. Bland, 9 Dana, 147.

[3] Strong v. New York F. Ins. Co., 11 Johns. 334; McGivern v. Stymest, 5 Allen, 320 (New Brunswick); Avon Marine Ins. Co. v. Barteaux, 2 Nova Scotia Dec. 195; Depau v. Ocean Ins. Co., 5 Cow. 63.

[4] Harris v. Scaramanga, L. R. 7 C. P. 481; Stewart v. West India, etc. Co., L. R. 8 Q. B. 88, 362; Power v. Whitmore, 4 M. & S. 141; Mayne on Dam., sec. 466.

[5] Butler v. Wildman, 3 B. & Ald. 402; Scudder v. Bradford, 14 Pick. 13; Wolcott v. Eagle Ins. Co., 4 Pick. 429; Smith v. Wright, 1 Caines, 43.

[6] Lenox v. United Ins. Co., 3 Johns. Cas. 224; Crane v. Aiken, 13 Me. 229; Covington v. Roberts, 2 B. & P. N. R. 378; Power v. Whitmore, 4 M. & S. 141.

ficed contribute equally with such as are saved; for if this were not required the loser would be in a better condition than the other contributors, as he would have the entire value returned to him, while his co-sufferers would lose a proportion.[1] Nor does anything contribute which has not been exposed to risk; for instance, where part of a cargo has been landed or sold for the ship's necessities.[2] Generally it is said that the ship and freight always contribute, and all goods carried for traffic whether they pay freight or not, and whether they belong to merchants, passengers, owners or masters; and they pay according to their value.[3] Bullion and jewels contribute unless worn on the person. Baggage and wearing apparel of passengers are exempt. Deck goods contribute[4] — though generally, as we have seen, they could not demand contribution if lost; and where a ship is ransomed from pirates the seamen contribute out of their wages; and where freight [83] is due at the time it is subject to the contribution. If the freight has been paid in advance it is exempt.[5] Neither are provisions for the ship, nor anything that belongs to the "wear and tear," liable to be brought in.[6]

§ 819. Same subject. The contribution is dependent on two things which are parts of one design: 1st, the method of ascertaining the loss; and 2d, the method of ascertaining the value of the property saved. Both depend upon where the adjustment is effected. If it is done at the port whence the ship sailed the loss will be the invoice price and charges added, unless the goods can be replaced, in which case the loss will be that price and shipping charges, but no insurance.[7] Prepaid freight must also be added if the goods would have been carried on.[8] The value of the property saved is determined

[1] Arnould on Ins. 918; Abbott on Ship. 505, 552 (11th ed.); Coast Wrecking Co. v. Phœnix Ins. Co., 7 Fed. Rep. 236; affirmed, 13 id. 127; 20 Blatch. 557.

[2] Arnould on Ins. 918; Abbott on Ship. 505, 552.

[3] Brown v. Stapyleton, 4 Bing. 119.

[4] The evidence of a custon to carry goods above deck must be clear in order that the underwriter shall be obliged to contribute. Wood v. Phœnix Ins. Co., 1 Fed. Rep. 235. If it is sufficiently proven the liability exists. S. C., 8 id. 27; Hazelton v. Manhattan F. Ins. Co., 11 Biss. 210; S. C., 12 Fed. Rep. 159.

[5] Frayes v. Worms, 19 C. B. (N. S.) 159.

[6] Wightman v. Macadam, 2 Brev. 230.

[7] Tudor v. Macomber, 14 Pick. 34.

[8] Frayes v. Worms, 19 C. B. (N. S.) 159.

by the same rule. When the adjustment takes place at an intermediate port, or at the port of destination, the property is estimated at the value it would sell for, deducting freight, duty, and landing expenses. And where the property saved has been damaged by the same accident that caused the loss, or by a subsequent disaster, its value is estimated as if all the lost and saved had arrived at port in the same condition. If the goods sacrificed are recovered before the adjustment the loss is estimated by adding to the damages sustained by them the expenses attending their recovery. The principle running all through these various rules is that equality is equity, and the intention is to do simply what is just. Rules are adopted with modifications and exceptions to effectuate this design, and are not allowed to override their real purpose of accomplishing what is just.[1] When damages occurring to the ship are of such a character as to amount to a partial loss the manner of computing the general average is to ascertain the cost

[1] On the subject of the manner of making adjustments the following cases may be consulted: Miller v. Letherington, 6 H. & N. 278; affirmed, 7 H. & N. 954; Gould v. Oliver, 4 Bing. N. C. 134; Milward v. Hibbert, 3 Q. B. 120; Crane v. Aiken, 13 Me. 229; Lenox v. United Ins. Co., 3 Johns. Cas. 224; Smith v. Wright, 1 Caines, 43; Dodge v. Barton, 5 Me. 286; Barker v. Baltimore, etc. R. Co., 22 Ohio St. 43; Barnard v. Adams, 10 How. 307; The Star of Hope, 9 Wall. 236; Dyer v. Piscataqua, etc. Ins. Co., 53 Me. 118; Doane v. Keating, 12 Leigh, 391; Barelli v. Hagan, 13 La. 580; Reynolds v. Ocean Ins. Co., 22 Pick. 191; Ball v. Ocean Ins. Co., 21 id. 472; Case v. Rully, 3 Wash. 298; The William Gillam, 2 Low. 154; Eppes v. Tucker, 4 Call, 346; Bell v. Smith, 2 Johns. 97; Dabney v. New England Mut. Mar. Ins. Co., 14 Allen, 300; Nelson v. Belmont, 21 N. Y. 36; Emery v. Huntington, 109 Mass. 431; McAndrews v. Thatcher, 3 Wall. 347; Harris v. Moody, 30 N. Y. 266; Lee v. Grinnell, 5 Duer, 400; Rossiter v. Chester, 1 Doug. (Mich.) 159; Gillett v. Ellis, 11 Ill. 579; Marshall v. Garver, 6 Barb. 394; Hobson v. Lord, 92 U. S. 397; Greely v. Tremont Ins. Co., 9 Cush. 415; Scudder v. Bradford, 14 Pick. 13; Tudor v. Macomber, 14 Pick. 34; Wightman v. Macadam, 2 Brev. 230; Slater v. Hayward Rubber Co., 26 Conn. 128; Gray v. Waln, 2 S. & R. 229; Carter v. Phœnix Ins. Co., 2 Wash. 51; Walker v. United States Ins. Co., 11 S. & R. 61; Columbian Ins. Co. v. Ashby, 13 Pet. 331; Lyon v. Alvord, 18 Conn. 66; Bentaloe v. Pratt, Wall. C. C. 60; Nimick v. Holmes, 25 Pa. St. 366; Dike v. Propeller St. Joseph, 6 McLean, 573; Eight Hundred Bales of Cotton, 8 Blatch. 221; Thornton v. United States Ins. Co., 12 Me. 150; Goodwillie v. McCarthy, 45 Ill. 186; also the treatises of Arnould and Benecke on this branch of the subject of insurance.

of repairs, deducting the one-third new from old.[1] Where [84] there is a total loss of the ship the measure of damages, or rather the amount of the loss, is held to be the value she would have been to the owner if he could have had her in security at the time of the loss, with the gross freight she would have earned by the voyage.[2] This is not the accepted law in England or in continental countries, according to Benecke, but it may be regarded as the law of this country, notwithstanding the opinion of Chancellor Kent in Bradhurst v. Columbian Ins. Co.[3] The rule laid down by the supreme court of the United States is supported by very strong American authority, which is cited, and has never been modified by that court. When the ship has been sold the price realized fixes her value in making the adjustment.[4] If she has not been sold, or has been totally lost, the value is fixed by ascertaining it when the voyage commenced; from this is subtracted the provisions and stores used up to the time of the loss, and any partial loss she may have sustained anterior to the final loss; and it is said that to this should be added any amount paid the ship as contribution on account of general average loss to herself.[5] The balance will be the basis of a contribution. The cases involving the method of the adjustment are almost without number; and the professional reader will find it to his advantage in complicated cases to consult a standard work like Arnould or Phillips, where the rules and exceptions are discussed in detail.

Section 2.

FIRE INSURANCE.

§ 820. Nature of contract; how made. Thus far the [85] subject of damages recoverable in marine insurance has been observed upon, and while the general remarks as to the character and quality of the contract are equally applicable to fire insurance, and many of the cases are cited from either class with propriety, there are some differences that demand notice. All that has been said as to the contract being one for the in-

[1] Abbott on Ship. (11th ed.) 551.
[2] Columbian Ins. Co. v. Ashby, 13 Pet. 331.
[3] 9 Johns. 13.
[4] Bell v. Smith, 2 Johns. 98.
[5] Arnold on Ins. 986 (4th ed.).

demnity of the insured for marine losses is equally applicable to insurance against fire.

Whenever it is established that the parties have concluded a contract by which the risk insured against, the amount of the indemnity, the duration of the obligation, the amount of the premium, and manner of its payment are definitely fixed, there is an agreement which is as sacred in the eye of the law as any that can be made.[1] And this contract, which must be such as to bind both parties to it,[2] is to be interpreted and construed, except when controlled or limited by statute, by the same rules and principles which govern other contracts.[3] Con- [86] tracts *for* insurance may be not only made by parol, but it has been held that they may be so made though the charter of the insurer requires all contracts *of* insurance to be in writing;[4] and if the risk has been accepted, and notice of the fact forwarded to the insured, though it may not have reached him until after the destruction, the insurer's obligation is complete.[5] So if fire insurance companies are authorized by their charters to insure property only to three-fourths of its value, yet if they deliberately make a valuation of property and insure three-fourths of the amount of such valuation, they are bound thereby, in the absence of fraud, collusion or misrepresentation, and cannot show in an action against them to recover a loss that the property was insured for more than three-fourths of its value.[6] It has been held that the contract is complete though the insurer, an incorporated company, had left the matter in the hands of an agent to determine if he had agreed to it, and the company had not received any notice of his acceptance of it.[7] And the contract is complete when the policy

[1] First Baptist Church v. Brooklyn Ins. Co., 28 N. Y. 153; Strohn v. Hartford Ins. Co., 37 Wis. 625. See Ela v. French, 11 N. H. 356. As to agreement to insure, Angell v. Hartford F. Ins. Co., 59 N. Y. 171; Perkins v. Washington Ins. Co., 4 Cow. 695.

[2] Wood v. Poughkeepsie Ins. Co., 32 N. Y. 619.

[3] Portsmouth Ins. Co. v. Brinckly, 2 Ins. Law Jour. 842; Illinois Ins. Co. v. Marseilles Manuf. Co., 6 Ill. 236.

[4] Security Ins. Co. v. Kentucky Ins. Co., 7 Bush, 81; Relief F. Ins. Co. v. Shaw, 94 U. S. 575. See *contra*, Head v. Providence Ins. Co., 2 Cranch, 127.

[5] Tayloe v. Merchants' Ins. Co., 9 How. (U. S.) 390; Hallock v. Commercial Ins. Co., 26 N. J. L. 268.

[6] Fuller v. Boston Mut. F. Ins. Co., 4 Met. 206. See Post v. Hampshire Mut. F. Ins. Co., 12 id. 555.

[7] Ellis v. Albany City Ins. Co., 50 N. Y. 402.

has been forwarded to the agent for delivery to the insured, though in fact it has not been delivered.[1] An agreement between a property owner and the agents of several insurance companies to take insurance to a gross amount will be construed to contemplate a separate policy by each company for an equal proportion of such sum.[2]

§ 821. General rule of damages. Assuming, therefore, the existence of a contract between the insurer and the insured against loss of or injury to the subject by fire, and that a loss has occurred, the first question is as to the amount which the insured can recover. Remembering the rule that insurance is a contract of indemnity, and that the insurer agrees for the *immediate*, not the *remote*, consequences of the loss,[3] he is bound to pay the whole loss if within the amount of the policy, without regard to the proportion between the amount insured and the value of the property at risk,[4] and is liable for the damage to the building or goods, excluding all gains or profits which might have come to the insured if the fire had not occurred.[5] The qualification just stated does not extend to the exclusion of evidence of the rental of buildings insured, where their value is in issue, and the evidence is offered to prove such value.[6] When an insured building [87]

[1] Hallock v. Ins. Co., 26 N. J. L. 268.

[2] Fitton v. Phœnix Ass. Co., 25 Fed. Rep. 880.

[3] Insurance Co. v. Boon, 95 U. S. 117; Insurance Co. v. Express Co., id. 227; Case v. Hartford Ins. Co., 13 Ill. 676; White v. Republic F. Ins. Co., 57 Me. 91.

[4] In an action on a policy in which the insurer promises to pay the insured all losses or damage not exceeding $2,500 that may happen by fire to their stock of goods; and providing also that the losses or damage be estimated at the actual cash value of the property at the time the same shall happen and be paid at the rate of two-thirds its cash value, held, that the losses or damage being found to be to the amount of $2,500, and that such loss was less than two-thirds of the value of the stock of goods, the insured are entitled to recover the full sum of $2,500, although that is the full amount of the insurance. Ashland Mutual F. Ins. Co. v. Honsinger, 10 Ohio St. 10; Thompson v. Montreal Ins. Co., 6 Up. Can. Q. B. 319; Underhill v. Agawam Mut. F. Ins. Co., 6 Cush. 440; Mississippi Mut. Ins. Co. v. Ingram, 34 Miss. 215.

[5] Farmers' Mut. Ins. Co. v. New Holland Turnpike Co., 122 Pa. St. 37; Liscom v. Boston Mut. F. Ins. Co., 9 Met. 205; Underhill v. Agawam Mut. Ins. Co., 6 Cush. 440; Phœnix Ins. Co. v. Cochran, 51 Pa. St. 143; Welles v. Boston Ins. Co., 6 Pick. 182; Wright and Pole, Matter of, 1 A. & E. 621; Niblo v. North Am. Ins. Co., 1 Sandf. 551.

[6] Cumberland Valley Mut. Prot. Co. v. Schell, 29 Pa. St. 31.

is totally destroyed, in fixing the amount of the loss there is no rule based on the estimated cost of a new building, with the difference between the new and the old structure, as in adjusting marine losses on ships;[1] nor does the cost of rebuilding furnish the rule of damages. The fair value of the property destroyed, as fixed by the judgment of a jury, is accepted as decisive of the question.[2]

The market value of a building burned is not always a fair rule of adjustment. The contract of the insurer is not that, if the property is burned, he will pay such value, but that he will indemnify the insured. Hence it is no defense to the insurer that the payment of what will amount to an indemnity may, by reason of the insured's collateral and independent contracts, give him an advantage. Thus, where the owner of an insured building sold the land on which it stood reserving title to the structure upon it, with the right to remove it before a day named, and if it was not removed it was to become the property of the grantee, it was ruled that the measure of his recovery against the insurer was not affected by the contingency that the building was to be removed.[3] This is in accordance with the rule as stated by Chancellor Kent, that "if a tenant erects a building on a lot held under a lease, with liberty to renew or remove the building at the end of the lease, and the building be destroyed by fire a few days before the end of the lease, though the building as it stood was worth

[1] Mississippi Mut. Ins. Co. v. Ingram, 34 Miss. 215; Brinley v. National Ins. Co., 11 Met. 195. See Parker v. Eagle F. Ins. Co., 9 Gray, 152.

[2] Brinley v. National Ins. Co., 11 Met. 195; Waynesboro Mut. F. Ins. Co. v. Creaton, 98 Pa. St. 451; Farmers' Mut. Ins. Co. v. New Holland Turnpike Co., 122 id. 37; Thompson v. Liverpool, L. & G. Ins. Co., 2 Haskell, 363 (the liability under a policy which restricts the damages to the cost of replacing the property, less its depreciation, etc., is not fairly determined by taking the difference between the value of the building and the land prior to the destruction of the former and the value of the land thereafter); Ætna Ins. Co. v. Johnson, 11 Bush, 587. It is said in the last case: It seems to us that the just mode of fixing the value, although the rule may not be of universal application, would be the value of the building as it stood upon the ground on the day it was destroyed as compared with a new building of the same kind and dimensions.

[3] Washington Mills Manuf. Co. v. Weymouth & B. Mut. F. Ins. Co., 135 Mass. 503; Same v. Commercial F. Ins. Co., 13 Fed. Rep. 646; Collinridge v. Royal Exchange Ass. Corp., 3 Q. B. Div. 173.

more than the sum insured, and if removed would have been worth much less, yet the courts look only to the actual value of the building as it stood when lost, and they do not enter into the consideration of these incidental and collateral circumstances in fixing the true standard of indemnity."[1]

On principles which are elsewhere stated and illustrated[2] the only damages which can be recovered from an insurer because of delay in making payment according to the contract is in the nature of interest,[3] and that only from the time of default.[4] No more than the amount insured can be recovered; that is the utmost limit of the insurer's liability. If a partial loss has been compensated and thereafter a total loss occurs, only the difference between the sum already paid and the whole amount designated in the policy can be recovered.[5] If the insured has only a special interest in the property covered by the policy, the recovery cannot exceed the value of his interest, though the insurance be upon the whole property.[6]

The insurer against damages by fire is responsible for the loss of goods stolen during the fire.[7] So, also, the damage and expense caused and incurred by removing, with a reasonable degree of care suited to the occasion, insured goods from apparent immediate destruction by fire, although the building in which they were insured and from which they were then removed was not in fact burned,[8] and damage by water thrown to extinguish the fire.[9] If a partial loss occurs upon a policy, for a sum expressed in dollars, made here upon property situated in a foreign country, the rule for estimating damages is

[1] 3 Kent's Com. 376; Laurent v. Chatham Ins. Co., 1 Hall (N. Y.), 41.

[2] Vol. 1, ch. 8.

[3] Insurance Co. v. Piaggio, 16 Wall. 378.

[4] Home Ins. Co. v. Adler, 71 Ala. 516.

[5] Lattomus v. Farmers' Mut. F. Ins. Co., 3 Houst. 401; Curry v. Commonwealth Ins. Co., 10 Pick. 535.

[6] Van Natta v. Mutual Security Ins. Co., 2 Sandf. 490; Smith v. Columbian Ins. Co., 17 Pa. St. 253; Niblo v. North American F. Ins. Co., 1 Sandf. 551. See Franklin v. National Ins. Co., 43 Mo. 491; Borden v. Hingham Mut. F. Ins. Co., 18 Pick. 523. See § 829, *post.*

[7] Tilton v. Hamilton F. Ins. Co., 14 How. Pr. 363; Independent Mut. Ins. Co. v. Agnew, 34 Pa. St. 96.

[8] White v. Republic F. Ins. Co., 57 Me. 91.

[9] Hillier v. Allegheny Ins. Co., 3 Pa. St. 470; Witherell v. Maine Ins. Co., 49 Me. 200; Lewis v. Springfield F. & M. Ins. Co., 10 Gray, 159.

to determine the loss at the place where it occurred in the currency of that country and then to find the equivalent in the country where suit is brought by determining the actual intrinsic value of the currency of that country as compared with the currency of the other; and it is immaterial, in reference to this, that the policy contains a provision that in case of loss the company shall have the right to replace the articles lost or damaged with others of the same kind and of equal quality.[1] Where there is an absolute loss of any article distinctly valued in the policy the loss is to be estimated according to the valuation, it being in the nature of liquidated damages.[2] A mortgagor of a house whose right in equity to redeem has been seized on execution has an insurable interest in the house, and it continues so long as his right to redeem such equity exists. In case of loss such assured is entitled to recover the whole sum insured if the value of the property destroyed amounts to that sum.[3] A sale on execution will not cause a forfeiture of a policy by force of a provision that if the property should be sold or conveyed in whole or in part the policy should become void.[4] The insurable interest of a mortgagee in the property mortgaged corresponds in its amount to that of the debt.[5]

§ 822. **Contribution if there is more than one policy.** When property covered by several policies is destroyed the proportion of its value to be paid by each insurer is that which the amount of his policy bears to the aggregate insurance thereon, although some of the policies cover other property than is insured by all the underwriters.[6]

§ 823. **Mitigation of liability.** If a premium due on the policy remains unpaid the amount should be deducted from

[1] Burgess v. Alliance Ins. Co., 10 Allen, 221.

[2] Harris v. Eagle F. Co., 5 Johns. 368.

[3] Strong v. Manufacturers' Ins. Co., 10 Pick. 40.

[4] Id.

[5] Kernochan v. New York B. F. Ins. Co., 5 Duer, 1; Boynton v. Clinton, etc. Ins. Co., 16 Barb. 254. See *post*, § 829.

[6] Blake v. Exchange Mut. Ins. Co., 12 Gray, 265; Staat v. Royal Ins. Co., 49 Pa. St. 14; Lycoming Ins. Co. v. Mitchell, 48 id. 367; Home Ins. Co. v. Baltimore W. Co., 93 U. S. 527; Richmondville Union Seminary v. Hamilton Mut. Ins. Co., 14 Gray, 459; Liverpool, etc. Ins. Co. v. Verdier, 33 Mich. 138; Westchester F. Ins. Co. v. Earle, id. 143; Ogden v. East River Ins. Co., 50 N. Y. 388; Baltimore F. Ins. Co. v. Loney, 20 Md. 20.

the sum for which the insurer is liable.[1] And if the policy provides for the deduction of the amount due on a premium note or any instalment of it, such deduction may be made, though the action to recover for a loss is not brought until the statute has barred a suit on the note.[2]

§ 824. What jury may consider. It is said when the subject of the insurance has not a "ready" market value the jury have the right to form their own judgment of its value, provided it be not unfair.[3] The cost of replacing the thing, deterioration, its worth to a stranger, are elements proper to be considered, but are not conclusive.[4] And in the case of articles having a ready sale, the market value at the time and place of the destruction is regarded as the cash value, but a temporary rise or depression of that value should not be allowed to control. Neither cost, profits nor unpaid duties are necessary elements unless the latter reduce the insurable interest; and in the case of damaged goods a fair sale at auction with the knowledge of the insurer furnishes a proper basis for fixing the damages.[5] In cases where the insurer restricts his liability by the policy to two-thirds, or other proportion of the actual value of the building and goods "at the time of loss," the limit applies equally to both classes of property; and when the insurer provides that partial losses shall be paid in full, not exceeding the amount insured, provided the insured had on hand the lowest amount stated in the application, as if the insurance is on merchandise to the amount of $3,000, it is not regarded as a case of partial loss, though a small amount, for example, $20 or $30 worth, were saved, because that was not the real intention of the parties.[6] There is no right [88]

[1] Home Ins. Co. v. Adler, 71 Ala. 516, 529.

[2] Alexander v. Continental Ins. Co., 67 Wis. 422.

[3] Gere v. Council Bluffs Ins. Co., 67 Iowa, 272.

[4] Brinley v. National Ins. Co., 11 Met. 195; Niblo v. North American Ins. Co., 1 Sandf. 551; Commonwealth Ins. Co. v. Sennett, 37 Pa. St. 205; State Ins. Co. v. Taylor, 14 Colo. 499.

[5] Wolfe v. Howard Ins. Co., 1 Sandf. 124; Hoffman v. Ætna Ins. Co., 1 Rob. (N. Y.) 501; Hoffman v. Western Ins. Co., 1 La. Ann. 216; Wolfe v. Howard Ins. Co., 7 N. Y. 583; Clement v. British Amer. Ass. Co., 141 Mass. 298 (the cost of manufacturing staple goods constantly sold in the market may be proved, not as a test but as one of the elements to aid the jury in finding their market value).

[6] Singleton v. Boone County Ins. Co., 45 Mo. 250.

of abandonment in fire as in marine insurance,[1] and goods destroyed are to be paid for at their value at the time of loss; and if they are only damaged, the difference between their value in their present and prior condition. When they are so injured as not to be salable in the ordinary way, the insured may, on notice to the insurer or with his knowledge, make a fair sale at auction, and, crediting him with the proceeds, recover the balance. If the sale is made without such notice or knowledge the insured takes upon himself the burden of proving that the goods brought all they were worth, the returns of the sale of themselves being insufficient evidence of their value.[2] When the parties have agreed in the policy upon the manner of ascertaining the value of the property the law will sustain the agreement, as already stated in the opening of this chapter.[3]

§ 825. **Proof of damages.** If no such agreement exists then the law permits the insured to prove by any legal testimony what the value actually was, so as to fix the damages;[4] and as to what testimony is admissible to establish the ultimate point in the inquiry is more a question in the law of evidence than in that of insurance. There are many varying and inharmonious decisions on what is proper testimony, but for the reason assigned they will not be further referred to.

§ 826. **General average in fire insurance.** While it is said the election of the insured to abandon the property does not exist in fire as in marine insurance, and this constitutes one of the distinctions between them, they have in some cases a feature in common which we would least expect to find, viz.: general average. During the progress of a fire the insured, with the approval of the insurer, procured and hung out of the windows of the building wet blankets, which proved to be of essential service in stopping the progress of the flames, and in preserving the goods in the building. On this state of facts it was held[5] that the insurer and the insured should contrib- [89] ute towards the loss of the blankets so used in proportion to the amount which they respectively had at risk in the store

[1] Henderson v. Western M. & F. Ins. Co., 10 Rob. (La.) 164.

[2] Ibid.

[3] *Ante*, § 804.

[4] Lycoming F. Ins. Co. v. Jackson, 83 Ill. 302.

[5] Welles v. Boston Ins. Co., 6 Pick. 182. See Liscom v. Boston Mut. F. Ins. Co., 9 Met. 205.

and contents. It was a practical case of dry land jettison and general average contribution deduced from the "laws of the sea." Common sense and common justice proved superior to the general rule that in a loss under a policy of insurance against fire the amount is to be paid without contribution, and shows that the insurer may become liable beyond the sum named in the policy.

§ 827. **Recoveries in special cases.** If the contract is to the effect that the insurer will pay all losses and damages, not exceeding a specified sum, which may happen to the insured property during the term of the insurance, and that the loss and damage shall be estimated according to the true and actual value of the property at the time the fire shall occur, and be paid at the rate of two-thirds of the actual loss, the insurer's liability is not limited to two-thirds of such loss. The liability under such a contract is to pay all losses sustained by the insured within the sum named in the policy, and not exceeding two-thirds the value of the stock insured. If the goods insured were worth only the amount specified in the policy, the insurer would only be liable for two-thirds of that amount; but if the stock were worth twice the amount stated in the policy it would be liable for the whole sum stated therein, because the loss exceeded the two-thirds of value which the insurer agreed to pay.[1] And whenever the contract is that the insurer will pay the value, or a certain proportion of the value of the property at the time of the loss, that value is determined by its *then* value, without reference to its worth at the time of the inception of the risk.[2] In cases where divers lots of goods in different places or buildings, and separately valued, are insured together for a gross sum named in the policy, though only on a proportion of the value, and a loss exceeding the proportion happens to a part of the lots, the liability of the insurer is not confined to the proportion of the value of the lots which are destroyed, but is to the extent [90] of the injury, not exceeding the amount named. In a case in New Hampshire where insurance was effected for a gross

[1] Ashland Mut. Ins. Co. v. Housinger, 10 Ohio St. 10; Huckins v. People's Ins. Co., 31 N. H. 238.

[2] Huckins v. People's Ins. Co., 31 N. H. 238; Post v. Hampshire Mut. F. Ins. Co., 12 Met. 555; Atwood v. Union Mut. F. Ins. Co., 28 N. H. 234.

sum on the plaintiff's house and sheds, valued at $1,200, furniture therein $250, barns $250, barn and shed in the meadow $250, hay and grain therein $400, it was held in a suit involving losses to the amount of $900, being of the barn and sheds in the meadow and the hay and grain therein, that the insurer was liable for the entire loss of all the hay in both barns, and not simply a proportion of each parcel or lot actually destroyed.[1] On the same doctrine it was held in Louisiana that where an insurance was taken on cotton to the amount of $20,000, it being stored in seven different warehouses, and cotton to the value of $17,000 was destroyed in one of them, the insured was entitled to recover the full sum lost, and was not limited to a proportion to be ascertained by a comparison of the sum in the policy to the value of the whole property insured. The court construed the policy to mean that the insurer engaged by his contract to indemnify the insured against all loss or damage on all and every part and parcel of the cotton insured, to the extent of $20,000; and as the loss was within that sum, although six of the seven lots insured were uninjured, the insured was entitled to recover for the entire loss.[2] And it may be stated as a rule, that where the amount of insurance is not distinctly apportioned between the subjects of it by the policy, the latter to its full amount will bear any loss that happens to either.[3] But if the policy is specifically limited to certain designated subjects it will not be extended beyond those specified.[4] In the New Hampshire case just cited it was held that on a policy for $1,500, where the by-laws of the insurer provided that in no case should it become bound to pay more than two-thirds of the actual value of the property insured at the time of loss, and the insured proved that he had on hand at that time property of the value of $2,250, [91] that he might recover the full amount of $1,500, it appearing that so much had been destroyed.

[1] Rix v. Mutual Ins. Co., 20 N. H. 198. It is usual for the policy to provide that liability shall be distributed *pro rata* among the various classes or lots of property insured, in which case each is considered separately. Insurance Co. v. Ayers, 88 Tenn. 728; Hoffman v. Insurance Co., id. 735.

[2] Nicolet v. Insurance Co., 3 La. 371.

[3] Blake v. Exchange Mut. Ins. Co., 12 Gray, 265, and cases cited *supra.*

[4] *Supra;* Huckins v. People's Ins. Co., 31 N. H. 238; Storer v. Elliot Ins. Co., 45 Me. 175; Liddle v. Market F. Ins. Co., 4 Bosw. 179; Burgess v. Alliance Ins. Co., 10 Allen, 221.

Where it is provided that the cash value of property destroyed or damaged shall in no case exceed what would be the cost to the assured of replacing it, the expense of doing that is a proper method of fixing the damages. Such cost includes the expense of removing machinery from the building in order that repairs may be made, although the machinery may have been owned by a third person, who, as between himself and the insured, was bound to remove it.[1] It was stipulated in the policy that the measure of damages in case of the loss of the lumber insured should not exceed the actual cost of producing it. This was construed to mean that if the insured bought the logs out of which the lumber was manufactured, the damages would be the price paid with interest, and the cost of manufacturing and storage; if he purchased the stumpage, the price paid with interest and expenses added; if he owned the land from which the logs were cut, the fair value of the stumpage with interest and expenses.[2]

In a recent New York case the insurance was upon oil-reducing works for the protection of specified royalties payable by the owner of the works to patentees. The contract between these parties stipulated that the royalties should amount to $250 per month; the policy was to the effect that in case the works were damaged so as to cause a diminution of the royalties the insurer would make good to the insured the amount of such diminution during the restoration of the premises to their previous producing capacity. The recovery was not limited to the loss of royalties on the oil actually burned, as the principal damage arose from the enforced idleness of the works. It was also held that it was competent, on the question of damages, to prove the royalties paid for two months immediately preceding the fire, and those paid during the time the works were being restored and for some months thereafter.[3]

§ 828. Insurance on commission goods. There is some difficulty in applying the measure of damages where the policy is taken upon goods which are held for sale on commission.

[1] Clover v. Greenwich Ins. Co., 101 N. Y. 277.

[2] Chippewa Lumber Co. v. Phenix Ins. Co., 80 Mich. 116.

[3] National Filtering Oil Co. v. Citizens' Ins. Co., 106 N. Y. 535.

It is clear that unless it specifies that the goods are held upon commission, and are insured for the true and actual or some named value, and insured as such, the loser cannot recover beyond the loss of his commissions. A party who sells goods on commission has such an interest as entitles him to insure them, but he must not insure them as his own; for as the contract is one of indemnity, and his interest is in fact limited, he will be restricted to his actual loss. But where the property so held is insured, as well the interest of the factor as of the consignor whom he represents, and who need not be specified or named, the policy will attach upon the thing as in other cases. And where it embraces "goods as well the property of the assured as those held by him on commission," and agrees to make good to the insured all loss and damage, to be estimated according to their true actual value at the time the loss shall happen, the insured may recover the whole value of such property, and not merely the amount of his lien or commissions.[1] In a Massachusetts case the insurers were commission merchants, and took out a policy for $10,000 on merchandise in their store, and by them held in trust. At the time of taking the policy they represented to the insurance company that they were in the habit of receiving goods for sale; that they made advances on some of them, and on some they made none; that the goods on hand were constantly changing by sales and new consignments; and that they desired to be insured on such goods to secure themselves against loss by fire, as the consignors might not be able to repay the advances. On the case stated it was decided that the insurer was liable only to the extent of *the interest* of the insured in the property lost; in other words, to such goods, and only to the extent that advances had been made or commissions attached.[2]

[92] § 829. **Insurance by mortgagee.** Where a mortgagee of property insures on his own account, it is but an insurance

[1] De Forest v. Fulton F. Ins. Co., 1 Hall, 84; Brichta v. New York Ins. Co., 2 Hall, 372; Home Ins. Co. v. Baltimore W. Co., 93 U. S. 527, 543; Johnson v. Campbell, 120 Mass. 449.

[2] Parks v. General Interest Ass. Co., 5 Pick. 34; Suffolk Ins. Co. v. Boyden, 9 Allen, 123; Foster v. Equitable Ins. Co., 2 Gray, 216; Washington Mills Manuf. Co. v. Weymouth & B. Mut. F. Ins. Co., 135 Mass. 503; Fire Ass'n v. Rosenthal, 108 Pa. St. 474.

to the extent of his debt, and the insurer is liable only to the amount of the debt;[1] but if the mortgagor takes out a policy and assigns it to the mortgagee as part of the security, the latter is entitled to recover the whole amount, though if there be an overplus beyond what is due on the mortgage debt, he will be liable to account to the mortgagor for it.[2] In a case arising in Massachusetts it was held that when a mortgagee at his own expense insures his interest in property against loss by fire, without particularly describing the nature of it, he is entitled on the happening of the loss to recover the amount of his loss as mortgagee to his own use without first assigning his mortgage to the insurer; nor is he compelled to account to the mortgagor for the amount so recovered in whole or in part; he retains a right to recover his whole debt from the mortgagor. And, on the other hand, when the debt is paid by the mortgagee, the money is not in law or equity the money of the insurer who has paid the loss, nor is it money paid for his use.[3] It must be confessed that at first view the doctrine of King v. State Mutual F. Ins. Co. seems at variance with other well established principles, but a closer examination of it will show it to be sound law. If a mortgagor insures and assigns the policy to the mortgagee as a further security for his debt, or if the mortgagee agrees to insure as part of his contract with the mortgagor, it is reasonable to say that he shall, as between him and the mortgagor, have only his debt, and that the policy is but a part of the security for that debt; but when the mortgagee, for his own security, at his own expense, and for his own exclusive benefit, procures an insurance, there is no such relation between him and the mortgagor as would authorize the latter or any one subrogated to his rights to call upon the insured for any part of the money paid on such policy. The insurance company having received the premium, and the event having occurred upon which [93] its liability became fixed, could no more defend the action

[1] Kernochan v. New York Bowery Ins. Co., 5 Duer, 1; 17 N. Y. 428.

[2] Tyler v. Etna Ins. Co., 16 Wend. 385; Carpenter v. Providence Ins. Co., 16 Pet. 495; Foster v. Equitable Mut. F. Ins. Co., 2 Gray, 216; McEwan v. Western Ins. Co., 1 Mich. N. P. 118.

[3] King v. State Mut. F. Ins. Co., 7 Cush. 1. The English case of Dobson v. Land, 8 Hare, 216, proceeds upon similar principles.

than in any other case of a contract liability; nor would the mortgagor have any right to call on the insured, because the money was procured on an independent contract and consideration moving from the party who received it. This case is supported by some subsequent adjudications, and seems on principle to be unassailable.[1] It is further announced in the case last cited from New Jersey that where a mortgagee holds other securities for the same debt and effects insurance on the mortgaged property, and subsequently parts with any of his securities, or part of his mortgage is paid, the insurer will only be liable on his policy to the amount remaining unpaid. But if the mortgagee parts with his other securities, or receives payment of part of his debt after a suit has been commenced, he is entitled to recover the full amount of his insurance. Nothing else being put in issue by the pleadings, the rights of the parties must be determined as they existed at the time the suit was instituted. If the mortgagee has been paid the debt to protect or secure which the insurance was effected, or if he has impaired the rights of the insurer in any securities to the benefit of which it was entitled, the latter must resort for relief to a court of equity, his equitable claim not being a proper subject for a jury.

It is respectfully submitted that the whole difficulty here suggested is based on the erroneous notion that a contract made by one person for his own benefit, on a consideration proceeding from him, with which the other has nothing to do, may be treated as giving that other a right. Of course under the code system of pleading, where legal and equitable defenses may be mingled in the same action, the difficulty last suggested would have no existence. In New York[2] it was held that when the insurer did not have *notice* that the insurance was on a mortgage interest, it was no defense to the action on the policy by the mortgagee that the mortgage [94] was ample security for what remained unpaid on the mortgage debt, notwithstanding the loss by fire, and that

[1] Concord Mut. Ins. Co. v. Woodbury, 45 Me. 452; Honore v. Lamar F. Ins. Co., 51 Ill. 409. It is questioned in New Jersey, and the opposite rule is there recognized. Sussex Ins. Co. v. Woodruff, 26 N. J. L. 541.

[2] Kernochan v. New York Bowery Ins. Co., 17 N. Y. 428.

therefore the plaintiff was not injured, though a loss had actually occurred. The court said that "if in any case the insurer of a mortgagee is entitled on payment of a loss to an interest in the debt and security, it is a mere equity, not arising out of the contract of insurance, but from all the circumstances of the case." And further that the insurance was not of the "debt of the mortgagor," but of the property, and upon its destruction the insured mortgagee had the right to recover. This case, to the extent the decision goes, was decided upon correct principles, though the court did not seem inclined to fully adopt the Massachusetts doctrine.

§ 830. Contracts to replace or rebuild. As has been already said, there is a class of insurance contracts in which the insurer reserves the right to replace the articles lost or rebuild the structures destroyed. This right depends wholly on the contract and does not exist independently of it. Under such a contract, if the insurer rebuilds or replaces, no action for the loss in money can be maintained. But if he fails to rebuild, the measure of damages is not what it would cost to replace or repair, but such a sum as will be a fair indemnity for the loss.[1] And where the insurer elects to rebuild, and is not permitted by the public authorities by reason of the building being dangerous or not being in conformity with some ordinance, he must pay damages for not performing his contract.[2] The fact that such a structure is prohibited by governmental authority, and that a new building must be of better material — brick, for instance, instead of wood — does not excuse the insurer; he must either build in conformity to such regulations or pay the insured the actual amount of the

[1] Brinley v. National Ins. Co., 11 Met. 195; Commonwealth Ins. Co. v. Sennett, 37 Pa. St. 205; Walbum v. Insurance Co., 4 La. 289.

In some jurisdictions the election to repair or rebuild converts the contract of insurance into a building contract. Good v. Buckeye Ins. Co., 43 Ohio St. 394; Heilman v. Westchester F. Ins. Co., 75 N. Y. 7; Beals v. Home Ins. Co., 36 id. 522.

[2] Brady v. Northwestern Ins. Co., 11 Mich. 425; Brown v. Royal Ins. Co., 1 Ellis & Ellis, 853; Hamburg-Bremen F. Ins. Co. v. Garlington, 66 Tex. 103.

This rule does not apply if the insurer's charter limits the amount which it may expend in building or repairing to the sum insured. Home Mut. F. Ins. Co. v. Garfield, 60 Ill. 124.

[95] loss.[1] Under a provision authorizing the insurer to elect to rebuild the property destroyed, he may place the insured in as good condition as he was before the fire by repairs or renewals which make it equal to its former condition. And in an action on the policy evidence of the repair and renewal is a good defense.[2] The insurer may show further in defense of an action that after his liability occurred and before the time for the election to repair had expired, he had made an arrangement with the insured by which the time for making the repairs had been extended beyond the time fixed in the policy, and this will be a good defense to an action for the loss.[3] It is also held that when the insurer reserves the option to make good the loss by "rebuilding, replacing or repairs, *the insured to contribute one-fourth* of the expense," etc., and there is a partial loss, and the insurer makes substantial repairs, though not so perfect as the contract requires, the insured is entitled to recover the difference between the value of the buildings as repaired in part and what their value would have been had the repairs been complete. The insured in such a contract must pay one-fourth of the value of such repairs to the estate — not simply one-fourth of the cost.[4]

If the insurer unnecessarily delays the work of repairing, and additional damage results, it must, on finally refusing to repair, pay what it would cost to do the work at the time of such refusal.[5] If the repairs as made do not make good the loss the insurer may recover the difference between the value

[1] Brown v. Royal Ins. Co., *supra*.

In the noted case of Hall v. Wright (E., B. & E. 746), in the English exchequer chamber, the subject of relief from a contract where fulfillment has become impossible is fully discussed. In the American publication of that case (96 E. C. L. Rep. 795), the editor adds a lengthy and valuable note showing that the American cases support the general doctrine of the case. "Where the party by his own contract creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract." Paradine v. Jane, Aleyn, 26; Barker v. Hodgson, 3 M. & S. 267; Clendaniel v. Tuckerman, 17 Barb. 184; Phillips v. Storm, 16 Mass. 238.

[2] Franklin F. Ins. Co. v. Hamill, 5 Md. 170; Ellmaker v. Franklin Ins. Co., 5 Pa. St. 183.

[3] Ellmaker v. Franklin Ins. Co., *supra*.

[4] Parker v. Eagle Ins. Co., 9 Gray, 152.

[5] American Central Ins. Co. v. McLanahan, 11 Kan. 533, 553.

of the building as repaired and its value as it would have been if they had been properly made.[1] Where repairs were begun but not finished, and the insured completed them, he recovered the cost of finishing them and damages for the delay, the rental value of the property being a proper element for ascertaining the amount of the latter.[2] The insurer is not liable for rent of the premises while it is repairing them unless it occupies them for an unreasonable length of time.[3] If two or more independent insurers elect together to rebuild, and there is a breach, full damages may be recovered from either.[4]

This brief view of the rule of damages in fire insurance cases must suffice. It might be extended almost indefinitely by a review of the numerous cases which are found in the American and English reports. Such a labor more naturally belongs to a work devoted to the topic of insurance exclusively; and as a number of such treatises are already in existence, the profession would hardly justify a further excursion into that field.

Section 3.

LIFE AND ACCIDENT INSURANCE.

§ 831. Definition of life insurance. As already stated,[5] a life insurance contract is an agreement upon the part of the insurer with the person who takes the policy that upon the death of the person whose life is insured during the time for which it is so insured, or, if generally upon his life, upon the occurrence of his death, the insurer will pay the amount of the policy to the person holding the same.

§ 832. Character of the contract. The discussion as to whether life insurance is or is not a contract of indemnity makes it necessary to do what has been omitted in the notice of marine and fire insurance contracts, viz.: discuss [97] briefly the nature of the contract itself, as this influences in a degree the measure of recovery in particular cases. It is well

[1] Morrell v. Irving F. Ins. Co., 33 N. Y. 429.

[2] Fire Ass'n v. Rosenthal, 108 Pa. St. 474.

[3] St. Paul F. & M. Ins. Co. v. Johnson, 77 Ill. 598.

[4] Morrell v. Irving F. Ins. Co., 33 N. Y. 429. See Good v. Buckeye Ins. Co., 43 Ohio St. 394.

[5] *Ante*, § 802.

settled in England that a life insurance contract is not one of indemnity. The weight of authority and the majority of judicial *dicta* in this country are in harmony with this view. Except in a particular class of cases arising under these contracts the question is an abstract one, but in that class it becomes vital, and hence important to be considered. Whenever the amount of the recovery may be determined or limited by the idea of its being given by way of indemnity it is essential to fix the nature of the contract. It was at first held in England, in Godsall v. Boldero,[1] that a life insurance policy was a contract for indemnity. It is now settled there to the contrary that such a policy is a simple contract to pay a specified sum at the death of the person named therein, whose life is insured, and neither more nor less than that sum with interest from that event can be recovered.[2] It seems that the original case in England[3] was acquiesced in by the parties, no steps having been taken to reverse it, but was generally disregarded in practice, and after many years has been overruled by the unanimous decision of six judges sitting in the exchequer chamber.[4] Baron Parke said that "the contract commonly called life insurance, when properly considered, is a mere contract to pay a certain sum of money on the death of a person in consideration of the due payment of a certain annuity for his life, the amount of annuity being cal- [98] culated in the first instance according to the probable duration of the life, and when once fixed it is constant and invariable. The stipulated amount of annuity is to be uniformly paid on one side, and the sum to be paid in the event of death is always (except where bonuses have been given by prosperous offices) the same on the other. This species of insurance in no way resembles a contract of indemnity." The overruled case proceeded upon the statute of Geo. III., c. 48, but upon an erroneous construction of it. That statute, to prevent wagering policies, required that the person effecting for himself the insurance should have an interest in the continuance of the life insured and limited the recovery to that

[1] 9 East, 72.

[2] Dalby v. India & L. L. Ass. Co., 15 C. B. 365; Law v. London, etc. Ass. Co., 1 K. & J. 223.

[3] Godsall v. Boldero, *supra*.

[4] Dalby v. India & L. L. Ass. Co., *supra*.

interest. The overruling case held that wagering policies were not void at common law, and that the statute only required an interest to support the insurance when it was effected, and limited the recovery to the interest then existing.

In this country wagering contracts, by statute and by the common law, have generally been held void as immoral and contrary to public policy; and hence the right of one person to obtain for his own benefit insurance on the life of another is more restricted. Such insurance is permitted if it is not in fact intended in whole or in part as a wagering venture. A person who has an interest in the continuance of the life which is the subject of the insurance may effect an insurance upon it. The amount of it is chiefly important as an evidentiary fact in the determination of its validity — in determining whether it is speculative. If such an interest exists at the time the insurance is effected the contract has a valid inception. Whether it will continue valid if that interest afterwards ceases is an open question in nearly all the state courts, though it has been recently ruled by the supreme court of the United States[1] and the court of last resort in Pennsylvania[2] that a policy procured in good faith and valid at its inception is not avoided by the cessation of the insurable interest, unless as a consequence of its own provisions. There are two New York cases in which this rule must have been acted upon. They hold that the assignee of a policy which was obtained *bona fide* may recover thereon without proving his interest in the life of the assured or the consideration paid for the assignment.[3] In the case first referred to, the English case of Dalby v. Insurance Co.[4] was thus remarked upon: "It seems quite remarkable that any other view should be taken of this question. The contract is not to make any loss good or to make compensation. The debt is not insured. It is an absolute contract to pay, not the amount of a loss or damage arising from a death, but a specified sum of money upon the termination of the life insured." *Dicta* to the like effect

[1] Connecticut Mut. L. Ins. Co. v. Schaefer, 94 U. S. 461.

[2] Scott v. Dickson, 108 Pa. St. 6; Corson's Appeal, 113 id. 438.

[3] Rawls v. American Ins. Co., 27 N. Y. 282; St. John v. Same, 13 id. 31. See Provident L. Ins. Co. v. Baum, 29 Ind. 236.

[4] 15 C. B. 365.

may be found in other cases,[1] and to the contrary in Connecticut.[2]

§ 833. Same subject. The interest required to support a contract of life insurance when it is obtained should probably be pecuniary, but when insusceptible of definite measurement in money, the amount fixed in the policy will not affect its [99] validity without other proof tending to show an intention to speculate on the chances of the life; nor will it be subject to modification by extrinsic proof.[3] Policies which are subject to no objection at their inception or afterwards, for being unsupported by the requisite interest in the beneficiary, are enforced not only in England but in this country; not on the principle of indemnity, but as valued policies, imposing on the insurer the obligation, upon the happening of the death, to pay the precise sum the life was insured for.[4] When a legal policy upon a life is made, all that remains is to follow its terms. If, in consideration of certain premiums paid or to be paid, annually or otherwise, a person enters into a contract with another to the effect that at a given time or on the occurrence of an event he will pay that other so much money, the failure to pay after the occurrence is a breach of the con-

[1] Mowry v. Home L. Ins. Co., 9 R. I. 346, 354; Johnson v. Trenton Mut. Ins. Co., 24 N. J. L. 576 (the doctrine of this case is that wager policies are not illegal); McKenty v. Universal L. Ins. Co., 3 Dill. 448 (federal district court for Minnesota, per Nelson, J.).

In Forbes v. American Mut. L. Ins. Co., 15 Gray, 249, 254, Hoar, J., said: "As the premium is intended to be a precise equivalent for the risk taken, it would seem that the contract is a just and equitable one, whether any interest in the life exists or not; and that the only essential inquiry is whether the object of the contract is to obviate the objections to a mere wager upon the chances of human life."

[2] Bevin v. Connecticut Mut. L. Ins. Co., 23 Conn. 244. See Rivers v. Gregg, 5 Rich. Eq. (S. C.) 274.

[3] Connecticut Mut. L. Ins. Co. v. Schaefer, 94 U. S. 461; Bevin v. Connecticut Mut. L. Ins. Co., 23 Conn. 244; Loomis v. Eagle Ins. Co., 6 Gray, 396; Miller v. Eagle Ins. Co., 2 E. D. Smith, 268; Equitable L. Ins. Co. v. Patterson, 41 Ga. 338; Chisholm v. Capital L. Ins. Co., 52 Mo. 213; Lewis v. Phœnix Mut. L. Ins. Co., 39 Conn. 104; Valton v. National L. Ass. Co., 22 Barb. 9; 20 N. Y. 32; Hoyt v. New York Ins. Co., 3 Bosw. 440; Morrell v. Trenton F. & L. Ins. Co., 10 Cush. 282; Lord v. Dall, 12 Mass. 115; Mitchell v. Union L. Ins. Co., 45 Me. 104.

[4] Trenton Mut. L. & F. Ins. Co. v. Johnson, 24 N. J. L. 576; Bevin v. Connecticut Mut. L. Ins. Co., 23 Conn. 244; Lord v. Dall, 12 Mass. 115; Goodwin v. Massachusetts Mut. L. Ins. Co., 73 N. Y. 480, 497.

tract, affording to that other a perfect right of action for the precise sum agreed to be paid. The party agreeing to pay has received the consideration in the premium money, and whether we call the resulting express obligation an indemnity, a debt, or a penalty, it becomes due as a liquidated sum under the contract; and any attempt to question the right of the policy-holder is only to raise a question as to whether the obligor in any contract may not repudiate it, and still keep the benefits of full performance of the provisions in his favor. When one person has such an interest in the life of another as to be entitled to effect an insurance on that life, and does so, paying his own money for the policy, it is a contract between the insurer and the holder of the policy; and any inquiry as to whether the interest of the insured has continued, and is in existence at the time the death occurs, either by the [100] insurer or the representatives of the deceased, is on principle immaterial and irrelevant. The motive of A. to insure the life of B. is probably self-interest, but it is of no consequence to C., who issues a policy to A., what the real motive is if it be lawful and furnishes to C. the agreed consideration for the engagement. If A. buys and pays for a particular thing which C. delivers, no other party has any legal or equitable interest in the transaction. The insurer gets his premium, and the person advancing it is entitled to the benefit of the contract as much as if he had sold a lot of merchandise and the purchaser had agreed to pay a stated price at a certain time.[1]

[1] Professor De Morgan, in his Essay on Probabilities, page 244, has so thoroughly annihilated the theory of the case of Godsall v. Boldero, and the cases following and adopting it, that I cannot forbear quoting. He says: "The word *insurance* or *assurance* has given rise to some wrong notions, and it will be worth while to examine the nature of the contract. A. & Co. engage with B. that, in consideration of 1*l.* a year, paid by him during his life, they will pay 20*l.* to his representatives as soon as he shall be dead. Both parties run a risk: A. & Co. that of having to pay B. more than they receive; B. that of paying more than will at his death produce 20*l.* But the risk of the office is of immediate loss; and that of B. of deferred loss; that of the former is also continually lessening, and that of the latter increasing; until, should B. live long enough, both risks become certainties. If the insurance be only for a term of years, B. runs the risk of losing his premiums altogether. The office does not inquire what reason B. may have for assuring his own life or that

[101] § 834. When life insurance collateral security. When a person takes an insurance on his life, paying the premiums, and assigns the policy as collateral security to his creditor for a debt, there is no question that the assignee is

of another person, nor do any possible contingencies, except those of life, affect the office calculations. We cannot, therefore, be too much surprised at the ignorance shown by that judge who declared that life insurance was of its own nature a contract of indemnity; that is, if, by any lucky chance, B. can be proved to have accomplished the object for which he insured by other means, he has no claim upon the office. The circumstances are as follows: and the absurd conclusion is law, and would be practice, if the insurance offices had not refused to acknowledge the decision, or protect themselves by the precedent. A. & Co. covenanted with B. to pay 500*l.* if C. should die within the term of seven years next ensuing, in consideration of the usual premium. C. did die within the term; A. & Co., in answer to a claim of 500*l.*, replied that the intention of B. in insuring the life of C. was to obtain security for the payment of a debt of 500*l.* due by C. to B., which debt had already been paid by C.'s executors; consequently they owed nothing to B. An action was brought by B., and defended by A. & Co., on the above plea; and a special case being made, the case was decided by the court of queen's bench against the plaintiffs, thereby establishing the principle that life insurance is a thing similar to fire or ship insurance; namely, a contract of indemnity, to be fulfilled with allowance of salvage.

"The defendant's case rested upon the asserted nature of the contract, and the statute of 14 Geo. III., ch. 48, which enacts that 'no greater sum shall be recovered from the insurers than the amount or value of the interest of the insured in such life.' The act does not state at what time the interest is to be reckoned, but the plaintiffs contend that *the time of death* was the meaning of the statute; the defendants averred, and the court decided, that *the time of bringing the action* was to be understood. The plaintiffs contended that the debt was not the object of insurance, but the life of the insured; the court decided that 'this action is, in point of law, founded upon a supposed damnification of the plaintiffs occasioned by the death, existing and continuing to exist at the time of the action brought; and, being so found, it follows, of course, that if, before the action was brought, the damage which was at first supposed likely to result to the creditor was wholly obviated and prevented by the payment of his debt, the foundation of the action on his part, or the ground of such insurance, fails.' This sentence contains nothing but very good sense, and no doubt very good law; but the application of it was accompanied by a mistake as to the nature of the damnification which the plaintiffs had sustained. The counsel on both sides, the court, the insurance office, and the plaintiffs themselves, showed a very partial knowledge of the nature of the contract; and I make no doubt that almost every person who heard it agreed with the court, however much they might impugn the decision on other grounds, that the damage to the creditor was 'wholly ob-

a trustee for the proceeds beyond the amount of the [102] debt. In such case the policy is merely pledged as collateral, and follows the general rule applicable to all such securities; the proceeds are applied in payment of the debt

viated and prevented by the payment of the debt.'

"In order to show that such was not the case, we must suppose that an exactly similar transaction had taken place before any insurance office existed. How this could have been may not be apparent, if we take the notion which the law formerly entertained of such an office; namely, that it is a species of gambling house; but if we prefer to consider it as a savings bank, with an equalization system, which is unquestionably the correct notion, we may return to the circumstances which the case would have presented had there been no insurance. C., a person whose credit has become doubtful, is indebted to B. to an amount which B. could not afford to lose; consequently B., knowing that the chance of payment is precarious, resolves to diminish his expenses, hoping by economy to restore to his family the sum which he may have lost by his engagements with C. He collects, accordingly, a small fund, which he places with his banker, avowing the purpose of its collection. In the meantime C. dies, and some friends pay off his debts, and that due to B. among the rest. The latter having now no further occasion for such economy draws upon his banker for the amount and is answered that, since the purpose of the saving was fulfilled by the payment of C.'s debt, he, B., has no further claim upon his own money. An action is brought and the courts decide that the banker is right, and that B., having really attained his object in one way, has no right of property in the proceeds of another attempt to serve the same purpose.

"The only distinction between the case just put and that which actually occurred is that the banker was a person who gained his profits by receiving such savings during a contingent term, and guarantying a fixed sum; standing the loss, if there were any, and paying himself for it out of the gain which would accrue in another instance; the premium having been calculated so as to insure a moral certainty of profits upon the average of similar cases. It is not pretended on either side that the chance of indemnification at the hands of C.'s executors was made to lessen the consideration paid by B. for the guaranty; and the legal iniquity of the decision may, I think, be made clear, as follows:

"It will hardly be disputed, firstly, that the legislature is the judge of what shall constitute valuable consideration; and secondly, that a consideration which is expressly allowed to be good in a statute should be admitted as such in the decisions of the courts. Now, the contract of insurance, be it gambling or be it not, rests entirely upon the permission given by the law to consider a high chance of a small sum as good consideration for a low chance of a large sum. If I now pay 2*l.* of premium for 100*l.* in case I should die in a year, and if my executors can maintain an action for 100*l.*, it must be because the law sanctions the notion that 2*l.*, nearly certain, may, with consent of parties, be considered as an actual equivalent for a distant chance of 100*l.*; as much so as one weight of

[103] secured, and the surplus goes to the debtor or his representatives; and on this principle the case of American Life & H. Ins. Co. v. Robertshaw was rightly decided.[1] But as has already been said of the case of a mortgagee who insures the mortgaged property on his own account against loss by fire, this furnishes no reason for either the insurer or the debtor to demand an inquisition into the contract.[2] The contract is to pay to the holder of the policy the sum specifically mentioned on the death of the person named; and the duty of the insurer is plain, so long as contracts are regarded as things to be enforced or kept as they are made. In a recent case in the supreme court of the United States[3] the duty of a creditor to account to the estate of his debtor for the overplus received by him on a policy beyond the amount of his debt is distinctly recognized and enforced; but it is nowhere intimated that if the creditor had procured a policy on the life of his debtor, paying the premiums himself, that any such duty to account would have arisen. The case was this: P. insured his life for $3,000 in November, 1866.

silver for another of bread, or food, clothing and wages for personal services. It is true that the same law, fearing certain reputed immoral practices to which the power of making a particular bargain offers temptations, may limit the circumstances under which it will permit such bargains to be made; but this is equally true in regard to the other sort of contracts mentioned; indeed, there is no sort of bargain which is not under regulation. The law, then, allows risks, and permits unequal chances to be compensated by giving odds; the courts declare that, after the cost shall have been made, and one of the parties shall have stood his risk, which turns out in his favor, the other party shall receive an *ex post facto* release from the conditions of his bargain, because circumstances afterwards arise, which, had they existed at the time of making the bargain, would have made it illegal. The several principles on which the decision was founded, well carried out, as they say in parliament, would require that the previous contracts of a man who became insane should be null and void; that the meat which a man buys for his dinner should be returnable to the butcher under the cost, if a friend should invite him in the meantime; and, in the case before us, supposing that C. should have outlived the term, and his debt were paid, as before, then B. might have brought his action against the office for the return of the premiums; alleging that, as it turned out, the office would have been indemnified, and, therefore, should be considered as having run no risk."

[1] 26 Pa. St. 189.

[2] King v. State Mut. Ins. Co., 7 Cush. 1; *ante*, § 828.

[3] Page v. Burnstine, 102 U. S. 664.

In 1871 P. was owing B., and being embarrassed and unable to pay the accruing premiums, made an assignment of the policy to B., who annually paid the premiums until 1873, when an absolute assignment and transfer of the policy was made to B. It was conceded that the original assignment, and the final one, had their origin in the loan of B. to P. in 1871, and the court construed the last assignment, though absolute in form, as simply intended by the parties as an appointment of B. to receive from the company, upon the death of P., such sum as would then become due on the policy, and, after reimbursing himself to the extent of his loans to P., to pay the balance to the persons entitled, viz.: P.'s legal representatives. It was accordingly decreed that B. was the [**104**] trustee of the estate for the balance remaining in his hands after repaying the loan and the advances for premiums. No effort was made by the company to compel the holder of the policy to accept the simple amount of his loan as an indemnity, and the case is in entire harmony with the doctrine herein maintained.

§ 835. Accident policies. Where the injury to the person does not produce death, these policies are entirely different, and are clearly contracts for indemnity.[1] In this class of cases the damages are not estimated by any proportion between the injury sustained and the amount payable had death occurred, but the damage is the amount of injury the insured has actually sustained not exceeding the sum mentioned in the policy. The expenses incident to the injury, and compensation for the suffering resulting therefrom to the insured, are the basis of the estimate. Remote consequences are not to be considered; for instance, the special loss which the accident may impose upon an individual growing out of his profession, occupation, or the state of his business; the damages are such as naturally follow the effects of the injury; like the loss of a limb, or an eye, and the attendant loss of time, suffering, expense, etc.[2]

§ 836. Difference between English and American decisions as to scope of recovery. The English case last cited

[1] Theobald v. Railway Pass. Ass. Co., 10 Exch. 45.

[2] Hadley v. Baxendale, 9 Exch. 354; Theobald v. Railway Pass. Ass. Co., *supra*.

limits the right to recover in case of an accident insurance to the suffering and expenses of the injured party, and the ruling is followed in at least one American court.[1] This, however, seems not to be the accepted doctrine in this country; and upon principle is not sustainable. The action in such case is upon the contract, and if loss of time follows, it seems reasonable that it should be the subject of compensation. If a person, as the direct consequence of an injury, loses his time and money in treating his injury, to say that the latter shall be paid back and the former be without compensation is both [105] unjust and illogical. Indemnity requires it, and the general and accepted rule in analogous cases fully supports it.[2] Some of the cases cited were actions for breach of contract, and are therefore precisely in point; others were based on the defendant's negligence, and were for personal injuries resulting therefrom, and upon principle are apposite to the point under review.

§ 837. **Restatement of the measure and elements of damage.** As a conclusion, the rule of damages measuring the right of recovery in life insurance is: 1. Upon the death of the party insured the insurer becomes liable to pay the amount of the policy, and interest upon that sum, if there be delay. 2. When there is an injury not fatal, the accident insurer is liable to pay the insured damages, such as a jury may find included in the following elements: (1) Expense incurred. (2) Suffering resulting from the hurt received. (3) Loss of time during the disability caused by the injury.

§ 838. **Insurer's liability for terminating the contract.** A contract of life insurance is executory. If the insurer discontinues its business and transfers its assets and liabilities to another company, each policy-holder has a right to consider his contract at an end, and demand such damages as he may be entitled to.[3] If an insurer wrongfully refuses to receive a

[1] Francis v. St. Louis T. Co., 5 Mo. App. 9.

[2] Ransom v. New York & E. R. Co., 15 N. Y. 421; Williams v. Vanderbilt, 28 N. Y. 224 (per Balcom, J.); Howe Machine Co. v. Bryson, 44 Iowa, 159; Drinkwater v. Dinsmore, 16 Hun (N. Y.), 250; Indianapolis v. Gaston, 58 Ind. 224; Morris v. C., B. & Q. R. Co., 45 Iowa, 29. See Bean v. Travelers' Ins. Co. (Cal.), 29 Pac. Rep. 1113.

[3] Lovell v. St. Louis Mut. L. Ins. Co., 111 U. S. 264, 274, and cases cited in the following notes.

premium when it is tendered, some authorities hold that it is liable to the insured or the policy-holder for the full amount he has paid, with interest from the time each payment was made.[1] This measure of damages is rested upon the principle that a party to an entire contract, who, after part performance, refuses to completely perform, can recover nothing for what he has done. The fault to be found with it lies in this: it ignores the fact that the insured has received a consideration for the money he has expended. A more just rule and one which affords the insured compensation for the wrong done him is that which prevails when the insurer becomes insolvent or is dissolved, and a claim is preferred against its assets or the fund which has been deposited to secure policy-holders. In such cases the insured has a claim for the value of the policy,[2] which is the amount it would cost on the day of dissolution or insolvency to purchase from a solvent company a policy of the same kind for a like sum and rate of premium. This is ascertainable by treating the difference between the premiums paid the first and to be paid the new insurer as an annuity for the assured's expectation of life, and calculating its cash value.[3] This rule applies to participating policies, except where bonuses have been declared and not paid, in which case their amount is to be added to the sum originally insured.[4] Where the insurer's breach occurs and suit is brought during the insured's life, but he dies before judgment, "the value of the policy is its present worth as at the date of the repudiation of the contract by the company of the sum insured and payable at the death of the person whose life was insured, to be abated, however, by the present value at the same date of the premiums subsequently accrued, and also by the amount

[1] Alabama Gold L. Ins. Co. v. Garmany, 74 Ga. 51; Meade v. St. Louis Mut. L. Ins. 51 How. Pr. 1; Helme v. Philadelphia L. Ins. Co., 61 Pa. St. 107; Piedmont & L. Ins. Co. v. Fitzgerald, 1 Texas Civil Cas. 784, 788. This rule was formerly in force in Missouri (McKee v. Phœnix Ins. Co., 28 Mo. 383), but is not now. Smith v. Charter Oak L. Ins. Co., 64 id. 330.

[2] Lovell v. St. Louis Mut. L. Ins. Co., 111 U. S. 264, 274; People v. Security L. Ins. & Annuity Co., 78 N. Y. 114; Attorney-General v. Guardian Mut. L. Ins. Co., 82 id. 336.

[3] Universal L. Ins. Co. v. Binford, 76 Va. 103; Clemmitt v. New York L. Ins. Co., id. 355; Bell's Case, L. R. 9 Eq. Cas. 706; Holdich's Case, 14 id. 72; Smith v. St. Louis Mut. L. Ins. Co., 2 Tenn. Ch. 727.

[4] Bell's Case, L. R. 9 Eq. Cas. 706.

of the premiums previously accrued (which are unpaid) and interest thereon."[1] If the insurer holds premium notes the amount they represent is, of course, to be deducted.[2]

The cases which allow the insured to recover the premiums paid and interest thereon when the insurer refuses to receive such payments as are necessary to keep the policy alive are sustainable only on the theory that there has been a total failure of consideration. This is not correct, because the insured has had insurance during the life of the policy, and had the event happened which would have imposed liability upon the company, his right to recover would have been absolute. Further, that measure of liability might under some circumstances result in the recovery of a sum in excess of that for which the insurer is liable, as where the policy had been continued for a great many years, the insured life exceeding the average. In Speer v. Phœnix Mutual Life Ins. Co.[3] a son had insured his father's life. The insurer refused after the policy had been in force for some years to receive further premiums. The court observe that the son had two remedies — one, to enforce the policy in equity by compelling the company to receive the premium and continue the insurance in force, the other to recover at law such damages as he had sustained.[4] The action was of the latter class, and the recovery was of the full amount paid as premiums with interest. Speaking for the court, Davis, P. J., said: "When the company broke this contract and the plaintiff decided to sue for damages instead of compelling the continuance of the contract, he was entitled to recover a sum that equaled the value to him of the policy; or, in other words, that would make good to him the loss he sustained by its breach. One mode of ascertaining that would be to determine the actual value of the policy at the time of the breach. By that is not meant what the company would be willing to pay

[1] Clemmitt v. New York L. Ins. Co., 76 Va. 355, 363; People v. Security L. Ins. & Annuity Co., 78 N. Y. 114.

[2] Lovell v. St. Louis Mut. L. Ins. Co., 111 U. S. 264.

[3] 36 Hun, 322; Brooklyn L. Ins. Co. v. Weck, 9 Ill. App. 358; Day v. Connecticut L. Ins. Co., 45 Conn. 480; Connecticut L. Ins. Co. v. Houser, 89 Ind. 258; S. C., 111 id. 266.

[4] Doubtless he might have tendered the premium as often as it became due, and, on the policy becoming payable, have tried the question of forfeiture in an action to recover on it. Day v. Connecticut L. Ins. Co., 45 Conn. 480.

for it as the surrender value under some rule of its own, but what it would cost the plaintiff to replace the broken contract by another of equal value to him for the same amount of insurance and at the same rate of annual premium. His father, on whose life the policy was taken, had advanced in years and doubtless in infirmities. The difference in cost in a responsible company of a policy upon his life, assuring the same at $10,000 during life, would make good the loss caused by the breach. . . . Either this must be the true rule of damages if the life continue to be insurable, or if it has ceased to be insurable their mode of ascertainment should be one which shall determine the actual value of the policy at the time of the breach, as being a valid and obligatory one against an entirely responsible company.[1] What that actual value might in that case be would depend upon facts and circumstances susceptible of proof, but not now before the court. The injustice of the mode actually adopted can be illustrated by the fact that if the plaintiff's father continued to live, and the plaintiff continued to pay the premiums, and the defendant to reserve them for a few years longer, the amount to be recovered upon the breach, under the rule applied in this case, would soon have exceeded the sum insured upon the life."

§ 839. Refusal to issue paid-up policy. In an action by the holder of an ordinary life policy to recover for the breach of an agreement to issue in lieu thereof a paid-up life policy the damages are not measured by the amount paid as premiums because the action is not in disaffirmance of the contract, but by the difference between the value of the two policies,[2] or the value of the paid-up policy and interest thereon.[3] A policy on the joint lives of a husband and his wife stipulated that if default should be made in the payment

[1] "If the person whose life is insured, though alive, should be laboring under a disease that must speedily result in death, the insurers ought not to be permitted to escape the payment of the amount for which the life was insured, by putting an end to the contract." Piedmont & A. L. Ins. Co. v. Fitzgerald, 1 Texas Civil Cas. 784, 789.

[2] American L. Ins. & Trust Co. v. Shultz, 82 Pa. St. 46; Farley v. Union Mut. L. Ins. Co., 41 Hun, 303.

[3] Rumbold v. Penn Mut. L. Ins. Co., 7 Mo. App. 71; Union Central L. Ins. Co. v. McHugh, 7 Neb. 66; Phœnix Mut. L. Ins. Co. v. Baker, 85 Ill. 410.

of any premium after the second that the company would issue a paid-up policy for a sum equal to the full amount of the annual premiums paid at the time of default. An action was brought for the breach of this agreement while both the insured were living. No damages were proved, and therefore the recovery was limited to a nominal sum. In considering the difficulty of arriving at the measure of damages on account of the uncertainty of the duration of the lives of the insured, Valentine, J., said: "Evidently then, while both the parties are living, they should not be entitled to recover in an action for a failure to issue the policy more than one of them would be entitled to recover on such a policy at the death of the other. In fact, it would not seem that they would be entitled to recover as much. The use of the money is surely worth something. If one of the parties should die before judgment were rendered, then the amount of the judgment should probably be the amount for which the policy should have been issued, together with interest from the date of such death. If, however, both of the parties were living at the date of the judgment, the judgment should probably be for a sum which would purchase such a policy in a good and responsible life insurance company."[1] If the action for the breach of a clause in a policy which stipulated that it was non-forfeiting after a certain number of premiums have been paid is against a mutual company, and the insured held a participating policy, the reserve fund governs the extent of his recovery.[2] The presumption is that a company doing business has on hand such a fund as will meet the demands of policyholders, and the *onus* is on the insurer to show the contrary.[3]

§ 840. **Liability of re-insurer.** Re-insurance is a contract of indemnity, and binds the re-insurer to pay the re-insured the loss sustained in respect to the subject insured, to the extent for which he is re-insurer.[4] "Since the decision of the French court of admiralty at Marseilles in December, 1848,[5]

[1] Missouri Valley L. Ins. Co. v. Kelso, 16 Kan. 481.

[2] Nashville L. Ins. Co. v. Mathews, 8 Lea (Tenn.), 499. See Cohen v. New York Mut. L. Ins. Co., 50 N. Y. 610; New York L. Ins. Co. v. Statham, 93 U. S. 24.

[3] Nashville L. Ins. Co. v. Mathews, 8 Lea, 499.

[4] May, Ins., § 11.

[5] Cited, says Longworth, J., in Emerigon Traité des Assurance, Meredith's Translation, 202.

it has been uniformly held that, where the first insurer becomes insolvent, and, on a compromise with his creditors, pays only a certain percentage of the loss, the re-insurer is, nevertheless, bound to pay the re-insured the full amount of the loss to the extent of the re-insurance. The most carefully considered case, and perhaps the leading case upon this subject, is Hone v. Mutual Safety Ins. Co.[1] In this case the decision of the French admiralty court is followed, and the court repeat with approval the language of Emerigon and Roccus to the effect that the re-insurer is bound to pay the whole loss which is incurred by the first insurer."[2] The reason is that the insolvency of the original insurer in no wise affects the contract of re-insurance. There is no privity of contract between the original insured and the re-insurer. The contract of re-insurance is totally distinct from and unconnected with the original insurance, the holder of which has no kind of claim against the re-insurer, but only against the first insurer. Policies of re-insurance usually contain a condition that the loss, if any, is payable *pro rata*, and at the same time and in the same manner as by the re-insured company. Under such a clause the sum paid by the latter company is the measure of the re-insurer's liability.[3] But where the latter's policy does not contain that clause it is liable to the re-insured for the amount named therein, if it does not exceed the amount of the loss, though the original insurer has not paid the full amount for which it was liable.[4] If a claim is made against the insurer and notice thereof is given the re-insurer, the latter must exercise its election to contest or admit it within a reasonable time. If it does not disapprove of a suit or authorize the re-insured to settle it, the presumption is that it authorizes the litigation, and by just implication it must indemnify the re-insured against the costs and expenses

[1] 1 Sandf. 137; affirmed. 2 N. Y. 235.

[2] Per Longworth, J., in Insurance Co. v. Insurance Co., 38 Ohio St. 11, 17. To the same effect is Blackstone v. Allemania Ins. Co., 56 N. Y. 104; Consolidated Real Estate & F. Ins. Co. v. Cashow, 41 Md. 59; Eagle Ins. Co. v. Lafayette Ins. Co., 9 Ind. 443; Strong v. American Central L. Ins. Co., 4 Mo. App. 7.

[3] Illinois Mut. F. Ins. Co. v. Andes Ins. Co., 67 Ill. 362.

[4] Insurance Co. v. Insurance Co., 38 Ohio St. 11; Gantt v. American Central Ins. Co., 68 Mo. 503, 540.

necessarily and reasonably incurred in defending the suit.[1] The effect of failing to defend after notice is to make the first insurer, by operation of law, the agent of the re-insurer. Hence a judgment rendered against the former, after a defense made in good faith, would bind the latter; but it would be otherwise as to a judgment obtained by collusion.[2]

It is incumbent upon the re-insured to prove the loss in order that it may have a cause of action against the re-insurer; this it must do in the same manner as the person insured must have proved it against the original insurer.[3]

[1] New York Central Ins. Co. v. National Protection Ins. Co., 20 Barb. 468; New York State Marine Ins. Co. v. Protection Ins. Co., 1 Story, 458; Gantt v. American Central Ins. Co., 68 Mo. 503.

[2] Gantt v. American Central Ins. Co., 68 Mo. 503.

[3] Yonkers, etc. F. Ins. Co. v. Hoffman Ins. Co., 6 Robert. 316.

CHAPTER XX.

LANDLORD AND TENANT.

SECTION 1.

LANDLORD AGAINST TENANT.

§ 841. Action for use and occupation.
842, 843. Measure of recovery.
844. Actions for rent.
845. Amount as affected by subsequent facts.
846. Recovery of rent payable in specific articles or as taxes.
847. Termination of lease by lessor.
848. Recovery of rent barred by eviction of lessee.
849, 850. Apportionment of rent.
851. Partial destruction of demised property.
852. Entire destruction of demised premises.
853. When premises taken for public use.
854. Lessee's liability for interest.
855. Covenants for repairs.
856–858. Measure of liability for not making repairs.
859. Liability of assignee of lease for repairs.
860. Damages for repairs and non-repairs in special cases.
861. Covenants not to sublet or assign.
862. Covenants to insure.

SECTION 2.

TENANT AGAINST LANDLORD.

863. Lessor's covenant for quiet enjoyment.
864. The general rule of damages.
865, 866. Special and consequential damages.
867–870. Recovery for damages to business.
871. Mitigation of damages by lessee.
872. Lessor's covenant to repair, etc.
873. Lessor's duty concerning repairs.
874. Liability for special and consequential damages.
875. Removal of fixtures.
876. Recoupment.

SECTION 1.

LANDLORD AGAINST TENANT.

The principal claim of a landlord against his tenant [**106**] is that for rent, or for compensation in some form for the use of the demised premises. Leases generally contain, however,

other covenants or stipulations for breach of which damages are recoverable: as covenants to repair, not to sublet or assign, and to insure. All these will be discussed in their order.

§ **841. Action for use and occupation.** This is an action of general *assumpsit* for reasonable compensation for the use of real estate with the permission of the owner, or one who is as to the occupant entitled to the rights of a landlord. In England this action is supposed to be given by a statute of Geo. II.,[1] and it is probable that it did so originate; but the weight of American authority is that it is maintainable on the principles of the common law.[2] It must be founded upon [**107**] contract, express or implied, creating the relation of landlord and tenant, and imposing upon the defendant the obligation to pay for the use of the premises.[3] The form of the action, however, does not imply that it is based upon

[1] 11 Geo. II., ch. 19, sec. 14. "That act enabled the landlord to bring an action on the case for use and occupation, without being liable to be defeated by proof of a parol demise or agreement. But the action of debt for use and occupation lay at common law, and could not be defeated by proof of a demise not under seal reserving a certain rent." Smith's L. & T. 200.

[2] Crouch v. Briles, 7 J. J. Marsh. 255; Roberts v. Tennell, 3 T. B. Mon. 247; Burnham v. Best, 10 B. Mon. 227; Gould v. Thompson, 4 Met. 227; Dwight v. Cutler, 3 Mich. 566; Eppes' Ex'rs v. Cole, 4 Hen. & Munf. 161.

In Hogsett v. Ellis, 17 Mich. 351, 371, Christiancy, J., said: "Since the old notion that such a claim savors of the realty, and could therefore be recovered only by an action of a higher nature, has been quite generally exploded, and especially since the true theory of implied promises in *assumpsit* has come to be better understood and settled, and such promises no longer rest merely upon the inference that a promise *in fact* has been made, but upon the *duty* of the defendant *to pay*, a duty which he will not be heard to deny that he has promised to perform, courts in this country have very properly held that *assumpsit* for use and occupation may be maintained at common law. And we are certainly unable to see why the implied promise to pay a reasonable compensation for the use of the owner's premises does not, within the limitations above laid down, come clearly within the principle of an implied promise at common law, as the like promise to pay for the use of a horse or the reasonable value of goods purchased."

[3] Taylor's L. & T., § 636; Hood v. Mathis, 21 Mo. 308; Edmonson v. Kite, 43 Mo. 176; Kittredge v. Peaslee, 3 Allen, 235; Davidson v. Ernest, 7 Ala. 817; Bradley v. Davenport, 6 Conn. 1; Henwood v. Cheeseman, 3 S. & R. 500; Pierce v. Pierce, 25 Barb. 243; Dalton v. Laudahn, 30 Mich. 349; Logan v. Lewis, 7 J. J. Marsh. 3; Cook v. Medbury, 150 Mass. 499; Henderson v. Detroit, 61 Mich. 378.

an express contract, nor does it presuppose a demise;[1] still if there be an actual lease not under seal this action will lie, and such lease is admissible to establish the relation of landlord and tenant and to fix the amount of rent.[2] A contract may be competent evidence for that purpose, though not valid as a lease under the statute of frauds.[3] On a verbal lease for more than a year no action will lie where the statute requires it to be in writing; but if the statute has not declared such a lease to be void any use may be made of it by either party except that of bringing an action upon it. If the lessee enters under such a lease he may use it for the purpose of showing that he is not a trespasser, and after he has enjoyed the leased premises for the term he will be liable for the rent, not upon the express contract, but upon that implied by law from his use and occupation of the premises, and either party, it is believed, may use the contract to fix the amount to be recovered.[4]

§ **842. Measure of recovery.** Circumstances in the [**108**] conduct of the parties may suffice to show that the occupation was with the owner's permission, notwithstanding a notice to quit and a tacit agreement in respect to the amount of rent paid. Thus, a tenant had been occupying at a stipulated rent of $250 a month, and the landlord served him with a notice to quit, having the effect to terminate the tenancy at the expiration of the current rent period; but it appeared that before such service the tenant had proposed to the landlord, through a third person, to continue his tenancy at $300 per month; that the landlord expressed himself satisfied with it, though there was no evidence that he notified the tenant of his acceptance. The tenant remained in possession, and in an action for the rent the court said, "the inference is that he

[1] Chambers v. Ross, 25 N. J. L. 293.

[2] Burnham v. Best, 10 B. Mon. 227; Sargent v. Ashe, 23 Me. 201; Osgood v. Dewey, 13 Johns. 240; Stevens v. Coffeen, 39 Ill. 148; Perrine v. Hankinson, 11 N. J. L. 181; Williams v. Sherman, 7 Wend. 109; Crawford v. Jones, 54 Ala. 459; Syllivan v. Stradling, 2 Wils. 214; Birch v. Wright, 1 T. R. 387; Wilkins v. Wingate, 6 T. R. 62; Brewer v. Palmer, 3 Esp. 213; Baker v. Holtpzaffell, 4 Taunt. 45; Egler v. Marsden, 5 Taunt. 25; Smith v. Stewart, 6 Johns. 46; Bancroft v. Wardwell, 13 Johns. 489.

[3] De Medina v. Polson, Holt, N. P. 47; Nachbour v. Wilner, 34 Ill. App. 237; Warner v. Hale, 67 Ill. 595.

[4] Roberts v. Tennell, 3 T. B. Mon. 247; Parker v. Hollis, 50 Ala. 411.

did so with the consent of the plaintiff, and that the proposal was accepted. We must infer this, or infer that he kept possession against the plaintiff's will and as a trespasser; and of the two inferences we adopt the former."[1] Where a tenant holds over after his lease has expired, the inference that the parties consent to a continuance of the same terms is so strong that it is adopted as a rule of law.[2] But the rule does not apply, and such an agreement is not implied where the lease contains collateral stipulations which could not be performed in a subsequent term;[3] nor where the intention to continue the same terms is otherwise rebutted by the provisions of the lease[4] or the conduct of the parties; where notice is given [109] that a higher rent will be claimed,[5] or the tenant gives notice of a different intention.[6] Where the lease was not for an annual rent it has been held not to govern after the term expired, but other evidence was admissible to show what was a reasonable annual rent.[7] So it has been held that circumstances affecting the condition of the premises may be shown to diminish or increase the rent.[8] The old lease is only evidence of a continuing agreement at a like rate in connection with the silence or other conduct of the parties evincing consent to abide by its terms for an extended time. Hence any

[1] Hoff v. Baum, 21 Cal. 120; Brinkley v. Walcott, 10 Heisk. 22; Griffin v. Knisely, 75 Ill. 411. See Clinton Wire Cloth Co. v. Gardner, 99 Ill. 151; Keegan v. Kinnare, 123 Ill. 280.

In Chambers v. Ross, 25 N. J. L. 293, it was held that a landlord does not deprive himself of the right to recover rent of a tenant by erroneously disclaiming the relation, unless such disclaimer has been acted on by the tenant or prejudiced him.

[2] Baker v. Root, 4 McLean, 572; Ames v. Schuesler, 14 Ala. 600; Schilling v. Holmes, 23 Cal. 227; Whittemore v. Moore, 9 Dana, 315; Carter v. Collar, 1 Phila. 339; Phillips v. Monges, 4 Whart. 226; Hemphill v. Flynn, 2 Pa. St. 144; Osgood v. Dewey, 13 Johns. 240; Evertson v. Sawyer, 2 Wend. 507; McCarty v. Ely, 4 E. D. Smith, 375; Clapp v. Noble, 84 Ill. 62; Parker v. Hollis, 50 Ala. 411; Meaher v. Pomeroy, 49 Ala. 146; Quinette v. Carpenter, 35 Mo. 502; Laugerenne v. Dougherty, 35 Pa. St. 45; Prickett v. Ritter, 16 Ill. 96; Weston v. Weston, 102 Mass. 514; New York, etc. Ry. Co. v. Randall, 102 Ind. 453.

[3] Diller v. Roberts, 13 S. & R. 60.

[4] Abbot v. Shepherd, 4 Phila. 90; 15 Am. Dec. 581, note.

[5] Hoff v. Baum, 21 Cal. 120; Griffin v. Knisely, 75 Ill. 411; Mack v. Burt, 5 Hun, 28.

[6] Delano v. Montague, 4 Cush. 42.

[7] Evertson v. Sawyer, 2 Wend. 507.

[8] Whittemore v. Moore, 9 Dana, 315; Clapp v. Noble, 84 Ill. 82. See McCarty v. Ely, 4 E. D. Smith, 375.

facts are admissible which contradict the inference of such consent.[1] Thus, after a sufficient notice to quit to terminate a pending lease, a landlord served the tenant with notice that if he continued in possession after the date when the tenancy ceased under the notice, he would be charged with an increased rent, and it was held that such increased rent was recoverable.[2] So where a tenant was let into possession during the currency of a term, the rent then being 47*l.*, with an agreement that at the end of the term he was to pay 80*l.*; and he paid the 47*l.*, but the agreement was abandoned in consequence of disputes arising in regard to it, though he continued to occupy, it was held that the jury should consider what was a fair rent for the continued holding, and that no necessary inference could be drawn from the former holding at 47*l.*[3] If a tenant enters with the consent of two owners, but afterwards promises one to pay him his half, this has been held sufficient to entitle him to recover separately for his share.[4]

A special action may be maintained on an agreement which is absolute to pay rent for the use of real estate, though the tenant has not taken possession, where there is a demise, parol or otherwise, and the lessor is not at fault in preventing actual enjoyment.[5] But general *assumpsit* for use and occupation will not lie if the tenant has never gone into [**110**] possession; but if he has taken a lease for a specified term, agreeing to pay rent, and once gone into possession so as to vest the term, this action will lie for the rent of the whole term, although the tenant may have abandoned the possession before the stipulated period expired.[6] A mere tenant at will has no term vested in him and is only liable for actual occupation.[7]

[1] Thomas v. Zumbalen, 43 Mo. 471.

[2] Higgins v. Halligan, 46 Ill. 173; Amsden v. Floyd, 60 Vt. 386. See Canning v. Fibush, 77 Cal. 196.

[3] Thetford v. Tyler, 8 Q. B. 95.

[4] Sargent v. Ashe, 23 Me. 201.

[5] Tully v. Dunn, 42 Ala. 262.

[6] Pinero v. Judson, 6 Bing. 206; Jones v. Reynolds, 7 C. & P. 335; Woolley v. Wathling, id. 610; Edge v. Strafford, 1 Cromp. & J. 391; Sullivan v. Jones, 3 C. & P. 579; Crommelin v. Thiess, 31 Ala. 412; Adreon v. Hawkins, 4 Har. & J. 319; McGunnagle v. Thornton, 10 S. & R. 251; Coit v. Planer, 7 Robt. 413; Ward v. Wilcox, 1 Denio, 37; Hoffman v. Delihanty, 13 Abb. 388; Hall v. Western Transp. Co., 34 N. Y. 284; Little v. Martin, 3 Wend. 219; Westlake v. De Graw, 25 Wend. 669.

[7] Crommelin v. Thiess, 31 Ala. 412.

§ 843. Same subject. Where the agreement was not signed by the lessee, and the lessor failed to fulfill on the point which was the principal inducement to it, it was held that the lessee could hardly be said to have enjoyed under the agreement, and the jury were instructed to allow compensation only according to the benefit he actually received.[1] The court said "that an eviction of part of the premises being shown, the jury was to ascertain, independently of any agreement, what the defendant ought to pay." The lessee not having executed the lease, he was not thereby bound to pay the rent reserved; and not having enjoyed what it purported to grant, the rent so reserved could not be regarded as the measure of recovery. In a later English case the lessors had not executed the indenture which purported to grant certain tolls for a year. It was held that the grantee, although he enjoyed the tolls for the full term, was not bound by the covenant on his part to pay the sum reserved as the consideration. Such sum, it was concluded, was fixed as the price of the conveyance of an estate or right in the tolls for a year, and though the grantee had received the tolls, the right or estate had not been granted; that in fact he had occupied under a mere license, and therefore there could be no recovery except on a *quantum meruit*.[2] Where the amount of rent or compensation for the use has not been fixed by agreement it is a *quantum meruit* claim; the [**111**] landlord is only entitled to what it was reasonably worth, and this must be ascertained by the jury upon evidence. If the property was untenantable that fact will affect the amount of recovery.[3] If it might have been leased but for the defendant's occupancy the sum which it would have rented for measures the recovery,[4] though the defendant did not use it for the purpose for which it was adapted, but for one which did not require the use of all the premises.[5] The liability of the occupier is measured by the value of his occupancy at the time he enters upon the property. Subsequent fluctuations in its

[1] Tomlinson v. Day, 2 Brod. & Bing. 680.

[2] Swatman v. Ambler, 8 Exch. 72.

[3] Brolaskey v. Loth, 5 Phila. 81; Potter v. Truitt, 3 Harr. (Del.) 331; Meeker v. Gardella, 1 Wash. St. 139; Vandevoort v. Gould, 36 N. Y. 639; Knox v. Singmaster, 75 Iowa, 64.

[4] Galveston Wharf Co. v. Gulf, etc. Ry. Co., 72 Texas, 454, 459.

[5] Horton v. Cooley, 135 Mass. 589.

value do not affect the amount which may be recovered of him.[1]

The action is an equitable one, and the plaintiff can recover no more than is equitably due. Where the defendant was turned out of possession of a demised farm, after making preparations for crops which he could not reap, so that he received no benefit from the occupation, it was held that the plaintiff could recover nothing.[2] A certain share of the profits of a tavern and farm was stipulated to be paid for their use, and it was held to be a money rent; though the amount was uncertain, that was no impediment to recovery on a count for use and occupation. The uncertainty would be removed by such proof as the plaintiff might be able to produce. If unable to prove the actual profits, he might resort to proof of the value. And the defendant whose appropriate duty it was to keep and render an account of the profits, as well as to pay the plaintiff his share, might exhibit proof of the actual profits in order thereby to limit the demand against him.[3]

To establish the rental value evidence may be received showing what the property had rented for in years immediately preceding the period in question; and also what other similar tenements rented for in the same neighborhood at and about the same time.[4] On this point Whitman, C. J., said: "Nothing is more common, in ascertaining the value of one thing, than to compare it with others of known value and of a similar description. Money itself is but a thing of known and fixed value; and we are continually comparing all other things with it by way of fixing their value. If two dwelling-houses are nearly contiguous, and one of them has a known and fixed value and the other has not, but its value has to be ascertained, resort may be had to a comparison of the one with the other for that purpose. Our constant course of reasoning is from things known to things unknown; and our deductions depend upon it. Our conclusions from cir- [112] cumstantial evidence are of this nature; and the evidence here relied upon to prove the value of a tenancy is of this class.

[1] Pope v. United States, 26 Ct. of Cls. 11; Johnson v. Same, 2 id. 391.

[2] Wheeler v. Shed, 1 D. Chip. 208; Gilhooley v. Washington, 4 N. Y. 217.

[3] Perrine v. Hankinson, 11 N. J. L. 181.

[4] Fogg v. Hill, 21 Me. 529.

The leases of the store in question in former years, to which one of the defendants was a party, were properly admissible. These show what he had admitted the value of the tenancy to be in years immediately previous. If rents had fallen, it would have been competent for the defendants to have shown it by way of lessening the effect in a greater or less degree arising from such admission." [1] But what one had paid for the use of the property is not admissible as a ground and measure of his recovery against another.[2] The opinions of witnesses, having knowledge of the particular subject, are generally held admissible on questions of value.[3]

§ **844. Actions for rent.** These are generally for a fixed sum, either reserved by a written instrument or made certain by oral agreement. In either case, when the contract is proved the jury have but to ascertain the amount in arrear and interest; unless on some ground of defense there is a right to an abatement, or the right of action or liability is divided by conveyance of the reversion or assignment of the term. The only difference in substance between an action directly on the terms of the lease and an action for use and occupation is that in the one the declaration is special and in the other general; the purpose of both actions is the same, and both arise upon contract.[4] If the lessee removes from or refuses to occupy the premises during the term or to pay rent, and an action is brought to recover before the term has expired, the recovery may include the amount due up to the time of the trial; [5] and no reason is perceived why it might not embrace the whole sum which will become due according to the terms of the lease.[6]

§ **845. Amount as affected by subsequent facts.** In certain cases the amount of rent depends on subsequent facts — as where it is a certain proportion of the profits to be realized from the use of the demised premises; [7] where it is to be calculated at some rate upon the production of a mine or a quarry,[8] or must be fixed by arbitration.[9] If after agreeing to

[1] Fogg v. Hill, 21 Me. 529.
[2] Moore v. Harvey, 50 Vt. 297.
[3] See vol. 1, §§ 444, 445; vol. 2, § 654.
[4] Dalton v. Laudahn, 30 Mich. 349.
[5] Cummins v. Hanson, 10 Daly, 493.
[6] Cleveland v. Bryant, 16 S. C. 634.
[7] Perrine v. Hankinson, 11 N. J. L. 181.
[8] Brainerd v. Arnold, 27 Conn. 617; Cross v. Tome, 14 Md. 247.
[9] Viany v. Ferran, 5 Abb. (N. S.) 110.

so fix the rent one of the parties refuses to act in selecting an arbitrator a court may execute this feature of the contract by a reference.[1] Under a covenant in a lease that if the [113] landlord re-entered for the non-payment of rent he might relet the premises as the tenant's agent, and that the tenant should be liable for any deficiency, the landlord, if he re-enters and relets, and brings an action for a deficiency before the rent under the new lease becomes due, can only recover the difference between the rent reserved by the original lease and that agreed to be paid by the new tenant. By commencing the action without waiting to see if the new tenant pays according to his agreement he assumes the hazard of his default. In such an action the landlord cannot recover for the expenditures made by him upon the premises after the re-entry, although by reason thereof he was enabled to relet at an enhanced rent.[2] In a case where the rent reserved was a certain fixed proportion of the price of stone which the lessees might get out of the demised premises and sell, to be paid to the lessor in a reasonable time after the stone should be sold and paid for, it was held that the lessees were under an obligation to work the quarries in a reasonable manner during the term. The case was deemed analogous to a letting of land upon shares, as it is termed, where it is said it would hardly be claimed it would be optional with the lessee whether he would cultivate it or not. The very nature of the contract in these cases implies that the property is to be cultivated for the mutual benefit of the lessor and lessee.[3] This obligation is more precisely defined in a Pennsylvania case. Upon a lease of coal land at a fixed price per bushel for all that should be mined, there being no stipulation as to the quantity to be

[1] Id.

[2] Hackett v. Richards, 13 N. Y. 138.

[3] Brainerd v. Arnold, *supra;* Koch & Balliet's Appeal, 93 Pa. St. 434 (equity will not take jurisdiction to compel the lessee to prosecute work; an action at law for breach of the covenant clearly lies).

In an Iowa case the lessee of coal land agreed to begin work as soon as practicable and to mine coal, provided there was found a workable vein of merchantable coal, and in that case to pay a stipulated monthly royalty. No effort was made by him to find coal, and there was no evidence, aside from an allegation in the complaint, that it could be found. It was ruled that there could be no recovery of royalty and that the damages were nominal. Carl v. Granger Coal Co., 69 Iowa, 519. See Cook v. Andrews, 36 Ohio St. 174.

mined, it was held that the lessors were entitled to recover in an action of covenant the stipulated rate for all that could reasonably have been mined, but deducting on the part not mined its value unmined.[1] In a more recent case in the same court a farm was leased for the purpose of exploring for and producing oil. The lessee was bound to continue with diligence and without delay to prosecute the business to success or abandonment; and in the former case to go on without interruption and pay a royalty of one-eighth of the production. Two wells were bored, both of which produced oil; the lessee refused to bore others. In an action for the breach of the covenant the following instruction, given the jury, was approved by the appellate court: "Ascertain how much more oil the plaintiff ought to have received than he actually did receive, and the value of it during the time when it should have been delivered to him; from this deduct the cost of producing what ought to have been produced at the time, under the circumstances, and with the appliances then known, and add to this remainder the interest on it from the time when the oil ought to have been produced to the present time, and this will be the measure of damages sustained by the plaintiff." It is said in the opinion of the supreme court: "We do not think damages for not securing flowing oil are to be ascertained exactly as if they were a stationary mineral. If oil be not utilized at a proper time it may be lost forever by reason of others operating near by. Not so with stationary mineral. It remains for future development. While there is some difficulty in the way the damages were ascertained in this case, yet no better or more accurate manner is pointed out."[2] Where a demise was made for a term of years of all the lessor's right in the coal in a certain estate, reserving 8*d.* per ton of coal, worked raised or got in each year, not exceeding thirteen thousand tons in any year, or that amount in money, viz., 433*l.* 6*s.* 8*d.*, each year as fixed rent, whether the coal should be worked or not, and the lessee covenanted accordingly, it was [114] held that the whole rent stipulated for was payable, although the mine was so exhausted that the lessee could not

[1] Lyon v. Miller, 24 Pa. St. 392; Cross v. Tome, 14 Md. 247. See Filey v. Meyers, 43 Pa. St. 404.

[2] Bradford Oil Co. v. Blair, 113 Pa. St. 83.

raise thirteen thousand tons in a year. The court held that a fixed rent was stipulated, coupled with a covenant that the mine should be worked to that extent; and the covenant did not carry with it, by any implication, a condition that there should be coal to that amount capable of being worked.[1] If a tenant of a coal mine is to pay the lessor in coal at specified prices, in the absence of any special agreement as to the condition in which the coal is to be delivered, it is his duty to deliver it in a marketable condition; and if not so delivered the expense necessarily incurred by the landlord in preparing it for market may be charged to the tenant.[2]

§ 846. Recovery of rent payable in specific articles or as taxes. If rent is payable in specific articles the measure of damages for failure to deliver them is the same as upon other contracts for the delivery of specific articles — their value when they should have been delivered.[3] Where the rent is a fixed amount so payable, the lessee is entitled to pay in that mode at the time when the rent is due; but if he does not avail himself of that privilege he is bound to pay that amount in money with interest after it becomes due. In other words, it is like any other debt payable in specific articles.[4] If there is no stipulation concerning the manner of cultivating land which is leased for a share of the crops which may be produced, the lessor has no claim because of the negligence or incapacity of the tenant.[5] A covenant to pay all taxes and assessments which shall be levied upon the demised premises during the term is broken when the neglect to so do occurs. The amount, as between the lessor and lessee, becomes the

[1] Marquis of Bute v. Thompson, 13 M. & W. 487; Jervis v. Tomkinson, 1 H. & N. 195. Compare Clifford v. Watts, L. R. 5 C. P. 577.

In Prestons v. McCall, 7 Gratt. 121, the tenant of a salt works was bound to pay as rent two-thirds of the salt manufactured, and to manufacture at least sixty thousand bushels per annum. He failed to manufacture that quantity. It was held that the rent to be distrained for or recovered was governed by the actual amount manufactured; that for failure to manufacture the required amount in any one year the proper action would be for damages occasioned thereby, and not for specific rent of sixty thousand bushels of salt.

[2] Audenried v. Woodward, 28 N. J. L. 265.

[3] Brooks v. Cunningham, 49 Miss. 108; Brown v. Adams, 35 Tex. 447. See Safely v. Gilmore, 21 Iowa, 588.

[4] See vol. 2, § 657.

[5] Patton v. Garrett, 37 Ark. 605.

latter's debt, for which he is not liable to the lessor until he has paid it. The sum levied constitutes the measure of the lessee's liability.[1]

§ 847. **Termination of lease by lessor.** If the landlord accepts a surrender,[2] puts an end to the lease for any cause before the expiration of the term,[3] or evicts the tenant from [115] any part of the demised premises, his right to rent will thereupon cease or be suspended;[4] and if this be done between the days specified in the lease for its payment the rent for the current period will be lost, for there can be no apportionment for a part of a rent period unless there is an agreement therefor.[5] Where there is an agreement for an

[1] Rector, etc. of Trinity Church v. Higgins, 48 N. Y. 532; Fountain v. Schulenberg & B. L. Co. (Mo.), 18 S. W. Rep. 1147.

[2] Mackellar v. Sigler, 47 How. Pr. 20; Hall v. Burgess, 5 B. & C. 332; Home L. Ins. Co. v. Sherman, 46 N. Y. 370; Whitney v. Meyers, 1 Duer, 266; Elliott v. Aiken, 45 N. H. 30.

[3] Day v. Watson, 8 Mich. 535; Crane v. Hardman, 4 E. D. Smith, 339; Zale v. Zale, 24 Wend. 76.

[4] Royce v. Guggenheim, 106 Mass. 201; Morse v. Goddard, 13 Met. 177; Shumway v. Collins, 6 Gray, 227; Leishman v. White, 1 Allen, 489; Billany v. Smith, 4 Houst. 113; Hunt v. Cope, 1 Cowp. 242; Watts v. Coffin, 11 Johns. 495; Christopher v. Austin, 11 N. Y. 216; Wright v. Lattin, 38 Ill. 293; Randall v. Alburtis, 1 Hilt. 285; Giles v. Comstock, 4 N. Y. 270; Peck v. Hiler, 14 How. Pr. 155; 24 Barb. 178; Marsh v. Butterworth, 4 Mich. 575; Halligan v. Wade, 21 Ill. 470; Wade v. Halligan, 16 Ill. 507; Bentley v. Sill, 35 Ill. 414; Tone v. Brace, 8 Paige, 597; Leadbeater v. Roth, 25 Ill. 587; Holbrook v. Young, 108 Mass. 83; Lewis v. Payn, 4 Wend. 423; New York Academy of Music v. Hackett, 2 Hilt. 217; Dyett v. Pendleton, 8 Cow. 727; Hayner v. Smith, 63 Ill. 430; Upton v. Townend, 17 C. B. 30; Vaughan v. Blanchard, 1 Yeates, 175; Blair v. Claxton, 18 N. Y. 529; Tunis v. Grandy, 22 Gratt. 109; Poston v. Jones, 2 Ired. Eq. 350; Hart v. Windsor, 13 M. & W. 85; Smith v. Wise, 58 Ill. 141; Wolf v. Weiner, 7 Phila. 274; Holmes v. Guion, 44 Mo. 164; McClurg v. Price, 59 Pa. St. 420; Mirick v. Hoppin, 118 Mass. 587; Dewey v. Gray, 2 Cal. 374; Colburn v. Morrill, 117 Mass. 262; Bennet v. Bittle, 4 Rawle, 339; Briggs v. Hall, 4 Leigh, 484; Wells v. Mason, 5 Ill. 84; Maverick v. Lewis, 3 McCord, 130; Sneed v. Jenkins, 8 Ired. 27; Chatterton v. Fox, 5 Duer, 64; Smith v. Shepard, 15 Pick. 147; Hegeman v. McArthur, 1 E. D. Smith, 147; Lynch v. Baldwin, 69 Ill. 210; Leopold v. Judson, 75 Ill. 536; Walker v. Tucker, 70 Ill. 527; First Nat. Bank of Joliet v. Adam, 34 Ill. App. 159, 168.

[5] Zale v. Zale, 24 Wend. 76; Skaggs v. Emerson, 50 Cal. 3; Briggs v. Hall, 4 Leigh, 484; Chatterton v. Fox, 5 Duer, 64; Campbell v. Shields, 11 How. Pr. 565; Kessler v. McConachy, 1 Rawle, 435.

Though the acceptance of the surrender of a lease terminates the lessor's right to recover rent, he has an action against the tenant for the damages resulting, which, if he has

apportionment it will be made accordingly. Thus, where a lease for three years required and recited the payment of all the rent in advance, and provided that in case the premises should be destroyed by fire during the term the rent reserved, or a proportionate part thereof, should be suspended or abated until the premises should be put in proper condition for use and habitation by the lessor, or the lease should be thereby determined and ended at the election of the lessor; and during the term the building was destroyed by fire, and the lessor elected not to rebuild, it was held that the lessee was entitled to recover a proportionate part of the rent paid in advance, because the provision for suspension or abatement could apply to nothing but the rent which had been mentioned as having been paid in advance, and the only [**116**] way of abating it was by allowing a proportionate part to be recovered.[1]

§ 848. Recovery of rent barred by eviction of lessee. Eviction by a stranger having a paramount title also bars rent subsequently payable.[2] It is a bar because it deprives the tenant of the consideration.[3] Eviction by the lessor, even from a part of the leased premises, suspends the rent for the whole. Quiet enjoyment of the premises, without any molestation on the part of the landlord, is the implied condition on which the tenant is bound to pay rent.[4] And when his possession is interfered with in such manner as to amount to an eviction by the landlord as to a part of the premises, it is a wrong done to one whom he was bound to protect, and the law will not permit him to apportion it so as to compel the lessee to pay anything for the enjoyment of the residue. While an eviction from part by the landlord continues he cannot recover from his tenant for his occupation of any other

leased the premises to another, are measured by the difference between the contract price for which such second lease was made and the price to be paid by the first lessee, if the rent in fact received from the second tenant was the most obtainable by the exercise of ordinary diligence. Randall v. Thompson, 1 Texas Civil Cas. 619.

[1] Rich v. Smith, 121 Mass. 328; May v. Rice, 108 Mass. 150.

[2] Morse v. Goddard, 13 Met. 177; Hegeman v. McArthur, 1 E. D. Smith, 147.

[3] Royce v. Guggenheim, 106 Mass. 201; Dyett v. Pendleton, 8 Cow. 727; Taylor's L. & T., § 378; Evans v. Murphy, 1 Stew. & Port. 226.

[4] Id.

part, either upon the lease or in an action for use and occupation.[1] And the fact that the tenant has recovered damages for the eviction does not restore the landlord's right to rent while the ouster continues.[2] The rule is otherwise in Alabama unless it is shown that the tenant surrendered or entirely abandoned possession of the premises. His liability to pay is discharged only *pro tanto* if he remains in undisturbed possession of a portion of the property.[3] Where the eviction from part of the demised premises is by a stranger asserting a superior title, it is only a bar *pro tanto*.[4] If one of two tenants in common makes a lease, and his co-tenant afterwards takes possession of the common property, the same rule applies to exonerate the lessee *pro tanto*.[5] Such an eviction is a discharge of so much of the rent as is in proportion to the value of the land from which the tenant is evicted.[6] So, if [**117**] the lessor accepts a surrender of part, or rightfully enters upon part for a forfeiture, or by special condition for entry, the rent may be apportioned.[7]

Physical expulsion is not necessary. Any act of a permanent character, done by the landlord or by his procurement,

[1] Id.; Shumway v. Collins, 6 Gray, 227: Leishman v. White, 1 Allen, 489; Skaggs v. Emerson, 50 Cal. 3; Lewis v. Payn, 4 Wend. 423; Christopher v. Austin, 11 N. Y. 216; Lawrence v. French, 25 Wend. 443; Colburn v. Morrill, 117 Mass. 262; Fitchburg, etc. Corp. v. Melven, 15 Mass. 268; Briggs v. Hall, 4 Leigh, 484; Tunis v. Grandy, 22 Gratt. 109; McClurg v. Price, 59 Pa. St. 420; Pridgeon v. Excelsior Boat Club, 66 Mich. 326; Collins v. Karatopsky, 36 Ark. 316, 329; Lynch v. Baldwin, 69 Ill. 210. There are some old English cases and one Irish case to the contrary. Stokes v. Cooper, 3 Camp. 514, note; Grand Canal Co. v. Fitzsimmons, 1 Hudson & B. 449. The case in Campbell was ruled at *nisi prius* by Dallas, C. J. It is not now authority in England, though the early English authors accepted it as such. The contrary rule was established by Upton v. Townend, 17 C. B. 30, 74.

[2] Peck v. Hiler, 24 Barb. 178.

[3] Warren v. Wagner, 75 Ala. 188; Chamberlain v. Godfrey, 50 id. 530; Cook v. Anderson, 85 id. 99.

[4] Peters v. Grubb, 21 Pa. St. 455; Christopher v. Austin, 11 N. Y. 216; Moffat v. Strong, 9 Bosw. 57; Fillebrown v. Hoar, 124 Mass. 580; Johnson v. Oppenheim, 12 Abb. (N. S.) 448; Giles v. Dugro, 1 Duer, 331; Smart v. Allegart, 14 Phila. 179; Seabrook v. Moyer, 88 Pa. St. 417.

[5] Hoopes v. Meyer, 1 Nev. 433.

[6] Cornell v. Jackson, 3 Cush. 506; Leiter v. Pike, 127 Ill. 287; Stevenson v. Lombard, 2 East, 575; Carter v. Burr, 39 Barb. 59; Hunt v. Cope, 1 Cowp. 242; Lansing v. Van Alstyne, 2 Wend. 661; Lawrence v. French, 25 Wend. 443.

[7] Coke Litt. 148*a*.

with the intention and effect of depriving the tenant of the enjoyment of the premises demised, or of a part thereof, to which he yields and abandons the possession, may be treated as an eviction.[1] To constitute an eviction the tenant must be disturbed in his possession, and in pleading the eviction an ouster must be alleged.[2] But there are a variety of circumstances short of physical force or legal process which are deemed such a disturbance of possession as to constitute an eviction. It has been held that any interference on the part of the landlord which impairs the beneficial enjoyment of the premises, such as the creation of a nuisance in another part of the same building, or the like, is sufficient.[3] The tenant must, however, quit the possession in consequence of such interference.[4] There is no implied warranty in a general lease that the demised building is safe, well built, or fit for any particular use;[5] and this absence of an implied covenant not only refers to the beginning, but to the whole term. Even the landlord's default in not repairing, when he is bound by custom or covenant to do so, though in consequence the buildings become unfit for occupancy, does not authorize the tenant to quit, or refuse to pay rent.[6] Neither does the breach of a covenant by the lessor not to rent other property in the lo-

[1] Royce v. Guggenheim, 106 Mass. 201; Smith v. Raleigh, 3 Camp. 513; Upton v. Townend, 17 C. B. 30; Morris v. Tillson, 81 Ill. 607; Hayner v. Smith, 63 Ill. 430; Warren v. Wagner, 75 Ala. 188 (subject to the qualification stated *ante*); Pridgeon v. Excelsior Boat Club, 66 Mich. 326.

[2] Vernam v. Smith, 15 N. Y. 327; Kerr v. Shaw, 13 Johns. 236; Waldron v. McCarty, 3 id. 471.

[3] Dyett v. Pendleton, 8 Cow. 727; Rogers v. Ostram, 35 Barb. 523; Halligan v. Wade, 21 Ill. 470; Cohen v. Dupont, 1 Sandf. 260; Moffat v. Strong, 9 Bosw. 57; Wright v. Lattin, 38 Ill. 293; Morse v. Goddard, 13 Met. 177; Leadbeater v. Roth, 25 Ill. 587; Waywood v. Logan, 78 Mich. 135 (nuisance in well); Conlon v. McGraw, 66 id. 194; Skally v. Shute, 132 Mass. 367; Sherman v. Williams, 113 id. 48.

[4] Home L. Ins. Co. v. Sherman, 46 N. Y. 370; Cram v. Dresser, 2 Sandf. 120; Gilhooly v. Washington, 4 N. Y. 217; Fuller v. Ruby, 10 Gray, 285; Skally v. Shute, 132 Mass. 367; Edgerton v. Page, 20 N. Y. 281; Boreel v. Lawton, 90 id. 293. But see Conlon v. McGraw, 66 Mich. 194.

[5] Dutton v. Gerrish, 9 Cush. 89; Foster v. Peyser, id. 242; McGlashen v. Tallmadge, 37 Barb. 313; Cleves v. Willoughby, 7 Hill, 83; Hart v. Windsor, 12 M. & W. 68; Welles v. Castles, 3 Gray, 323; Libbey v. Tolford, 48 Me. 316; Donner v. Ogilvie, 49 Hun, 229; Edwards v. New York & H. R. Co., 98 N. Y. 245.

[6] Royce v. Guggenheim, 106 Mass. 201.

cality for the same business as the lessee is engaged in. The effect of such a breach is to reduce the rent, the reduction to [118] be proportioned over the whole term.[1] A breach by the lessor of his covenants in the lease for repairs or improvements is no defense, except by way of recoupment, to his demand for rent covenanted to be paid unless by the terms of the lease the performance of his covenants is made a condition.[2] Nor can the tenant in summary proceedings at the instance of the landlord to obtain possession set up his breaches of covenants in the lease as a counter-claim.[3]

Where the landlord, by the terms of the lease of a store being erected by him, undertook to finish it for immediate occupancy as a store by a given time, it was held that the lessee, by entering at that time, notwithstanding that the store was not finished so that the term was vested, waived the condition precedent, though not the right to have the work done. Thereafter the lessor's default in not completing the store was no defense to an action for rent except as a counter-claim. If the lessee had not taken possession he could only have been made liable for rent upon his covenant, as for a breach of an executory contract; and to entitle the lessor to recover he would be obliged to show that he had performed his part.[4] Tortious conduct of the landlord on the demised premises which does not disturb the tenant's possession, though it may diminish his beneficial enjoyment, will not amount to an eviction nor have the effect to suspend the rent.[5] Eviction is no answer as to rent which has already accrued [119] and become due before it took place.[6] And this is

[1] Allegaert v. Smart, 2 Penny. (Pa.) 320.

[2] Chicago Legal News Co. v. Browne, 103 Ill. 317; La Farge v. Mansfield, 31 Barb. 345; Kelsey v. Ward, 16 Abb. 98; 38 N. Y. 83; Etheridge v. Osborn, 12 Wend. 529.

[3] People v. Kelsey, 14 Abb. 372; McHoy v. Ryan, 27 Mich. 110; D'Armond v. Pullen, 13 La. Ann. 137; Eldred v. Leahy, 31 Wis. 546; Lunn v. Gage, 37 Ill. 19.

[4] La Farge v. Mansfield, 31 Barb. 345; Lunn v. Gage, 37 Ill. 19.

[5] Fuller v. Ruby, 10 Gray, 285; Drake v. Cockroft, 4 E. D. Smith, 34; Johnson v. Oppenheim, 12 Abb. (N. S.) 449; Edgerton v. Page, 20 N. Y. 281; Lounsberry v. Snyder, 31 N. Y. 514; Cram v. Dresser, 2 Sandf. 120; Mortimer v. Brunner, 6 Bosw. 653; Vatel v. Herner, 1 Hilt. 149; McFadin v. Rippey, 8 Mo. 738; Luckey v. Frantzkee, 1 E. D. Smith, 47. See Leostzky v. Canning, 33 Cal. 299.

[6] Vernam v. Smith, 15 N. Y. 327; McKeon v. Whitney, 3 Denio, 452;

so though the rent be payable in advance, and the eviction takes place during the rent period for which it was payable.[1] Nor will eviction bar rent which accrues after it has ceased if the tenant continues in possession.[2] Giving a note for the rent during eviction from part of the premises is a waiver of the objection, and the moral obligation from partial enjoyment is a sufficient consideration.[3]

New York Academy v. Hackett, 2 Hilt. 217; Pepper v. Rowley, 73 Ill. 262; Kessler v. McConachy, 1 Rawle, 435; Salmon v. Smith, 1 Saund. 202; May v. Diaz, 42 Ala. 383; Giles v. Comstock, 4 N. Y. 270; Johnson v. Oppenheim, 55 id. 280; Crane v. Hardman, 4 E. D. Smith, 448; Hinsdale v. White, 6 Hill, 507; Cushingham v. Phillips, 1 E. D. Smith, 416; Dawson v. Donati, 2 id. 121; Whitney v. Meyers, 1 Duer, 266.

[1] Whitney v. Meyers, 1 Duer, 266; Healy v. McManus, 23 How. Pr. 238; Giles v. Comstock, 4 N. Y. 270.

[2] Ogden v. Sanderson, 3 E. D. Smith, 166.

[3] Anderson v. Chicago, etc. Ins. Co., 21 Ill. 601.

In Merritt v. Closson, 36 Vt. 172, the plaintiffs, tenants, had paid a part of the rent of leased premises, when they were ousted by the defendant, who took all the crops. Held, that in estimating the damages the defendant is entitled to have the unpaid rent deducted from the value of the crops, though he could not maintain an independent action to recover it. Poland, C. J., said: "The court told the jury that the defendant, by thus ousting the plaintiffs, forfeited all right to that portion of the rent unpaid, and that therefore the crops taken by him were to be estimated at their full value without deducting anything for the unpaid rent. It is undoubtedly true the defendant could not, if he ousted his tenant during the term, maintain any action to recover the rent to be paid for the term. But the question here was, what damage or loss had the plaintiffs suffered by the wrongful act or breach of contract on the part of the defendant. What would they have gained or been entitled to if the defendant had allowed them to remain on the premises till the end of the year? They would have had the use of the premises and the personal property to the end of the year, subject to the payment of the balance of the rent and the expense of keeping the stock. By being ousted from the premises, the plaintiffs lost the use of the premises for the residue of the year, the crops on the farm and the use of the personal property; but they also were relieved from the burden of paying the balance of the rent, and from keeping the stock through the winter. The true rule of damages was the difference in value between the two conditions. The county court recognized this in part, and decided that nothing should be allowed to the plaintiffs for the loss of the use of the premises for the residue of the year, as the evidence showed that the unpaid rent was more than the value of such use, and if they remained they would have the rent to pay. So the jury were directed, if they found that the keeping of the stock through the winter would cost the plaintiffs more than the worth of the use of the stock, the difference should be deducted from the value of

[120] § 849. **Apportionment of rent.** It is a general principle that there can be no apportionment of rent in respect to time. By this is meant that the sum accruing between one time of payment and another is a single, entire debt; it is due from the tenant only on the condition of enjoying the premises for the whole rent period, and to the owner of the reserved rent only when it becomes payable. These rent payments may be successively recovered by different persons; but in the absence of an agreement therefor there can be no recovery for occupation for a part only of the time between rent days. If, therefore, the enjoyment be interrupted the rent for the current rent period is lost. And if a person having a life estate, with no power to make a lease to continue longer than during his life, should make a lease for a year, reserving rent half yearly, and should die before the end of a half year, there could be no legal demand for the rent of that period. The executor or representative of the lessor would not be entitled to it although there was no eviction, because the lessor's title ceased at his death; and by the nature of the contract the tenant was not bound to pay, and the lessor was not entitled to receive, rent except in the sums and at the times specified in the lease. His successor in the reversionary estate could not claim it for the additional reason that the reversion was not his until the lease itself was terminated by the death of the life tenant who gave it. If the lessee continues to hold afterwards, he does so under some new contract with the party on whom the estate has devolved.[1] If the lease continues, although intermediate the days of payment the reversion passes wholly into new hands, the obligation of the lessee to pay rent will continue also. Thus, in the middle of a quarter the lessor may convey the whole estate which is under the lease, or it may be sold under execution or mort-

the crops. If there was still, after the allowance of these deductions, any sum of unpaid rent which the plaintiffs would have had to pay if they had not been ousted, in order to entitle them to have the crops as their own by the terms of the lease, that should have also been deducted. In actions for breach of contract where the damages are open and unliquidated the true rule of damages is to requite the party for what he has actually lost by the violation of the contract by the other."

[1] Marshall v. Moseley, 21 N. Y. 280; Perry v. Aldrich, 13 N. H. 343. Compare Foote, Appellant, 22 Pick. 299, and Price v. Pickett, 21 Ala. 741.

gage, or he may die leaving it to descend to his heirs, or he may dispose of it by will. The lease itself is unaffected by these events, and the rent is therefore payable as though [121] they did not occur; but it is payable only in the sums and at the times specified in the demise. The reversion may be transmitted to a new owner during the period between the days of payment, but such an event does not divide the obligation of the tenant. The accruing rent follows the reversion wheresoever that goes, and neither the former owner nor his representative can recover any portion of it. Being recoverable only in a single sum, and not until the prescribed day of payment, the common law gives it to him who is the reversioner at that time.[1] The covenant to pay rent creates no debt until the day of payment arrives.[2]

Where the entire reversion is transferred, subject to the lease, by sale or descent, by act of the lessor or operation of law, the rent which becomes payable afterwards follows the reversion, unless reserved or otherwise specially disposed of, and belongs to and may be recovered by the party so succeeding to it.[3] Nor is it necessary, in such cases, to perfect the reversioner's right to the entire rent afterwards falling due, or to discharge the tenant's liability to the lessor therefor, that such tenant should attorn or be evicted.[4]

A covenant for rent runs with the land, and, at common law, rent may be apportioned either on severance of the land from which it issues, or of the reversion to which it is incident.[5] It must be divided and apportioned whenever several persons succeed to the right of the lessor to receive the rent;

[1] Porter v. Sweeney, 61 Texas, 216; Hearne v. Lewis, 78 id. 276; Price v. Pickett, 21 Ala. 741. See Mixon v. Coffield, 2 Ired. L. 301; Sutliff v. Atwood, 15 Ohio St. 186.

[2] Wood v. Partridge, 11 Mass. 488; 3 Kent's Com. 470.

[3] Wise v. Falkner, 51 Ala. 359; Dailey v. Grimes, 27 Md. 440; Fay v. Holloran, 35 Barb. 295; Getzandaffer v. Caylor, 38 Md. 280.

[4] Id.; English v. Key, 39 Ala. 113.

[5] Van Rensselaer v. Bradley, 3 Denio, 135; Stevenson v. Lombard, 2 East, 575; Astor v. Miller, 2 Paige, 68; Cruger v. McLaury, 41 N. Y. 219; Van Horn v. Crane, 1 Paige, 455; Merceron v. Dowson, 5 B. & C. 479; Wollasten v. Hakewill, 3 M. & G. 297; Ingersoll v. Sergeant, 1 Whart. 337; Van Rensselaer v. Chadwick, 22 N. Y. 32; 2 Platt on Leases, 131, 132; Marshall v. Moseley, 21 N. Y. 282; Crosby v. Loop, 13 Ill. 625; Cole v. Patterson, 25 Wend. 456; Linton v. Hart, 25 Pa. St. 193; Reed v. Ward, 22 Pa. St. 144; Biddle v. Hussman, 23 Mo. 597.

also when the demised premises, by assignment of the lessee's estate, go in parcels or otherwise to other persons. When the severance of the reversion is by the act of the lessor, the con-
[122] sent of the tenant is necessary to the apportionment, unless the persons who become the owners liquidate and settle the proportions to be paid them respectively.[1] If not so adjusted it may be apportioned by the jury according to the relative value of the several parts held by each of the owners.[2] But if the severance of the reversion is by act of the law, or where it occurs by descent to several heirs, or a judicial sale of part, an apportionment may be made without the consent of the tenant; he will have two or more landlords instead of one, and be bound to pay rent to each according to his interest.[3] When a tenant has assigned a part of his estate under the lease in which he has covenanted to pay rent, he is not thereby relieved from his obligation. If the lessor thinks proper to rely on his covenant, he is at liberty to do so without resorting to the assignee. When the lessee has covenanted to pay rent he cannot exonerate himself, either wholly or in part, by such an assignment. Nor can he apportion the rent between himself and his assignee without the concurrence of the landlord, so as to liquidate the liability of the assignee.[4]

§ **850. Same subject.** The action for rent against the lessee's assignee is based on privity of estate; hence he is only liable so long as he remains in the legal relation of assignee to the premises. If he assigns to another and the latter accepts the assignment, the liability of the former is at an end.[5]

[1] Bliss v. Collins, 5 B. & Ald. 876; Roberts v. Snell, 1 Man. & Gr. 577; Ryerson v. Quackenbush, 26 N. J. L. 236; Taylor's L. & T., § 383.

[2] Cuthbert v. Kuhn, 3 Whart. 357; Farley v. Craig, 11 N. J. L. 262; McElderry v. Flannagan, 1 Har. & G. 308; 3 Kent's Com. 370.

[3] Cole v. Patterson, 25 Wend. 456; Wotton v. Shirt, Cro. Eliz. 742.

[4] See Ghegan v. Young, 23 Pa. St. 18; Frank v. Maguire, 42 Pa. St. 77; Wall v. Hinds, 4 Gray, 256; Taylor's L. & T., § 384; Pitcher v. Tovey, 1 Salk. 81; Buckland v. Hall, 8 Ves. 92; Bailiff of Ipswich v. Martin, 1 Roll. Abr. 235.

[5] Seifke v. Koch, 31 How. Pr. 383; Sutliff v. Atwood, 15 Ohio St. 186; Hintze v. Thomas, 7 Md. 346; Journeay v. Brackley, 1 Hilt. 447; Armstrong v. Wheeler, 9 Cow. 88; Lekeug v. Nash, 2 Str. 1221; Taylor v. Shum, 1 B. & P. 21; Paul v. Nurse, 8 B. & C. 486; Graves v. Porter, 11 Barb. 592; Hannen v. Ewalt, 18 Pa. St. 9. See McKeon v. Whitney, 3 Denio, 452.

The assignee of a lease is liable for rent only by reason of the privity of estate between him and the lessor, and this privity is the assignee's right of possession under the assignment and not his actual possession; and in an action by the lessor [**123**] against the assignee for rent the measure of the latter's liability is the extent of his possessory right, though it be to an undivided part, and not the extent of his actual possession.[1]

[1] St. Louis Public Schools v. Boatmen's Ins. Co., 5 Mo. App. 91. In this case a lease was made to two persons, one of whom by deed assigned his undivided half interest therein to a third person who entered into exclusive possession and occupied the whole of the leased premises; the lessor sued the assignee for the amount of the rent reserved in the lease. Held, that the assignee was liable only for the undivided half. Bakewell, J., said: "In the consideration of this case we have no aid from any direct authority on the very point involved. The precise question seems never to have come up for judicial determination except in a single instance. In that case the reported opinion is deprived of the weight it would otherwise have, from the unfortunate circumstance that the premises of the learned judge who delivered it being wholly untenable, one is compelled to distrust the conclusion arrived at, which of course can only be correct by accident, and must be erroneous if arrived at by any process of right reasoning.

"There can be no question that the assignee of a lease is liable only by the privity of estate between himself and his landlord. Arch. L. & Ten. 70; Smith, L. & T. 292; Hannen v. Ewalt, 18 Pa. St. 9. But it is assumed by the learned judge delivering the opinion in the case referred to (Damainville v. Mann, 32 N. Y. 197), that perhaps the assignee is not liable by virtue of the privity of estate; and he puts the liability on the ground of actual possession. It has not, we believe, ever been held that an actual entry under the assignment is necessary to make the assignee liable in respect of assignments by deed which are regarded as effecting a transfer, not only of title, but also of the legal possession. The acceptance of the assignment creates the liability, and the legal possession which ownership implies is all that is required. Woodf. L. & T. 166, 289; Taylor, L. & T. 450–452; Smith v. Brinker, 17 Mo. 148. In Walker v. Reeves, 2 Doug. 461, note, quoted in the New York case, the question was discussed whether the assignment imposed the obligation to pay rent. Lord Mansfield says that it does; that the actual possession is immaterial; and that the possession in law, by the assignment of the title which passed the possessory right, is sufficient. The case was that of a mortgagee who had not taken possession, and it was distinguished from that of an absolute assignee, who was assumed to be liable without entry. Although the cases in which the assignee in bankruptcy is held not liable to pay rent are put expressly upon the ground that an assent to the assignment is necessary to bind him, and the question of actual possession is considered in such cases only as it bears upon this assent (Turner v. Richardson, 7

[125] The assignee of the whole premises is liable for the rent of the whole though only in possession of a part.[1] And if he remains in their actual possession and beneficial enjoyment his liability as assignee will continue though he may have as-

East, 335), the learned judge in the New York case asserts that the true grounds of the decision in these cases is the question of possession, which seems to be not the fact.

"After quoting a remark by Shep-[124] pard, the well-known author of the Touchstone, in an argument prefixed to the report of Webb v. Russell, 3 T. R. 394, which he interprets by the light of his peculiar view of the law, the learned judge boldly concludes that there is no privity of estate between the lessor and the assignee of the lease where there is only constructive possession; and, having found an imaginary resting place for his feet, he proceeds to construct thereon a fabric which can have no greater value than any other poetic fiction, because, like the stags of Tityrus, it rests on air. He proceeds to argue that the owner of the other undivided half of the lease in the case before him, who took by a separate assignment, is under no obligation to pay rent, not being in possession. This, clearly, is not the law. Coote's L. & T. and text-books and cases *passim*. Yet, on the truth of this proposition, he proceeds, mainly, to rest the decision of the whole question. It follows, he says, that defendant in possession is taking the property of the landlord without any responsibility to him (as if the lessor, before the determination of the term, had any right to say who should occupy the premises); and this, he thinks, is manifestly unjust, because the assignee in possession, having all that is useful in the premises, should pay the rent as the condition of his enjoyment. But why, it may be asked, should he pay a rent which he has never agreed to pay, and which may at the time of his possession be ten times the actual rental value? For, having what is useful in the premises, it would seem that he should only pay what may be shown to be the reasonable value of their use. But that is not the theory of this action, and is not what the lessor is seeking to recover from the assignee. However, whilst holding that defendant is liable, the learned judge says that he adopts this conclusion not without considerable hesitation. We cannot adopt this conclusion at all; and we think that this case, properly considered, even tells against the respondent in the case at bar. It seems to be admitted in the opinion, that, but for an assumption which we cannot but consider as wholly unwarranted, the decision should be the other way. The lessor looks for his rent, not to the person in possession, but to the lessee; and if he rents to two, and by agreement between themselves, or otherwise, one of them has exclusive possession, or if they choose to keep the premises vacant, this in no way concerns the lessor. The relation of landlord and tenant does not exist between the landlord and the mere occupier; nor can one merely occupying land be sued for rent in an action of debt or covenant. On the other hand, it is nowhere intimated in the books that the assignee is liable on a *quantum meruit*, as for use

[1] Negley v. Morgan, 46 Pa. St. 281.

signed to another person.[1] The assignee of a separate part is liable only for the rent of that part.[2]

If a national bank has paid rent for the premises occupied by it up to the time a receiver is appointed, the latter is not bound to take possession of them and pay rent; neither is the claim for rent during the unexpired term enforcible against the assets in his hands. After the charter of the bank is forfeited there is no party with whom the lessor can deal in reference to the lease, and it necessarily terminates.[3]

If several tenants in common of land chargeable with rent make partition, each assuming the payment of his equitable

and occupation. He is liable at the rate fixed by the lease of which he is the assignee. If the rent is not paid, the assignee in possession may be put out; but we can see no reason whatever why the assignee of an undivided interest in a lease, though in the actual possession of the whole premises, should be made to pay the whole rent reserved. Any such rule might work very great hardship in cases that may be easily supposed; while there seems to be no hardship in holding the assignee in possession liable only according to his interest as shown by the assignment itself. His interest by virtue of the assignment created his liability; and we do not see why the assignee of an undivided, and perhaps infinitesimally small, interest should, any more than a stranger, be liable for rent for the whole premises at the rate reserved in the lease, and which, obviously, may be no measure of their actual rental value, merely because his possession is, as it may well be, larger than his interest. If the landlord does not get his rent, he may forfeit the lease and put out any one in possession, whether assignee or sub-tenant. The reason of the case seems clear. Where a lease is made to two, there is a privity of estate and privity of contract between lessor and lessee; by the terms of the contract, and by virtue of the contract and not of the privity of estate, each lessee is liable for the whole rent, though each has only an undivided half of the estate. Where one of these two men assigned his interest, there is now no privity of contract between the assignee and the landlord; but there is privity of estate; and that privity of estate, and that alone, creates the liability for rent. The liability for rent, in such a case, does not arise from privity of contract, for that is at an end; nor from possession, for it is held in Missouri (17 Mo. 148), and elsewhere, that possession can never be material in establishing the liability of an assignee of a lease, except so far as it may serve to determine the question of acceptance of the assignment,—that is, the question whether the defendant is in fact the assignee. The ground of liability is privity of estate alone. The only question that remains, then, is as to the extent of that privity; and this, we think, is determined by the extent of the estate."

[1] Negley v. Morgan, 46 Pa. St. 281.

[2] Astor v. Miller, 2 Paige, 68.

[3] Fidelity Safe Deposit & Trust Co. v. Armstrong, 35 Fed. Rep. 567.

share, each will still be liable to the lessor for the rent, but as between themselves each will be liable to the others for any amount either may be compelled to pay beyond his proportionate share.[1] A release by the lessor to one of the tenants in common, given subsequently to the partition, discharging him from the payment of rent on his divided part, will not extinguish the liability of the others. Such a release makes the lessor a party to the partition and apportionment; thereafter he cannot claim from the others more than the [126] portion of the rent fixed between the lessees by their contract of partition.[2] In making such apportionments the ratio of values and not of quantities governs.[3] If there is no proof of relative values the whole premises will be presumed to be of equal value; then an apportionment made according to the relative quantities will be deemed *prima facie* right.[4] But in a case against the assignee of part of the demised premises, where upon the trial the court had apportioned the rent as matter of law according to the number of acres, there being no evidence of value, it was held to be error. Beardsley, C. J., said: "The amount due would necessarily depend on the proportionate value of the part of which the defendant was assignee, there being no evidence that the amount to be paid on his part had been adjusted by agreement between the parties in interest. I see no *data* in the case before us upon which the defendant's share could be determined as a matter of law, and very little to aid the jury in ascertaining it as a matter of fact. Possibly there was enough to have upheld a verdict if the amount had been determined by the jury; but the judge refused to submit the question to their decision, in which, I think, he clearly erred." [5]

§ **851. Partial destruction of demised property.** A tenant who has made an unconditional contract to pay rent for a term cannot claim an apportionment or abatement of it for

[1] Van Rensselaer v. Chadwick, 24 Barb. 333; Graves v. Porter, 11 id. 592; Van Rensselaer v. Gifford, 24 id. 349.

[2] Van Rensselaer v. Gifford, 24 Barb. 349.

[3] Van Rensselaer v. Gallup, 5 Denio, 454; Same v. Jones, 2 Barb. 643; Same v. Bradley, 3 Denio, 135; Cuthbert v. Kuhn, 3 Whart. 357; Farley v. Craig, 11 N. J. L. 262; McElderry v. Flannagan, 1 Har. & G. 308.

[4] Van Rensselaer v. Jones, *supra*.

[5] Van Rensselaer v. Bradley, 3 Denio, 153.

being deprived of any beneficial enjoyment of the premises by their being out of repair, or untenantable, or unfit for the use for which they were leased.[1] Nor if the buildings or premises are destroyed or rendered useless by fire, tempest, flood, war or other inevitable casualty.[2] Moreover, there is no implied warranty by the landlord of the fitness of the premises [**127**] for the use the tenant has in view or against accidental destruction; nor is there any implied undertaking to repair or rebuild.[3] But it has been ruled where real and personal property is leased by the same instrument for a gross sum, and the personalty is a substantial part of the whole, that its destruction without the fault of the lessee entitles him to an apportionment of the rent.[4]

[1] Smith v. McLean, 123 Ill. 210; Westlake v. De Graw, 25 Wend. 669; Cleves v. Willoughby, 7 Hill, 83; Welles v. Castles, 3 Gray, 323; Dalton v. Gerrish, 9 Cush. 89; Hart v. Windsor, 12 M. & W. 68; Sutton v. Temple, id. 52.

[2] Cook v. Anderson, 85 Ala. 99; Warren v. Wagner, 75 id. 188; Smith v. McLean, 123 Ill. 210; Paradine v. Jane, Aleyn, 26; Wagner v. White, 4 Har. & J. 564; Hallett v. Wylie, 3 Johns. 44; Belfour v. Weston, 1 T. R. 310; Monk v. Cooper, 2 Ld. Ray. 1477; 2 Str. 763; Fowler v. Bott, 6 Mass. 63; Izon v. Gorton, 5 Bing. N. C. 501; Arden v. Pullen, 10 M. & W. 321; Helburn v. Mofford, 7 Bush, 169; Robinson v. L'Engle, 13 Fla. 482; Smith v. Ankrim, 13 S. & R. 39; Gibson v. Perry, 29 Mo. 245; White v. Molyneux, 2 Ga. 124; Gates v. Green, 4 Paige, 355; Patterson v. Ackerson, 1 Edw. 96; Peterson v. Edmonson, 5 Harr. (Del.) 378.

A lease of mill property provided for an abatement of rent in case any part of the property should be damaged by fire during the term. A boarding house on the premises used by the mill operators was destroyed by fire; and it was held that the abatement to be made was not limited to the actual value of the building destroyed, but included any depreciation in the rental value of the remainder of the premises, if caused by its destruction. Cary v. Whiting, 118 Mass. 363.

[3] Tay. L. & T., § 372; Sheets v. Selden, 7 Wall. 416; Johnson v. Oppenheim, 43 How. Pr. 433; Westlake v. De Graw, 25 Wend. 669; McGlashan v. Tallmadge, 37 Barb. 313; Sutton v. Temple, 12 M. & W. 52; Hart v. Windsor, id. 68. See Doupe v. Genin, 37 How. Pr. 5; S. C., 45 N. Y. 119.

[4] Whitaker v. Hawley, 25 Kan. 277. This was ruled in England so long ago as 1544. Taverner's Case, 1 Dyer, 56*a*. There is an *obiter* remark to the contrary in Bussman v. Ganster, 72 Pa. St. 285. Where the lease was of a tannery and other real property and the tools belonging to the former, it was held that the tools should be deemed part of the realty. "Rent cannot be reserved out of chattels personal. If such chattels are demised with land at an entire rent, the rent issues out of the land only." Fay v. Holloran, 35 Barb. 295. See Jones v. Smith, 14 Ohio, 606; Sutliff v. Atwood, 15 Ohio St. 186.

§ 852. Entire destruction of demised premises. Where the estate out of which the rent issues is gone, and the demised tenement has ceased to exist, the rent terminates, and the obligation to pay it is at an end. Thus, by the lease of apartments in a building for the purpose of trade, the lessee takes only such interest in the subjacent land as is dependent upon the enjoyment of the apartments rented and necessary thereto; and if they are totally destroyed by fire this interest ceases; the relation of landlord and tenant, upon such a lease, is dissolved thereby, and thenceforth the lessee has no interest in or right to the land.[1] The lease is not terminated, nor the right to rent extinguished, where, by the operation of the lease, the tenant has, after destruction of the building, an in- [128] terest in the soil, and is authorized to rebuild, so that thereby or otherwise he may still have some beneficial enjoyment of the premises.[2]

§ 853. When premises taken for public use. Whenever the estate which a lessor had at the time of making the lease is defeated or in any manner determined, the lease is extin-

[1] McMillan v. Solomon, 42 Ala. 356; Graves v. Berdan, 26 N. Y. 498; Austin v. Field, 7 Abb. (N. S.) 29; Ainsworth v. Ritt, 38 Cal. 89; Kerr v. Merchants' Exch. Co., 3 Edw. 315; Winton v. Cornish, 5 Ohio, 477; Womack v. McQuarry, 28 Ind. 103. See Izon v. Gorton, 5 Bing. N. C. 501.

[2] Warren v. Wagner, 75 Ala. 188, 202; Graves v. Berdan, 26 N. Y. 498.

In South Carolina it has been held that where a tenant has been dispossessed by an enemy he ought to be thereafter relieved from paying rent; that his liability is suspended when his enjoyment is interrupted by the casualties of war. Bayly v. Lawrence, 1 Bay, 499. So where a hurricane rendered the rented house untenantable. Ripley v. Wightman, 4 McCord, 477. In the later case of Coagan v. Parker, 2 Rich. 255, it appeared that the tenant, although his beneficial enjoyment was impaired by the casualties of war, had not surrendered or offered to surrender the lease, or otherwise to rescind the contract, and it was held that his defense should not be allowed. The authorities in that state and elsewhere are reviewed, and the true doctrine held to be, that where there is a substantial destruction of the subject-matter out of which the rent is reserved, in a lease for years, by an act of God or the public enemy, the tenant may elect to rescind, and on surrendering all benefit from the lease shall be discharged from the payment of rent. It was also decided that if the tenant be deprived of the beneficial enjoyment of the leased premises according to the intent of the lease, that is a destruction of its subject, of its subject-matter, within the meaning of these terms, whether there be a physical destruction of the premises or not.

guished with it;[1] as where a tenant for life makes a lease for a term and dies before it ends.[2] So where the entire premises demised are taken for any public use the lease is thereby terminated; it becomes void when the proceedings have divested the lessor's title, and payment therefor is made him.[3] But where only a portion of the demised premises is taken, the taking has no effect upon the rights or relations of lessor and lessee; each is entitled to compensation for his property so taken, and the lessee is not entitled to an abatement of the rent he has covenanted to pay unless by force of some provision of the lease or statutory regulation.[4] This is the rule, although the lessor consents to the entry by a railroad company and conveys to it the right of way.[5] It is held in Missouri and Mississippi, and in Pennsylvania in equity, that the claim for rent on the portion of the land appropriated is extinguished.[6] The general rule rests on the principle that upon such condemnation the amount of compensation or [129] damages is the same whether one person owns the property entirely, or several have distinct estates or interests therein.[7] Where the division of interest is between a lessor holding the reversion and the lessee of an unexpired term, the subsequent liability of the latter for rent without abatement, notwithstanding the curtailment of the demised premises, enhances his share of the damages which are assessed on the taking for public use.[8] But where, as in Missouri, Mississippi and New York — in the latter state by statute,— the rent is apportioned when a part of the leased property is taken for public use,[9] the lessor's share of the damages is enhanced by the subsequent loss

[1] Taylor's L. & T., § 519.

[2] Marshall v. Moseley, 21 N. Y. 280.

[3] Barclay v. Pickles, 38 Mo. 143; Foote v. Cincinnati, 11 Ohio, 408; Noyes v. Anderson, 1 Duer, 342.

[4] Workman v. Mifflin, 30 Pa. St. 362; Parks v. Boston, 15 Pick. 198; Stubbings v. Evanston, 136 Ill. 37; 26 N. E. Rep. 577; Chicago v. Garrity, 7 Ill. App. 474. But compare Leiter v. Pike, 127 Ill. 287.

[5] Blythe v. Pratt, 62 Miss. 707.

[6] Biddle v. Hussman, 23 Mo. 597; Barclay v. Pickles, 38 id. 143; Commissioners v. Johnson, 66 Miss. 248; Cuthbert v. Kuhn, 3 Whart. 356.

[7] Edmands v. Boston, 108 Mass. 535; Burt v. Merchants' Ins. Co., 115 Mass. 1; Burt v. Wigglesworth, 117 Mass. 302; Ross v. Elizabethtown R., 20 N. J. L. 230; Kohl v. United States, 91 U. S. 367.

[8] Id.

[9] Biddle v. Hussman, 23 Mo. 597; Kingsland v. Clark, 24 Mo. 24; Gillespie v. Thomas, 15 Wend. 464; Williams and Anthony Sts., 19 Wend. 678.

of rent on the part so taken. He then gets in hand from the public an equivalent for his rent, and the tenant's future liability is apportioned so as to confine it ratably to the residue.[1]

§ 854. Lessee's liability for interest. Interest on rent in arrear is, in this country, allowed upon the same principle as [130] upon other debts.[2] Although it was held in some old cases that it should not be allowed upon rents because it would be making a profit on profit, the more modern and reasonable doctrine seems to be that a certain sum due for rent is similar to any other debt;[3] but it is said in the Kentucky case from which the foregoing is quoted, that when due by verbal contract interest shall be allowed or not according to circumstances. In Mississippi it is said interest on rent is in the discretion of the court.[4] In New York and Pennsylvania it seems to be settled that interest is not only allowed on rent payable in money, but also when payable otherwise, as in wheat, fowls and services, if not paid when due.[5] In a case in which the point was very fully considered Bronson, J., referring to the earlier cases, said: "The principle to be extracted

[1] In In re New York C. R. Co., 49 N. Y. 414, a railroad company leased its road and all its land upon or across which the road or any part thereof, or its machine shops, etc., were constructed. It was held that the lease included all lands acquired for use in operating the road, and without which the use of the road or any part of it would be less convenient and valuable; and also that where the railroad company had prior to the execution of such a lease acquired title to a piece of land for the purpose of use as a street in connection with its road, which use would be highly beneficial to and convenient for its business, the land was included in the lease, although such use had not been actually obtained at the time of the execution of the lease; and that upon the subsequent condemnation of this land by another railroad the lessee was entitled to the use of the money awarded as damages for such taking during the continuance of the lease.

[2] Elkin v. Moore, 6 B. Mon. 462; Honore v. Murray, 3 Dana, 31; Clark v. Barlow, 4 Johns. 183; Stockton v. Guthrie, 5 Harr. (Del.) 204; Walker v. Hadduck, 14 Ill. 399; Naglee v. Ingersoll, 7 Pa. St. 185; Glover v. Wilson, 6 id. 290; McQuesney v. Hiester, 33 id. 435; Dorrill v. Stephens, 4 McCord, 59; Dennison v. Lee, 6 Gill & J. 383; Downing v. Palmateer, 1 T. B. Mon. 64; Vance v. Evans, 11 W. Va. 342; Stevenson v. Maxwell, 2 Sandf. Ch. 273; Crane v. Hardman, 4 E. D. Smith, 448; Binsse v. Wood, 47 Barb. 624; Van Rensselaer v. Jones, 2 id. 643; Same v. Jewett, 2 N. Y. 135.

[3] Burnham v. Best, 10 B. Mon. 227.

[4] Howcott v. Collins, 23 Miss. 398.

[5] Lush v. Druse, 4 Wend. 313; Van Rensselaer v. Jones, 2 Barb. 643; Oliver v. Moore, 53 Hun, 472.

from these decisions may be stated as follows: 'Whenever a debtor is in default for not paying money, delivering property or rendering services in pursuance of his contract, justice requires that he should indemnify the creditor for the wrong which has been done him; and a just indemnity, though it may sometimes be more, can never be less than the specified amount of money, or the value of the property or services at the time they should have been paid or rendered with interest from the time of the default until the obligation is discharged. And if the creditor is obliged to resort to the courts for redress he ought, in all cases, to recover interest in addition to the debt by way of damages.' It is true that on an agreement like the one under consideration the amount of the debt can only be ascertained by an inquiry concerning the value of the property and services. But the value can be ascertained; and when that has been done the creditor, as a question of principle, is just as plainly entitled to interest after the default as he would be if the like sum had been payable in money."[1] It is accordingly allowed also in an action for use and occupation.[2]

In Virginia, however, it is not recoverable of course. [131] In an early case[3] Tucker, J., said: "This question depends partly upon the nature of the thing demanded, which is *rent*, and partly upon the nature of the action which is brought for the recovery of it. Some consideration is also due to the nature of interest and damages according to the principles of the common law." Because a summary remedy by distress was afforded to the landlord for rent it was deemed to be giving him advantage from his own *laches* to allow him interest unless the tenant had in some way obstructed that remedy. "Rent service, when it consisted either in personal or manual operations, or in unproductive things, as capons, spars, bows, shafts, roses and other articles enumerated by Sir Edward Coke, was not of a nature to yield any profit growing out of the thing itself in the nature of interest. And if they happened to be uncertain the lord could neither distrain nor re-

[1] Van Rensselaer v. Jewett, 2 N. Y. 135; Bradford Oil Co. v. Blair, 113 Pa. St. 83. See Livingston v. Miller, 11 N. Y. 80.

[2] Ten Eyck v. Houghtaling, 12 How. Pr. 523.

[3] Newton v. Wilson, 3 Hen. & Munf. 470.

cover damages for withholding them. By the common law interest, under the odious name of usury, was altogether prohibited; consequently it could not be recovered in the common-law courts for the mere detention or delay of payment of a debt, however just, or how unreasonably soever the payment might have been delayed. And upon this principle it seems to be that in actions of debt the damages are in general merely nominal; and even in replevin at common law it would seem that the rent is to be regarded as the certain measure of the damages." It seems to be considered in that state that interest is allowable in the discretion of the chancellor or jury in view of particular facts showing a delay in the landlord's remedies for rent without any neglect on his part.[1] It is not allowed where it appears that there were always effects on the premises liable to distress sufficient to have satisfied the rents, even though such rents were demanded by the landlord.[2]

§ **855. Covenants for repairs.** It has been the established rule of the common law for ages that an express covenant to repair binds the covenantor to make good any injury to the [132] demised premises which human power can remedy, even if caused by storm, flood, fire, inevitable accident or the act of a stranger.[3] The covenant embraces not only the buildings on the premises at the date of the demise, but any new buildings erected during the term, unless the contract expresses a different intention; as where it stipulates to keep in repair the demised buildings.[4] Such a covenant, however,

[1] Id.; Cooke v. Wise, 3 Hen. & Munf. 463; Mickie v. Lawrence, 5 Rand. 571.

[2] Dow v. Adams, 5 Munf. 21. See Payne v. Graves, 5 Leigh, 561; Roper v. Wren, 6 Leigh, 38; Buckmaster v. Grundy, 8 Ill. 626; Mulliday v. Machir, 4 Gratt. 1.

[3] Leavitt v. Fletcher, 10 Allen, 119; Polack v. Pioche, 35 Cal. 416; Nave v. Berry, 22 Ala. 382; Phillips v. Stevens, 16 Mass. 238; Paradine v. Jane, Aleyn, 26; 1 Dyer, 33*a*; Earl of Chesterfield v. Duke of Bolton, 2 Comyn. 627; Walton v. Waterhouse, 3 Saund. 422*a*; Bullock v. Dommitt, 6 T. R. 650; Compton v. Allen, Style, 162; Green v. Eales, 2 Q. B. 225; Bigelow v. Collamore, 5 Cush. 226; Allen v. Culver, 3 Denio, 294; Bohannom v. Lewis, 3 T. B. Mon. 376; 2 Platt on Leases, 186; Parrott v. Barney, 1 Sawyer, 423.

[4] Worcester School Trustees v. Rowlands, 9 C. & P. 734; Cornish v. Cleife, 3 Hurl. & Colt. 446.

A covenant to surrender the premises at the end of the term in the same state of repair or condition they were in at the date of the lease, nat-

does not bind the tenant to insure against natural wear and decay;[1] nor to give the landlord at the end of the term new buildings in the place of old ones.[2] Where a very old building is demised, it is not meant that it should be restored in an improved state, nor that the consequences of the elements should be averted; it is to be repaired as an old house; but the tenant has the duty of keeping it as nearly as may be in the state in which it was at the time of the demise by the timely expenditure of money and care.[3] The term "good repair" is to be construed with reference to the subject-matter, the age and class of the tenement, and must differ as that may be a palace or a cottage; but to keep in good repair presupposes a putting into such repair, and means that during the whole term the premises shall be in that condition.[4] And it is [133]

ural wear and tear excepted, does not bind the lessee to rebuild if they are accidentally destroyed by fire, without the negligence of the lessee, or make him responsible for the loss. Miller v. Morris, 55 Texas, 412; Nave v. Berry, 22 Ala. 391; Maggort v. Hansbarger, 8 Leigh, 536; Wainscott v. Silvers, 13 Ind. 500; Warner v. Hitchins, 5 Barb. 666; McIntosh v. McLawn, 49 id. 554; Levey v. Dyess, 51 Miss. 501.

[1] Harris v. Goslin, 3 Harr. (Del.) 338; Ball v. Wyette, 8 Allen, 275; Gutteridge v. Munyard, 7 C. & P. 129; Harris v. Jones, 1 Mood. & Rob. 173.

[2] Belcher v. M'Intosh, 8 C. & P. 720; Hart v. Windsor, 12 M. & W. 68; Mantz v. Goring, 4 Bing. N. C. 451.

[3] Gutteridge v. Munyard, 7 C. & P. 129; Payne v. Haine, 16 M. & W. 541.

If the lease authorizes the lessee to adapt the premises to a use different from that to which they have been put, a condition requiring their surrender in the same state they were in when leased, reasonable use and wear for the purposes for which they were leased excepted, does not make it the duty of the lessee to restore them to a state fitted for their original use. McGregor v. Board of Education, 107 N. Y. 511.

[4] Payne v. Haine, 16 M. & W. 541; 3 Par. on Cont. 233; Burdett v. Withers, 7 A. & E. 136; Walker v. Hatton, 10 M. & W. 249; Hart v. Windsor, 12 id. 68. But see West v. Hart, 7 J. J. Marsh. 258, in which, referring to Brashear v. Chandler, 6 T. B. Mon. 150, Nicholas, J., said: "It is said in that case that a covenant simply to repair may be construed to embrace only the making good what may be damaged *ad interim*, but that the stipulation to deliver in good repair in every respect left no room for limiting it to a covenant merely to repair according to the original condition of the farm. The word 'keep' seems to us to have direct reference to the condition of the premises at the time of the leasing, and that the then state of repair must be taken to be what the parties meant by good repair. There is so broad and palpable a distinction between a promise to put into repair and one to keep in repair that it is almost impossible to believe that the parties meant the

proper to show what was the age, class and general state of repair of the premises when the tenant took them in order to measure the extent of the repairs to be made.[1]

The covenant to repair or to keep in good repair does not mean merely that the premises are to be kept in as good a state of repair as when the tenant took them; for that may not be good repair.[2] Such covenants are to be construed according to their particular words.[3] A covenant to put the premises into habitable repair does not require the tenant to make a new house; but the word "put" implies that it is to be improved; regard being had to the state in which it was at the time of the agreement, and also to the situation and class of persons who are likely to inhabit it, the lessee is to put it into a condition fit for a tenant to inhabit.[4] A covenant by the lessee of farm lands "to repair the buildings, build all fences, and to generally improve the property," does not include work done by the lessee at the request of the lessor and on a promise to pay him therefor, in the erection of new buildings, whether the material in them is entirely new or partly derived from old structures, nor in the cutting off of parts of the demised dwelling and setting them up as independent structures. The agreement to generally improve the property refers to the mode of cultivating the lands, the proper and sufficient use of manures and other like matters.[5] Where the general covenant to repair excepts damages by the elements or acts of providence, no damages are within the exception to which human agency has in any way contributed.[6] A tenant holding over is impliedly bound by all the stipulations in the lease which are applicable to his new situation, including that for repairs, where there is nothing in the lease, or any extrinsic fact, to destroy this implication.[7]

former when they used the latter expression. A covenant to keep in repair is certainly no broader than a covenant to repair, and if the latter obliges only to make good the damages *ad interim*, no greater stress can be laid on the promise to keep in repair." See Stultz v. Locke, 47 Md. 562.

[1] Payne v. Haine, *supra;* Burdett v. Withers, *supra;* Stanley v. Towgood, 3 Bing. N. C. 4; Mantz v. Goring, 4 id. 451.

[2] 3 Par. on Cont. 233.

[3] Cornish v. Cleife, 3 H. & C. 466.

[4] Belcher v. McIntosh, 8 C. & P. 720.

[5] Naye v. Noezel, 50 N. J. L. 523.

[6] Polack v. Pioche, 35 Cal. 416.

[7] Digby v. Atkinson, 4 Camp. 275;

If he has been in possession several consecutive terms the lessor is not bound to show the separate damages he has sustained at the end of each. It is enough for him to prove a breach of the covenant under one or more or all of the leases. The delivery of each new lease was not a waiver nor an estoppel of the right to claim damages previously sustained.[1] In a covenant to keep the outside premises in repair, the external parts are construed to be those which form the [**134**] inclosure of them, and beyond which no part of them extends; and it has been held to be immaterial whether those parts are exposed to the atmosphere, or rest upon and adjoin some other building which forms no part of the premises let, as a wall dividing the demised house from an adjoining one.[2] Where a party to the lease of a carriage-house, consisting of a frame covered with matched boards, a shingle roof, and having a plank floor, covenanted to do the necessary repairs on the outside, and the other those on the inside, it was held that the outside included the whole outer shell of the building or external inclosure of roof and sides; that the necessary repairs on the outside were those which would make the building outwardly complete. It having been crushed without the fault of either party by a heavy fall of snow upon the roof, it was held that he who undertook to make the outside repairs must first rebuild so as to make the building externally complete before the other was bound to make the repairs inside. The fact that rebuilding the outside would so far replace the whole building as to leave but little to be done on the inside, and thus make the performance of the other party's covenant very easy, did not in any degree excuse the former from first performing his contract.[3]

§ 856. Measure of liability for not making repairs. For a continuing breach of a covenant to repair damages may be recovered *toties quoties*.[4] But a covenant by a lessee to repair fences on or before a certain day is not a continuing one, and

Riggs v. Bell, 5 T. R. 471; Beavan v. Delahay, 1 H. Bl. 8; Beale v. Sanders, 3 Bing. N. C. 850.

[1] McGregor v. Board of Education, 107 N. Y. 511.

[2] Green v. Eales, 2 Q. B. 225.

[3] Leavitt v. Fletcher, 10 Allen, 119.

[4] Hill v. Barclay, 16 Ves. 402; Kingdon v. Nottle, 1 M. & Sel. 365; Tremeere v. Morison, 1 Bing. N. C. 89; Beach v. Crain, 2 N. Y. 86; Shaffer v. Lee, 8 Barb. 420; Phelps v. New Haven, etc. Co., 43 Conn. 420. See Cooke v. England, 27 Md. 14.

in an action for a breach damages must be recovered once for all.[1] An action may be brought for breach of a covenant to keep demised premises in repair whenever such breach occurs, even while the lessee is in possession and during the term;[2] and the recovery will be limited to compensation for the in- [135] jury to the plaintiff. Where it is brought by the owner of the reversion before the term has expired the measure of damages is the diminution in value of the reversion in consequence of the want of repairs.[3] This is manifestly a just rule, rather than that of the amount it would cost to put the premises in repair, as was held in some early cases.[4] The landlord is not bound to expend the moneys recovered as damages in repairs, and whatever he recovers beyond his reversionary interest is in excess of due compensation. Alderson, B., said:[5] "The damages for non-repair may surely be very different if the reversion would come to the landlord in six months or nine hundred years, and that Lord Holt's doctrine in Vivian v. Campion would startle a man to whom the proposition was stated." Where the reversion is limited to one for life, with remainder to another in tail, with remainder to a third in fee, and there is a breach of covenant which gives the tenant for life a right to sue, he can only recover damages according to the injury done to his life estate, and not those which may be sustained by the reversioner.[6] The injury to the reversion, however, is not universally the basis and measure of recovery; the damage which the plaintiff suffers, and for which the tenant is liable, may not arise from its depreciation. Thus, a defendant, an under-lessee, who had covenanted with the plaintiff, his lessor, as the latter had with his lessor, to keep, and, at the expiration or sooner determination of the term, to leave and deliver up the premises in repair, allowed them to

[1] Cole v. Buckle, 18 Up. Can. C. P. 286.

[2] Buck v. Pike, 27 Vt. 529; Luxmore v. Robson, 1 B. & Ald. 584; Schieffelin v. Carpenter, 15 Wend. 400. See Atkins v. Chilson, 9 Met. 52.

[3] Worcester School Trustees v. Rowland, 9 C. & P. 734; Smith v. Peat, 9 Exch. 161; Mills v. East London Union, L. R. 8 C. P. 79; Williams v. Williams, L. R. 9 C. P. 659; Atkinson v. Beall, 11 Up. Can. C. P. 245; Fagan v. Whitcomb, 14 S. W. Rep. (Texas), 1018.

[4] Vivian v. Campion, 2 Ld. Raym. 1125; 1 Salk. 141; Nixon v. Denham, 1 Irish L. 100.

[5] Turner v. Lamb, 14 M. & W. 412.

[6] Evelyn v. Raddish, Holt, N. P., 543.

become out of repair. While they remained in this condition, the plaintiff having committed a forfeiture by non-payment of rent, the superior landlord ejected both him and the defendant; and it was held that the plaintiff was entitled to recover substantial damages for the non-repair. The lease to the plaintiff was for a term of seventy-two years, only sixteen of which had elapsed. Though the term had been forfeited by the plaintiff's act, and not that of the de- [136] fendant, it was ended, and by the terms of the covenant the lessor was entitled to have the premises surrendered in repair; hence the damage to the reversion from the non-repair was necessarily what it would cost to put the premises in repair. It was contended for the defendant that as the plaintiff had no reversion, and had lost it by his own default, he was entitled only to nominal damages; that it was as if the premises had been built on a cliff which fell into the sea. But Pollock, C. B., said: "This case is distinguishable from the supposed case of the demised premises being destroyed by a convulsion of nature, or by falling into the sea, or being swallowed up and lost, because there the original lessor could not maintain an action of covenant against his tenant, and therefore such lessee would have no right of action against his under-lessee. That does not apply here because the superior landlord has a right of action on the covenant to leave and deliver in repair. . . . And as the intermediate landlord is liable to make good the defects in the premises he may indemnify himself by this action beforehand." In respect to the diminution in value of the reversion being the measure of damages, Bramwell, B., said it "was a very good test, but not the only test of the damages to be recovered. Then a case was suggested of a man being under a covenant to repair a house, but not to rebuild it if it should be burnt down. If in such a case the house should be burnt down when out of repair I should say that no action could be maintained by the lessor on the covenant to repair, because he would have sustained no damage. Here, however, the premises when delivered up to the ground landlord were worth 40*l.* less than they would have been if in proper repair."[1]

In the case of a fee-farm grant there is no reversion, and

[1] Davies v. Underwood, 2 Hurl. & N. 570.

the only right the grantor has is to preserve the security for his rent, and to have the premises kept in such repair as shall not lessen this security or endanger their recovery in fair tenantable condition if he evicts for the non-payment of rent. Hence an assessment of damages on the principle of ascertaining the sum required to restore the premises to good tenantable condition and reducing such sum to its present value as a reversionary interest which will come into possession at the termination of the grant does not apply. The rule which must govern is to ascertain how much the present value of the landlord's right is depreciated by the breach of the covenant — how much less his interest will sell for in the existing condition of the premises than they would have brought if they had been preserved. In cases where the buildings form the main value of the premises the damages will be much greater than in the case of a ground rent or an agricultural holding where the land forms the chief security for the rent.[1]

§ 857. **Same subject.** Where the tenant under a lease containing a covenant to repair underlet the premises to one who entered into a similar covenant, and the original lessor brought an action on this covenant in the first lease, and recovered 10*l.* damages and 57*l.* costs, and the lessee therein incurred 48*l.* costs in his defense, it was held that the damages and costs recovered in that action, and also the costs of defending it, might be recovered as special damages in an action against [**137**] the under-tenant for breach of his covenant to repair. The court say: "If he could not recover these damages and costs against this defendant, he would be without redress for an injury sustained through the neglect of the defendant, and not in consequence of his own default; for during the term he could not enter and repair the premises without rendering himself liable to be treated as a trespasser."[2] This case as to the allowance of the costs of the former action has been overruled.[3] In a case in which the plaintiff, after having suffered judgment at the suit of his lessor for non-repair of demised premises, sought to recover from his own lessee for breach of

[1] Lombard v. Kennedy, 23 L. R. Ireland, 1.

[2] Neale v. Wyllie, 3 B. & C. 533.

[3] Walker v. Hatton, 10 M. & W. 249; Penley v. Watts, 7 id. 601.

the covenants for repairs contained in the sublease of the same premises, including the costs to which he had been subjected, the queen's bench held the covenants in the two leases were materially different, and suggested that this consideration had been overlooked in the decision of the preceding case.[1] Parke, B., said the action was not on a contract of indemnity: that the only true measure of damages was what it would cost to put the premises in repair, and if the plaintiff had expended more, that was his own fault, for which the defendant was not liable.[2] In a similar case which came before the same court the following year[3] these facts appeared: The original lessors having brought an action against the plaintiff for breaches of the covenant to repair, he applied to the defendant to perform the repairs, and for instructions as to the course he should pursue with respect to the defense of the action. The defendant denied that any notice to repair had been given; insisted that the premises did not require it, and even refused permission to the plaintiff to enter and execute the repairs himself; the plaintiff thereupon offered to suffer judgment by default, which the defendant refused to assent to. The plaintiff then gave the defendant notice that, as he had denied that any notice had been served, and insisted that [138] the premises were not out of repair, he should traverse the breaches of covenant assigned, and try the question, holding the defendant responsible for the costs. This he accordingly did, and the result was that the original lessor recovered 68*l.* damages and 58*l.* 12*s.* costs, and he himself incurred as costs 53*l.* 14*s.* 4*d.* in defending the action. Lord Abinger, C. B., said: "I do not think the covenant entered into by the defendant extended to the payment of the whole of these damages, but only to that portion of them which was necessarily incurred by the plaintiff. Now the real damage he sustained was the sum of 68*l.*, being the amount recovered by the plaint-

[1] Neale v. Wyllie, *supra.*

[2] Penley v. Watts, 7 M. & W. 610. On the argument the cases of Lewis v. Peake, 7 Taunt. 153, and Pennell v. Woodburn, 7 C. & P. 117, were referred to, and Parke, B., said: "Those cases would be applicable if the [former] action had been defended in the belief that the premises were in repair. The case of a warranty applies to an existing state of things, not to a thing to be done in the future."

[3] Walker v. Hatton, *supra.*

iff in the former action. The costs were certainly incurred by the present plaintiff in his own wrong, for he could have put an end to the present controversy between him and his lessor by the payment of that sum in the first instance, or he might have subsequently paid it into court. If we held that any more damages were recoverable there would be no limit; the only safe rule is to confine the verdict to those which were the necessary result of the act complained of, viz., the want of repairs; and I cannot see how it can be contended that the costs of both the plaintiff and the defendant in the former action were the natural or necessary consequences of that act. I think the case of Neale v. Wyllie is not law, and that it was decided on a mistaken principle." While it was said in this case by Parke, B., that the covenants in the two leases were not in substance identical, since one was given two years after the other, and a general covenant to repair must be construed to have reference to the condition of the premises at the time when it begins to operate; still the amount of the damages recovered against the plaintiff in the action on the covenants in the first lease was adopted as the "real damage" for breach of the second, on the motion of the defendant. On the whole, it is probable that the costs were disallowed because unnecessarily incurred — on the ground of an improvident defense of the former action.[1]

[139] § 858. **Same subject.** A landlord cannot recover as part of his damages for the failure of his lessee to repair, losses to which he has contributed by his own acts. Thus, the plaintiff held the demised premises subject to the performance of several covenants, one of which was to repair; he sublet to the defendant on a covenant by the latter to repair, which he failed to perform. The superior landlord ejected the plaintiff for breach of all the covenants, including that broken by the defendant. It was held that the plaintiff could not recover from the defendant for the loss of the term because there were breaches of other than the defendant's covenant, and it did not appear that the ejectment resulted

[1] See Smith v. Compton, 3 B. & Ad. 407; Short v. Kalloway, 11 A. & E. 28; Tindall v. Bell, 11 M. & W. 233; Wrightup v. Chamberlain, 7 Scott, 598; Smith v. Howell, 6 Exch. 730; Blyth v. Smith, 5 Man. & Gr. 405.

alone from the breach thereof; it was left undecided whether, if the loss of the term had been solely caused by the defendant's failure to perform his covenant, it could have been taken into consideration in the assessment of damages.[1] Where the plaintiff, to save his lease from forfeiture, has entered during his tenant's term, after default of the latter on his covenant to make repairs, and has executed repairs which both covenants required, the reasonable cost of the same is the measure of damages against his tenant; and it is not necessary to prove that his lessee assented to his entry and to the repairs being made by him, because, if there was no assent, the plaintiff would be merely liable as a trespasser, and it would have no effect on the measure of the tenant's liability for non-repair.[2]

As has been already incidentally mentioned, if a tenant bound to repair, or under a covenant to leave and deliver up in repair, leaves the premises at the end of his tenancy in a state of dilapidation, he is liable in damages for what it will reasonably cost to put them in the state in which he was bound to leave them,[3] and also to make compensation for loss of the use while the premises are undergoing repairs.[4] This measure of liability cannot be diminished by proof which shows that the premises have so altered in value by reason of surrounding circumstances that they may be worth as much for certain purposes if some of the repairs the lessee covenanted to make are omitted or made in a less expensive way than his duty required him to make them;[5] nor by the fact that because of the terms of a lease granted by the lessor to another lessee from the expiration of the defendant's term,

[1] Clow v. Brogden, 2 M. & G. 39.

[2] Colley v. Streeton, 2 B. & C. 273; Martinez v. Thompson, 16 S. W. Rep. 334. See Williams v. Williams, L. R. 9 C. P. 659.

[3] Penley v. Watts, 7 M. & W. 601; Rawlings v. Morgan, 18 C. B. (N. S.) 776; Keyes v. Western Vt. Slate Co., 34 Vt. 81; State v. Ingram, 5 Ired. 441; Hays v. Moynihan, 60 Ill. 409; Rutland v. Dayton, id. 58. See Myers v. Burns, 35 N. Y. 269; Cook v. Soule, 56 id. 420; Pennsylvania R. Co. v. Patterson, 73 Pa. St. 491; Phelps v. New Haven, etc. Co., 43 Conn. 453.

[4] Woodhouse v. Walker, 1 Q. B. Div. 408; Rawlings v. Morgan, 18 C. B. (N. S.) 776; Woods v. Pope, 6 C. & P. 782; Hexter v. Knox, 63 N. Y. 561. See Green v. Eales, 2 Q. B. 225.

[5] Morgan v. Hardy, 17 Q. B. Div. 770.

the lessor is at the time of bringing his action no worse off by reason of the defendant's breach.[1]

[140] If buildings fall to the ground by reason of the neglect of the covenantor to repair them, or are blown down by the wind, or burned by an accidental fire, the proper measure of damages is the amount it will take to rebuild, deducting the difference in value between old and new, as the landlord is not entitled to be put in a better position on account of the destruction, and cannot have the value of a new house when the one he lost was old.[2] If there be covenants to repair and to insure against loss by fire for a specific sum, the liability of the covenantor on the former, in respect to the cost of rebuilding in case the premises are burned down, is not limited to the amount designated to be covered by insurance.[3] Nor has the tenant any equity to compel his landlord to expend money received upon insurance in rebuilding the demised premises on their being burnt down, or to restrain him from suing for rent until after the premises have been rebuilt.[4] It is a common-law duty of a tenant to use the demised premises in such a way that no substantial injury shall be done them. He is not bound to make anything beyond tenantable repairs, such as keeping fences in order, replacing windows and doors broken during the pendency of the lease. For any damage resulting from his use of the premises beyond that incident to such as is reasonable he is responsible.[5] If fixtures are removed the damages are ascertained by the sum required to restore them, allowing for reasonable use and wear and for the increased value of new materials over old.[6]

§ 859. **Liability of assignee of lease for repairs.** An assignment of a lease subject to the performance of the covenants does not import a covenant on the part of the assignee; but a covenant to repair runs with the land, and he is liable

[1] Joyner v. Weeks, 2 Q. B. [1891], 31.

[2] Yates v. Dunster, 11 Exch. 15; 1 Add. on Cont., § 767.

[3] Digby v. Atkinson, 4 Camp. 275.

[4] Leeds v. Cheetham, 1 Sim. 146; Ely v. Ely, 80 Ill. 532; Lofft v. Davis, 1 El. & El. 474; Bussman v. Ganster, 72 Pa. St. 285; Magaw v. Lambert, 3 id. 444. The English cases referred to are cited with approval *arguendo*, in Sheets v. Selden, 7 Wall. 424. See Kingsbury v. Westfall, 61 N. Y. 359.

[5] Genau v. District of Columbia, 20 Ct. of Cls. 389.

[6] Watriss v. First Nat. Bank, 130 Mass. 343.

whilst he continues to hold the premises.[1] This covenant is divisible in respect to the privity of estate, and may be apportioned when the reversion or the land is severed.[2] In an action by an intermediate lessor against his lessee, after the lease had passed through several hands, and the premises had been surrendered out of repair to the superior landlord, it appeared that they were in that condition while held by the defendant, and while in the possession of the subsequent assignees, and it was ruled, in the absence of proof to the contrary, that the dilapidations took place in the defendant's term. Pollock, C. B., observed: "It does not appear that the defendant made any complaint about the state of the premises at the time he took them, and if so, the presumption is, [**141**] either that the premises were in a good state of repair, or that the person from whom he took them paid him a sum of money to put them in repair."[3]

§ **860. Damages for repairs and non-repairs in special cases.** A person desired to erect a building adjoining the brick house of another, and obtained permission to sink his foundation wall below and partly under the latter, agreeing to pay all damages such house might thereby suffer; in putting in that foundation damage was done to the brick house; the owner repaired it, and in a suit for the expense so incurred called expert witnesses who gave detailed estimates of the cost. Among the items was one for "risk" in doing the work, and there was conflicting testimony in respect to its being a usual charge in such cases. Sheldon, J., delivering the opinion, thus referred to it: "It can hardly be said that there was no evidence tending to show that this charge of risk was not a proper item of the expenses of the repairs of the building; and so long as there was any such evidence, although it might be weak, it was for the jury to consider and weigh it; and we cannot say that the court erred in refusing to entirely exclude it from the consideration of the jury. The court could not have been required to do more than say to the jury

[1] Wolveridge v. Steward, 1 Cr. & M. 644; Hintze v. Thomas, 7 Md. 346; Gordon v. George, 12 Ind. 408.

[2] Badeley v. Vigurs, 4 El. & Bl. 71; Lee v. Payne, 4 Mich. 106; Cox v. Fenwick, 4 Bibb, 538; Congham v. King, Cro. Car. 222; McMurphy v. Minot, 4 N. H. 251.

[3] Smith v. Peat, 9 Exch. 161.

that they should not make any allowance on account of that item, unless they believed from the evidence that it was a usual and customary charge in the making of such repairs. The item should not have been allowed as an item of damage under the evidence. But there were four witnesses . . . each one of whose estimate of the damages, exclusive of that item, exceeded the amount of the verdict, so that we cannot say that that charge must have entered into the verdict and formed a part of it." [1]

By an act of the legislature, in 1857, for the sale of public works, consisting of a railroad and canal, it was required that the purchaser should, immediately after taking possession, thereafter keep up, in good repair and operating condition, the line of said railroad and canal," the same to be and remain forever a public highway, and kept open and in repair by the purchaser for all parties desiring to use and enjoy them. [142] By a subsequent act it was declared that by the act of 1857 the commonwealth required the purchasers of the main line to keep the canal " in a condition of repair and fitness for use, which shall, at all times during seasons of navigation, be equal and not inferior to the condition of repair and fitness for use in which they were at the time the commonwealth delivered the same into the purchaser's possession." It was held that under these acts the purchasers were bound to keep the canal in good repair and operating condition, although they may not have been in such repair when delivered to them; that the duty was immediate on taking possession as respects its obligation, but not as to the time of its performance; the purchasers were entitled to a reasonable time commensurate with the magnitude of the work of making the repair; and if they did not commence the repair in a reasonable time, and pursue it with diligence, they were liable for damages to the owners of canal boats for such injuries as were thereby sustained, but not for unavoidable accidents by sudden storms or floods. The following instructions on the measure of damages were approved by the appellate court: " 1st. In cases of detention, the loss suffered by the expense of hands, horses, provisions consumed, and loss of the use of the boats during the period of detention would properly be

[1] Hays v. Moynihan, 60 Ill. 409.

allowed. 2d. In case of damage to the boats and tackle, caused by defective locks, shallow water, or other defect producing unusual wear and tear, the damages thus sustained would be properly allowed. 3d. In cases of injuries caused by difficult and delayed navigation, owing to the negligence of defendant, the loss of ability to carry freight, if offered, and extra length of voyages would be the subject of just compensation. 4th. If by such detentions a trip which could in a proper state of repair be made in a certain time should be prolonged for some days, the expense of the boats, horses, hands and provisions for this extra time would be properly allowed. 5th. If, in consequence of this difficulty of navigation, caused by defendant's negligence, a boat was compelled to forego a full load it had offered to it, or certainly could have had, and had to take so much less, the net amount of freight thus lost would be a proper allowance. 6th. If, for the same reason, the plaintiff was compelled to take two boats to carry a load which otherwise he would have carried [**143**] in one boat, the expense of the extra boat, horses, hands and provisions would be properly allowed. 7th. If, for the same reason, the plaintiff was compelled to hire extra teams of horses, and hands on his boats, to enable them to make their trips, he is entitled to his actual expenses and losses, and all other losses which he has proved were the legal, natural and immediate consequences of the neglect of the defendant. 8th. The plaintiff is entitled to interest from the date of each loss which he has sustained up to this date." [1]

§ 861. Covenants not to sublet or assign. These covenants have not generally raised any question of damage, but one of forfeiture.[2] In a recent case in England the action was brought on the covenants in a lease which bound the lessees and their assigns to maintain and keep in repair the forge and buildings demised, and all buildings which should be erected during the demise, and all additions and improvements thereto; and to maintain in good working order the fixtures, steam-engines, tools, utensils, and other articles demised; also others that might be brought or set up on the premises, and to replace and make good all such fixtures, engines, tools, utensils

[1] Pennsylvania R. Co. v. Patterson, 73 Pa. St. 491.

[2] Taylor's L. & T., ch. 9.

and other articles as should be broken or worn out; and it was also covenanted that neither the lessees nor their assigns would assign or part with the possession of the demised premises without the consent in writing of the lessor. It was held, first, that so much of the covenant for repairs as related to buildings, machinery, tools and utensils which were tenant's fixtures ran with the land; second, that so much as related to tools and utensils which were not fixtures did not run with the land; third, that the assignee was not liable for breaches of the covenant after an assignment by him without the consent of the lessor; fourth, that the covenant not to assign ran with the land, and bound an assignee to whom the premises had been assigned with the consent of the lessor; fifth, that the lessor could recover damages indirectly in respect of [144] those breaches which had already occurred, and future breaches; that the measure was such sum as would, so far as money could, put him in the same position as if he had retained the liability of the defendant, instead of having an inferior remedy against a person less able to perform the covenants or to compensate for the breach of them.[1]

§ 862. **Covenants to insure.** The bare covenant to insure is personal, extending only to the covenantor and his personal representatives, without binding the assignee of the term, and in general gives the landlord no right to receive the insurance money from the insurers; but when it contains a clause for reinstating the premises with such money he may not only require it to be so applied, but it becomes also a covenant running with the land, enabling the assignee of the reversion to maintain an action for its breach.[2] In case of the breach of such a covenant the lessor is entitled to recover the value of the premises lost to the plaintiff by the defendant's neglect to insure, not exceeding the sum to which he was by his covenant to have insured.[3] And it will make no difference that on failure of the lessee to insure the lessor was allowed by the lease to do so and charge the premiums as rent.[4]

Where the plaintiff has paid the insurance premium and the covenant to insure has been broken, he may recover it, no

[1] Williams v. Earle, 9 B. & S. 741.

[2] Taylor's L. & T., § 400; Douglass v. Murphy, 16 Up. Can. Q. B. 113.

[3] Douglass v. Murphy, *supra.*

[4] Id.

special loss having occurred.[1] The plaintiff being himself a lessee and under like obligation, such payment of the premium was not voluntary, but necessary for his own safety. And doubtless if an ordinary lessor had, on his tenant's default, insured for his own protection he would be entitled to recover of his lessee the amount so paid.[2] Mr. Mayne says: "If, however, he has not paid the premiums, then the question is, how much is the reversion the worse by reason of the lapse or non-existence of such a policy, no loss having as yet occurred? The answer to this would seem to be that the loss to the reversion is measured by the amount which it would cost the plaintiff to put himself into the same position as he [**145**] would now be in had the defendant kept his contract. If no insurance has been effected this amount would be the cost of entering into one; that is, all the charges which a party has to incur at starting before his next premium falls due. If a policy has been effected, then the arrears of premiums (if the office will accept them), or the cost of a new policy, whichever is cheaper. It seems plain that this is all to which the plaintiff is entitled; he can claim nothing in respect of the past risk, for this is over; nor in respect of past payments, for he has made none. The cost of commencing an insurance will at any moment secure him against risk till default made in paying the premiums; and when this takes place he may pay them himself and recover their amount as damages."[3] Where the covenant does not fix the amount of insurance to be effected, but is general to insure against loss by fire, it will be intended that there should be full indemnity, and the value of the property lost by the failure to insure may be recovered.[4] Where a defendant agreed with the plaintiff to [**146**]

[1] Hey v. Wyche, 12 L. J. (Q. B.) 83.

[2] Mayne on Dam., Wood's ed., 374.

[3] See Charles v. Altin, 15 C. B. 46.

[4] Ex parte Bateman, 2 Jur. (N. S.) 265; Betteley v. Stainsby, 12 C. B. (N. S.) 477; Douglass v. Murphy, *supra;* Beardsley v. Davis, 52 Barb. 159.

In Charles v. Altin, 15 C. B. 46, by a charter-party it was agreed between the master and the charterers that one-third of the stipulated freight should be paid before the sailing of the vessel,— the same to be returned if the cargo was not delivered at the port of destination,— the charterers to insure the amount at the owner's expense, and deduct the cost of doing so from the first payment of freight. The charterers paid one-third of the freight, deducting the premium of insurance. In an action

have the building of the latter insured in some good company and had made arrangements for that purpose, but before the insurance was effected the building was burned, and it appeared that the company so selected, in consequence of the great Chicago fire, had become insolvent, but was good when the arrangement was made, it was held that the sum at which the insurance was agreed to be made was not the proper measure of damages for breach of the agreement, but only such dividend as the company would be able to pay in case the insurance had been perfected before the loss.[1]

There can be no question under the authorities that the collection of insurance money by the lessor upon the destruction of the demised property, where he has paid the premiums, does not affect the lessee's liability for rent in case the lease is silent as to that contingency. But where the insurance is procured by the lessee pursuant to his contract for the lessor's benefit, the rule may well be otherwise, as has been held in a well-considered case in which Judge Brewer wrote the opinion. The provision requiring the lessee to insure was held to qualify the promise to pay rent, and when the former

brought by them to recover the freight so paid the owner pleaded that the loss of the freight to be returned was such a loss as was by the charter-party to be insured against by the charterers at the owners' expense, and such insurance, if effected, would have indemnified the defendant against the loss of the freight stipulated to be returned; that, although the plaintiff might, with the use of reasonable care and diligence, have effected an insurance whereby the defendant and the owners of the ship would have been fully indemnified against the loss of the one-third of the freight so to be returned, the plaintiffs effected the insurance so negligently and out of the usual course of business that the same became of no use or value, and the defendant, by reason of such improper conduct, had sustained damages to the amount of said third freight so insured, and the plaintiffs thereby became liable to the defendant for the same, and liable to make good to the defendant such amount as he should have to return to the plaintiffs under this charter-party; and any sum paid or returned by the defendant to the plaintiffs in respect of the freight would be the damages sustained by the defendant, by reason of such improper conduct and deviation, and the defendant would be damnified to that extent. The plea was held bad on demurrer, inasmuch as the conclusion was not warranted by the facts stated, for the liability of the plaintiffs in respect of their negligence in effecting the insurance was a liability to *damages*, which were not *necessarily* identical in amount with the claim set up by the plaintiffs in the action.

[1] Chicago Building Society v. Crowell, 65 Ill. 453.

became operative the latter ceased to have force. Whether the amount of insurance was equal to the value of the leased property or not was considered immaterial, as was the question whether the policy covered all or only a portion of it. In the case in question[1] real and personal property was leased

[1] Whitaker v. Hawley, 25 Kan. 674. The writer of the opinion says: "The obligation to pay rent after the destruction by fire was always rested upon the part of the contract therefor. It was never doubted but that by contract this obligation might be limited or removed. The parties might stipulate for rebuilding by either, for the absolute termination of the lease or any other change in their respective obligations and rights. Here the contingency of fire was foreseen and provision made therefor. And whether that provision was ample or not is no more a matter of present inquiry than whether the rental stipulated for was excessive or insufficient. The contract was that the tenant should keep the personal property insured at its insurable value in some responsible company for the benefit of the landlord. Thus in case of fire the landlord would receive pay for his property destroyed. Rent is compensation for the use, and implies the continued existence of the property to be used. Here this compensation was named in the fore part of the lease as '$275 per month as rent for the use of the premises and property above described.' Beyond this compensation was the stipulation for insurance. By the lease, then, as a whole, the tenant was to pay rent for the use of the property, and in addition purchase a guaranty to the landlord that in case such use should fail by reason of fire, he should receive the value of the property destroyed. When the latter comes into force, is it not plain that the former ceases? Was not the one intended as a substitute for the other? Suppose, instead of contracting to procure insurance, the tenant had contracted himself to insure the property so that in case of destruction by fire he was bound to pay the value; would it for a moment be doubted that the rent ceased when the obligation to pay the value arose? Apply such a contract to the case at bar: could it be held that a party who contracted that in case of destruction by fire the day after he had taken possession, he would pay to the landlord the value of the property leased and also pay $275 a month rent for its use for the ensuing two years? Before a contract could be so interpreted it must appear, not merely that the language will justify such an interpretation, but also that it necessarily excludes every other construction. Paying value is equivalent to purchase, and who would think if the right to purchase at a stipulated sum was inserted in the lease, that rent could be enforced after such purchase? If the contract to pay value to insure is so manifestly inconsistent with the obligation to pay rent that the latter gives way when the former becomes operative, the same principle applies when the contract is to furnish insurance. While the contrast is not so glaring, it is still obvious that the insurance is to take the place of the rent. The insurance is a provision to compensate the landlord when the rent fails and not a provision to double the rent. . . . But it is

in one instrument for a gross sum. The latter was insured. It was held that on its destruction the lessee was relieved from liability for rent, although he had covenanted to keep the premises in repair.

Section 2.

TENANT AGAINST LANDLORD.

§ 863. Lessor's covenant for quiet enjoyment. In every lease there is an express or implied engagement by the lessor that he has such title to the premises as enables him to give the lease, and that the lessee shall not be disturbed in his possession during the term by the lessor, nor by a paramount title.[1] If the lease contains an express stipulation on this subject, although a restricted one, none will be implied.[2] A [147] disturbance of possession by a stranger having no title will not be a breach of the covenant for quiet enjoyment; but any interference with the possession of the lessee, more than a mere trespass by the lessor himself, will be a breach of his engagement.[3] Hence, if a party accepts a lease and engages absolutely to pay rent for premises which the lessor owns and has power to lease for the term he undertakes to grant, the

said that the insurance contracted for was simply on the personalty; that such insurance, even if it abates the rent, abates it only on the personalty, and that if the defendants wish any abatement they must show the relative rental values of the real and personal property. This is a misconception. The rent was in gross for the real and the personal property. The contract concerning insurance was a single provision; it shows that the parties contemplated the possibility of fire, and made their stipulations accordingly; and whether that provision was for insurance in a definite amount on all the property or the full value of either the real or the personal is immaterial; it is the contract provision for the possibility of fire."

[1] Smith's L. & T., 206; Taylor's L. & T., § 304; Mayor v. Mabie, 13 N. Y. 151; Tone v. Brace, 8 Paige, 597; Vernam v. Smith, 15 N. Y. 327; Graves v. Berdan, 26 id. 498; Granger v. Collins, 6 M. & W. 458; Maule v. Ashmead, 20 Pa. St. 482; Bandy v. Cartwright, 8 Exch. 913; Carson v. Godley, 26 Pa. St. 111; Ross v. Dysart, 33 id. 452; Baugher v. Wilkins, 16 Md. 35.

[2] Gardner v. Keteltas, 3 Hill, 330; Howell v. Richards, 11 East, 642; Burr v. Stenton, 43 N. Y. 462; Merrill v. Frame, 4 Taunt. 329; Line v. Stephenson, 4 Bing. N. C. 578; S. C., 5 id. 183.

[3] Mayor v. Mabie, 13 N. Y. 151; Baugher v. Wilkins, 16 Md. 35; Taylor's L. & T., § 305.

lessee will be bound to pay though kept out of possession by a former tenant whose term has expired.[1] But an entry by the lessor himself, tortiously and without right or title, will amount to a breach.[2] A recovery in trespass by a prior lessee is an eviction, although the action was not brought until the termination of the first lease.[3] Every grant of any right, interest or benefit carries with it an implied undertaking on the part of the grantor that the grant is intended to be beneficial; and that, so far as he is concerned, he will do no act to interrupt the free and peaceable enjoyment of the thing granted.[4]

If one takes possession of land under a parol agreement, void under the statute of frauds, with the consent of the owner, and with his consent expends time, labor and materials thereon for the purpose of placing it in condition for use under the contemplated lease, the contract is so far taken out of the statute that there may be a recovery for what has been done, and also of fair compensation for what the contemplated lessee has lost.[5]

§ 864. The general rule of damages. When the lessee is prevented from taking possession, or is afterwards evicted by the lessor or any other person claiming under a paramount title, the general rule of damages in this country is the same as upon executory contracts for the sale of real estate, and the covenants for title in conveyances. In those states where the doctrine of Flureau v. Thornhill[6] prevails the purchaser recovers the consideration money and interest, and not the value of the property; he recovers nothing for the loss of the bargain where the sale is made in good faith, and fails by the vendor's inability, without his fault, to give a good title.[7] Following that analogy, the rent reserved in a lease, where no other consideration is paid, is regarded as a just compensation for the use of the premises.[8] In case of eviction the rent

[1] Gardner v. Keteltas, 3 Hill, 330. See Coe v. Clay, 5 Bing. 440; Trull v. Granger, 8 N. Y. 115; Underwood v. Birchard, 47 Vt. 305.

[2] Sedgwick v. Hollenback, 7 Johns. 376; Levitsky v. Canning, 33 Cal. 298; Bennet v. Bittle, 4 Rawle, 339; Bartlett v. Farrington, 120 Mass. 284; Keegan v. Kinnare, 123 Ill. 280; Huline v. Brown, 3 Heisk. 679.

[3] McAlester v. Landers, 70 Cal. 79.

[4] Dexter v. Manley, 4 Cush. 24.

[5] Deisher v. Stein, 34 Kan. 39.

[6] 2 W. Bl. 1078.

[7] Vol. 2, § 578.

[8] Kelly v. Dutch Church, 2 Hill, 105;

ceases, and the lessee is relieved from a burden which is treated as equal to the benefit which he would derive from the enjoyment of the property. Having lost nothing he can [148] recover no damages. He is, however, entitled to the costs he has been put to in defending against the paramount title; and as he is answerable to the true owner for the *mesne* profits for a limited period, he may recover the rent he has paid for the same time with interest thereon.[1] Upon an executory contract to give a lease, and a refusal, the rule of damages is the same, if the inability or refusal is without fault or fraud on the part of the party promising to execute the lease.[2]

In a comparatively late case in New York[3] one of the two judges delivering opinions treated the rules adopted upon the analogy of those governing between vendor and purchaser as settled in that state; but because the lessor was an actor in evicting the tenant he was held liable for compensatory damages, measured, not by the rent, but the value of the lease. The judgment appealed from was based upon that view, and was affirmed. Smith, J., in an opinion in favor of affirmance, says the mild rule which has been stated has not been very

Mack v. Patchin, 42 N. Y. 167; In re Strasburger, 56 Hun, 164; S. C., 132 N. Y. 128; Smart v. Allegart, 14 Phila. 179; Lanigan v. Kille, 97 Pa. St. 120.

If the lessee's term is brought to an end by the foreclosure of a mortgage, it will be presumed that the rent agreed upon is the fair value of the use of the property, and he will not be allowed anything out of the surplus proceeds of the sale as against the owner of the equity of redemption. Larkin v. Misland, 100 N. Y. 212.

[1] Id.; Kinney v. Watts, 14 Wend. 38. In this case the court also say, in respect to improvements he may have made upon the premises, and money expended upon them, he stands precisely upon the same footing with a purchaser who recovers nothing for improvements or expenditures, nor can a lessee, upon an ordinary covenant for quiet enjoyment. McAlpin v. Woodruff, 11 Ohio St. 120; Mack v. Patchin, 42 N. Y. 167; Green v. Williams, 45 Ill. 206; McClowry v. Cloghan, 1 Grant's Cas. 307; Van Brocklin v. Brantford, 20 Up. Can. Q. B. 347; Chatterton v. Fox, 5 Duer, 64; Ricketts v. Lastetter, 19 Ind. 125.

[2] Noyes v. Anderson, 1 Duer, 342.

If the custom, usage and by-laws of a church recognize the right of a member of it to the continuance of his lease of a pew on compliance with the prescribed terms, he may recover reasonable, but not vindictive, damages for a refusal to recognize such right. Johnston v. St. Andrew's Church, 1 Can. Sup. Ct. 235. Three hundred dollars were allowed as damages.

[3] Mack v. Patchin, 42 N. Y. 167.

satisfactory to the courts in this country, and it has been modified more or less to meet the injustice done by it to lessees in particular cases. He refers to two English cases[1] as repudiating that rule, and mentions a New York case[2] as based on the same doctrine. The English cases do repudiate the rule except as between vendor and purchaser. Erle, C. J.,[3] said: "If there be a lease of land in possession, and the lessee enters under it, and is ousted or evicted by one against whose acts the lessor covenants, . . . the lessee is entitled to recover all he has lost, that is, the value of the term." Byles, J., in the same case, said that the rule firmly established between vendor and purchaser is that the purchaser is not to be [**149**] placed in the position he would have been in if the vendor had performed his contract, but in the position he — the purchaser — would have been in if the contract had never been made; that is, he is entitled to a return of his deposit with interest, and to any expenses he may legitimately have been put to in investigating the title, and to nominal damages, and no more. "That," he adds, "is an anomalous rule, confined, for the sake of general convenience, to the case of vendor and purchaser. In all other cases of breach of contract the measure of damages is the loss the plaintiff has proximately sustained by reason of the breach of the defendant's contract."[4]

In several states of the Union the doctrine of Flureau v. Thornhill has never been adopted between vendor and purchaser, and has no influence upon the adjudications between lessor and lessee.[5] Where a lessor knows, or is chargeable with notice, of such defect of his title that he cannot assure to his lessee quiet enjoyment for the term which he assumes to grant; where he refuses in violation of his agreement to give a lease, or possession pursuant thereto, having the ability to fulfill, as well as where he evicts his tenant, he is chargeable with full damages

[1] Williams v. Burrell, 1 C. B. 402; Lock v. Furze, 19 C. B. (N. S.) 96; affirmed, L. R. 1 C. P. 441.

[2] Trull v. Granger, 8 N. Y. 115.

[3] Lock v. Furze, *supra.*

[4] See Rolph v. Crouch, L. R. 3 Exch. 44.

[5] Gore v. Brazier, 3 Mass. 523; Dexter v. Manley, 4 Cush. 14; Horsford v. Wright, Kirby (Conn.), 3; Sterling v. Peet, 14 Conn. 245; Hardy v. Nelson, 27 Me. 525; Elder v. True, 32 Me. 104; Doherty v. Dolan, 65 Me. 87; Caswell v. Wendell, 4 Mass. 108; Sumner v. Williams, 8 Mass. 222; White v. Whitney, 3 Met. 81; Hertzog v. Hertzog, 34 Pa. St. 418; McNair v. Compton, 35 Pa. St. 23.

for compensation, and the doctrine of that case has no application. On this general proposition the authorities agree. In such cases the difference between the rent to be paid and the actual value of the premises at the time of the breach for the unexpired term is considered the natural and proximate damage.[1] This is ordinarily measured by the amount the lessee would be compelled to pay for other premises equally well adapted to his business.[2] If the premises are in the possession of another under a valid lease and an advance payment of rent has been made the lessor is liable for it and interest.[3] The subsequent lessee is not bound to consider his lease as an assignment of the rent accruing under the prior lease, though he may do so at the risk of waiving any claim he may have [**150**] against his lessor.[4] Where the lessee is deprived of possession under the circumstances indicated the lessor is either guilty of intentional wrong, or has made the lease and assumed the obligation to assure the lessee's quiet enjoyment with a culpable ignorance of defects in his title, or on the chance of afterwards acquiring one. In neither case has he any claim to favorable consideration, and he is not excused on the doctrine of Flureau v. Thornhill from making good any loss which the lessee may suffer from being deprived of the demised premises for the whole or any part of the stipulated

[1] Green v. Williams, 45 Ill. 206; Dobbins v. Duquid, 65 Ill. 464; Mack v. Patchin, 42 N. Y. 167; 29 How. Pr. 20; Trull v. Granger, 8 N. Y. 115; Driggs v. Dwight, 17 Wend. 71; Tracy v. Albany Exp. Co., 7 N. Y. 472; Chatterton v. Fox, 5 Duer, 64; Dean v. Roesler, 1 Hilt. 420; Myers v. Burns, 35 N. Y. 272; Porter v. Bradley, 7 R. I. 538; De La Zerda v. Korn, 25 Tex. Sup. 188; Dexter v. Manley, 4 Cush. 14; Townsend v. Nickerson Wharf Co., 117 Mass. 501; Giles v. O'Toole, 4 Barb. 261; Yeager v. Weaver, 64 Pa. St. 425; Wolf v. Studebaker, 65 Pa. St. 459; Cilley v. Hawkins, 48 Ill. 308; Newbrough v. Walker, 8 Gratt. 16; Chambers v. Brown, 69 Iowa, 213; Woods v. Kernan, 57 Hun, 215; Alexander v. Bishop, 59 Iowa, 572; Snodgrass v. Reynolds, 79 Ala. 452; Rose v. Wynn, 42 Ark. 257; Cohn v. Norton, 57 Conn. 480; Kenny v. Collier, 79 Ga. 743; Jewett v. Brooks, 134 Mass. 505; Dodds v. Hakes, 114 N. Y. 260; Pumpelly v. Phelps, 40 id. 60; Robrecht v. Marling, 29 W. Va. 765; Poposkey v. Munkwitz, 68 Wis. 322; Marrin v. Graver, 8 Ont. 39; Hughes v. Hood, 50 Mo. 350. "Value of the use" and "rental value" mean substantially the same thing. Alexander v. Bishop, 59 Iowa, 572.

[2] Poposkey v. Munkwitz, 68 Wis. 322.

[3] Id.

[4] Id.; Hughes v. Hood, 50 Mo. 350.

term.[1] Nor would a vendor, who had contracted for the sale and conveyance of land and, being able to fulfill, refused, or was unable to perform by reason of a known absence or defect of title, be held liable to the purchaser for less damages than the value of his bargain.[2] A lessee who is thus denied possession or evicted may recover the difference between the agreed rent and the actual rental value as general damages. It is not necessary to state them as special damages in the declaration.[3] The right of action accrues at the time the covenant is broken, and all damages that have been or will be sustained may be immediately recovered.[4] A tenant at will, evicted by his landlord without notice, may recover damages until the time when the tenancy might have been terminated by the landlord — even in an action brought before the expiration of that time.[5]

§ 865. Special and consequential damages. If the lessee has been put to costs in defending a suit against the paramount title he may recover them, and his right to do so is governed by the same principles that apply when the action is brought upon other forms of warranty. There is included an implied indemnity against all such costs as have been properly and necessarily incurred.[6] These include not only the costs recovered by the claimant of the superior title, but also those incurred in the unsuccessful defense, where the lessee is justified in making it.[7] Such costs must be specially [151]

[1] The text is quoted with approval in Poposkey v. Munkwitz, 68 Wis. 322, 329.

[2] Vol. 2, § 580.

[3] Green v. Williams, 45 Ill. 206.

[4] Jewett v. Brooks, 134 Mass. 505; Conlon v. McGraw, 66 Mich. 194.

[5] Ashley v. Warner, 11 Gray, 43.

[6] Wynn v. Brooke, 5 Rawle, 106; vol. 1, § 84; vol. 2, § 617. See Child v. Stenning, 11 Ch. Div. 82.

[7] Willson v. Willson, 25 N. H. 229; Williams v. Burrell, 1 C. B. 402; Howes v. Martin, 1 Esp. 162; Wrightup v. Chamberlain, 7 Scott, 598; Lewis v. Peake, 7 Taunt. 153; Mainwaring v. Brandon, 8 Taunt. 202; Pennell v. Woodburn, 7 C. & P. 117; Blyth v. Smith, 5 Man. & Gr. 405; Leffingwell v. Elliott, 10 Pick. 204; Reggio v. Braggiotti, 7 Cush. 166; Ottumwa v. Parks, 43 Iowa, 119; New Haven, etc. Co. v. Hayden, 117 Mass. 433; Rolph v. Crouch, L. R. 3 Exch. 44; McAlpin v. Woodruff, 11 Ohio St. 120; Harding v. Larkin, 41 Ill. 413; Levitsky v. Canning, 33 Cal. 299; Adamson v. Rose, 30 Ind. 380; Phipps v. Tarpley, 31 Miss. 433; Fernander v. Dunn, 19 Ga. 497; Blake v. Burnham, 29 Vt. 437; Baxter v. Ryerss, 13 Barb. 267; Sterling v. Peet, 14 Conn. 245; Welsh v. Kibler, 5 S. C. 405; Hardy v. Nelson, 27 Me. 525; Keeler v. Wood, 30 Vt. 242; Ryerson v. Chapman, 66 Me. 557; McAlester v. Landers, 70 Cal. 79; Baumier v. Antiau, 68 Mich. 509;

claimed in the declaration; they are items of special damage.[1] If other damages have resulted as the direct and necessary or natural consequence of the defendant's breach, these are also recoverable. For example, if the plaintiff in good faith, and relying on the contract, has made preparations to take possession, and these have been rendered useless by the defendant's refusal to perform, the authorities hold that there may be a recovery for the loss thus sustained.[2] Thus, where a

Poposkey v. Munkwitz, 68 Wis. 322; Rose v. Wynn, 42 Ark. 257, quoting the text with approval.

[1] Green v. Williams, 45 Ill. 206.

[2] Adair v. Bogle, 20 Iowa, 238; Green v. Williams, *supra*.

In Pratt v. Paine, 119 Mass. 439, a lease of a dwelling-house for five years provided that the lessor might terminate it by notice, and that if this was done during the first three years of the term the lessee should be paid such sum as a compensation for the loss as he might "by such abridgment of the term sustain in consequence of expenditures incurred by the lessee in fitting up the premises and expense incurred in removing." In an action by the lessee to recover for expenses incurred in fitting up the premises, the lease having been terminated by notice within the three years, it appeared that at the time it was made the building was in thorough repair, but the lessee made changes in it, and furnished it; held, that the term 'fitting up the premises' included not only the fitting up the building and premises for the uses of the lessee, but also the fitting up of the furniture to the building; and that the measure of damages was the loss sustained by reason of his having incurred such expenditures, the full benefit of which he had lost by the abridgment of his term, and not the entire cost of the fitting up.

In Cohn v. Norton, 57 Conn. 480, the lessor failed to give possession of a building which he knew was leased for use as a clothing store. The lessee incurred expense in engaging clerks and purchasing goods. It does not clearly appear whether he did so before or after he knew that there was a prior outstanding lease. On the assumption that he acted in good faith, the court ruled that he could not recover. Carpenter, J., said: "The lessor did not request the plaintiff to hire clerks and purchase goods, nor was he advised that the plaintiff would do so. While he may have supposed that the plaintiff would make suitable preparations to occupy the store, yet he could not know what preparations were necessary. He may have needed no clerks, or they may have been previously engaged, and the necessary goods may have been then in his possession. As a matter of law it cannot be said that the defendant contemplated that the plaintiff would hire clerks and purchase goods under such circumstances as to incur heavy liabilities in case of failure for any cause. In no proper sense, therefore, was the defendant a party to those arrangements, had no interest in them and had no right to interfere, consequently he cannot be held responsible."

Where a lessor, on finding it impossible to give possession of premises, permitted the lessee to temporarily occupy adjoining premises,

party agrees to demise certain premises to another, who breaks up his establishment and proceeds with his family and furniture to the place where they are situate, and the landlord refuses to give possession, the tenant is entitled to recover the damages sustained by his removal.[1] So where a defendant had leased a farm to plaintiffs and permitted them to enter and break ground before the lease commenced, and afterwards when it commenced refused to let them have possession, it was held that they were entitled to recover [**152**] not only the market value of the lease, but also the worth of the labor they had bestowed upon the premises, together with such other losses as they had sustained by incurring expenses in preparing to carry out their agreement under the lease.[2] A defendant in New Hampshire proposed by letter to the plaintiff residing in Wisconsin, that if the latter would come to the writer he would give him and his wife a year's board, and allow him to carry on his farm. The defendant having refused, on the plaintiff complying with his proposition, to fulfill his agreement, it was held that the expenses incurred by the plaintiff in so removing his family, and compensation for his necessary loss of time, as well as the loss of other advantages offered him in the contract, might be recovered; but not his sacrifice in selling his property with a view to such removal.[3]

Where there was a refusal to execute a lease of a hotel the persons entitled thereto recovered the contract price for the services of a clerk employed by them, with the knowledge of the other party, in anticipation of the lease, money paid as rent and interest thereon, the reasonable value of their own services while waiting for the building, their personal expenses incurred in leaving their homes, and the reasonable value of the services of one of them up to the time the hotel was ten-

the latter could not recover in an action for the breach of the covenant for expenditures made in fitting up the premises so occupied; they were not the direct and necessary result of the lessor's act. Engelsdorff v. Sire, 18 N. Y. Supl. 907.

[1] Driggs v. Dwight, 17 Wend. 71; Giles v. O'Toole, 4 Barb. 261.

[2] Cilley v. Hawkins, 48 Ill. 308. See Robrecht v. Marling, 29 W. Va. 765.

[3] Woodbury v. Jones, 44 N. H. 206; Adair v. Bogle, 20 Iowa, 238; Yeager v. Weaver, 64 Pa. St. 425. *Contra*, Hughes v. Hood, 50 Mo. 350; Williams v. Oliphant, 3 Ind. 271.

dered, if a tender was made, and if not the value of his time, less such sum as he had or might have by reasonable diligence earned up to the time of trial.[1] If the lessee of a farm who pays a share of the produce as rent is dispossessed before his crop is harvested he may recover the value of his share when it is harvested, and if the lessor negligently cares for it, in consequence of which there is a depreciation in its value, the lessee may recover the damage he sustains; the lessor is, however, entitled to a deduction equal to the value of his labor in producing and harvesting the crop.[2] If an eviction takes place at a season when the expense of removing from the demised premises is greater than it would have been at the close of the term, the lessor is liable for the extra cost.[3] Where the landlord wrongfully entered and ejected his tenant, the latter, on regaining possession, was entitled to compensation for the actual injury sustained by his goods and other property, the inconvenience and expense of being deprived of their use and of returning them to their places on the demised premises, and also "for any bodily or mental anguish or suffering, for injury to his pride and social position, and for the sense of shame and humiliation at having his wife and family turned out of their home into the public street."[4]

§ 866. **Same subject.** If the tenant has expended money in improvements these will not add to the damages he is entitled to recover for eviction, except as such expenditures enhance the rental value, or the value of the premises for the particular use they may have been rented for, unless the tenant has some property in the improvements and is entitled to be paid therefor or to remove them;[5] in which latter case to the extent to which the defendant's act of disturbing the lessee's possession injures his rights in the new erections, or entitles him to claim as for their destruction or conversion, his damages for eviction will be increased.[6] In an action for a tortious and illegal eviction brought by a tenant against his landlord, where the former with his family and goods have been ejected

[1] Hall v. Horton, 79 Iowa, 352.
[2] McClure v. Thorpe, 68 Mich. 33.
[3] Chatterton v. Fox, 5 Duer, 64.
[4] Moyer v. Gordon, 113 Ind. 282, 288.
[5] Schlemmer v. North, 32 Mo. 206; Flagg v. Dow, 99 Mass. 18; Conlon v. McGraw, 66 Mich. 194. See Lanigan v. Kille, 97 Pa. St. 120.
[6] Ricketts v. Lastetter, 19 Ind. 125.

from the premises demised to him, he may recover in addition to other damages for injury to his feelings,[1] but not for injury to his health from exposure in going two days afterwards from the premises to another place, or from attending his family when ill from the effects of the eviction, or from grief at their illness.[2]

Where premises are let for a particular purpose, if the lessor withholds them or any part, he will be liable for [**153**] their rental value for that purpose or the diminution of value from the loss of the part withheld.[3] And if an established business is suspended by eviction, or probably by refusal to renew a lease pursuant to agreement, the injury suffered in the breaking it up may be taken into consideration in the assessment of damages. A lease for years was made of real estate comprising a factory, water-power, tools, machinery and apparatus for carrying on the manufacture of pails. In an action on the implied covenant for quiet enjoyment the plaintiff was permitted to introduce evidence on the question of damages for the interruption of his business, and on the value of his lease; to show the condition and capacity of his works, the number of pails that could be made, the cost of making them, and their price at the shop and in the market. He also called a witness who had been engaged in making similar pails at a place twenty-five miles distant from the plaintiff's works, who was permitted to testify to the particular items of the cost of manufacturing, to the price of pails at the shop and in the market, and to the profits of the business. The appellate court held there was no error in admitting such evidence, for it enabled the jury to approximate to the actual damage.[4]

§ **867. Recovery for damage to business.** How far the lessee is entitled to have his damages increased by including compensation for any loss he may suffer in having a business, contemplated or being done on the demised premises, thwarted

[1] Fillebrown v. Hoar, 124 Mass. 580; Moyer v. Gordon, 113 Ind. 282.

[2] Fillebrown v. Hoar, *supra*.

[3] Hexter v. Knox, 63 N. Y. 561; Townsend v. Nickerson Wharf Co., 117 Mass. 501; Dobbins v. Duquid, 65 Cush. 464; Dexter v. Manley, 4 Cush. 14.

[4] Dexter v. Manley, 4 Cush. 14; Dwyer v. Carroll, 86 Cal. 298; Lambert v. Haskell, 80 id. 611; Hawthorne v. Siegel, 88 id. 159.

or broken up is not quite settled. The cases agree that where possession is withheld or interrupted by the landlord the tenant is entitled to damages on the basis of the rental value at the time of the breach. That is an element of damages or measure of redress to which he is manifestly entitled, because such value is the natural and direct product of the contract. This value, however, may not be the special value the premises have for the lessee's use, but is the market value,— the value for general use, or which might be realized by subletting, or by assignment of the lease. It is not enhanced or affected by consideration of any profits which the lessee has [**154**] by his plans in prospect, or is actually realizing in a business projected or being conducted on the demised premises, and for which they are essential to him for the time being. The suspension of a profitable business, even if it can be reestablished elsewhere, involves a loss of the gains which would be made in the interval, the expense of the change, and if a good will has been created that will be in some measure, if not wholly, lost by the removal to a different place. The objection usually made to the allowance of damages for the loss of profits, when they are disallowed, is that such damages are remote and uncertain or speculative. They are not remote when the premises were leased for the particular business, and the action is against the lessor or his successor in interest by the lessee or his assignee whether it is on the covenant for quiet enjoyment or in tort; nor are they remote to a wrong-doer who destroys or impairs a business open to his observation.[1] The objection that the damages are uncertain

[1] Townsend v. Nickerson Wharf Co., 117 Mass. 501; Hexter v. Knox, 63 N. Y. 561; Chapman v. Kirby, 49 Ill. 211; Smith v. Wunderlich, 70 id. 426; Dobbins v. Duquid, 65 id. 464; New York Academy of Music v. Hackett, 2 Hilt. 217; Allison v. Chandler, 11 Mich. 542; Seyfert v. Bean, 83 Pa. St. 450; Park v. C. & S. W. R. Co., 43 Iowa, 636; Lacour v. Mayor, etc., 3 Duer, 406; St. John v. Mayor, etc., 13 How. Pr. 527.

In Eten v. Luyster, 60 N. Y. 252, the purchaser of the reversion evicted the tenant and the latter brought an action for damages. The defendant had torn down and destroyed a building erected by plaintiff on the premises; the latter gave evidence tending to show that he also had a sum of money in a box in that building which was lost in the removal. It was held that the plaintiff was not bound to gather up the fragments of his scattered and broken chattels, but was at liberty to leave them where the defendant placed them, and to look to him for their value;

and speculative is insuperable when they are incapable of estimation and proof with that degree of certainty requisite to establish facts for the consideration of a jury. There should be no distinction as to the degree of certainty required in proof between this fact and any other upon which either the [155] right to damages or their amount depends. A conservatism, however, pervades generally the law of damages; and it being the common experience that there is a wide difference between theoretical or speculative profits estimated in advance without any actual *data*, and the result usually achieved when the scheme is put in practice, it is necessary that the law should discard what is merely fanciful or possible, and only permit those profits to be considered which have some basis of actual facts to support them.[1]

§ 868. Same subject. In a New York case which went to the court of appeals, a tenant evicted by his landlord by void summary proceedings before a justice, which were annulled on *certiorari*, brought an action for the damages resulting. On the trial the plaintiff was the only witness as to the amount of his loss. He estimated the damage to his property in items amounting to $4,645, and also testified, without objection, that

that the plaintiff was entitled to recover for all losses occasioned by the trespass, including the destruction of the building, the loss of the money, and the value of the unexpired term; that although the money was kept in an unusual place, and the defendant may not have suspected its presence, yet he was liable for its loss, it being the direct result of his acts.

[1] Kenny v. Collier, 79 Ga. 743. As to the mode of proving loss of hotel profits, see Stewart v. Lanier House Co., 75 Ga. 582.

Evidence of profits made by the successor of an evicted lessee who continued the latter's business is not admissible for the purpose of proving the disseizee's damages. Smith v. Eubanks, 72 Ga. 280.

In Montgomery, etc. Society v. Harwood, 126 Ind. 440, there was a breach of an agreement not to rent land adjoining the piece leased plaintiff for the purpose of a stand during the continuance of a fair for uses similar to that which he was to use his. It was held that profits lost in consequence of competition within the prescribed limits could not be recovered as damages. The compensation due plaintiff was measurable by the difference between the rental value of the ground unoccupied by the competing stands and such value as it had as it was occupied. See Kelly v. Miles, 58 N. Y. Super. Ct. 495. The same rule has been applied to the violation of a lease giving the sole right to sink and operate oil wells on described lands. Duffield v. Rosenzweig, 23 Atl. Rep. 4; 144 Pa. St. 520, 539.

he lost a large amount — $4,000 — which he supposed or estimated he would have made if he had not been molested. This supposed loss, so stated, it was held he was not entitled to recover. No facts were given which a jury could weigh; the profits claimed to have been lost were, so far as appeared, wholly conjectural.[1] In an earlier case[2] suit was brought against a municipal corporation for causing a nuisance in the street by which the plaintiff, as proprietor of a restaurant and lodging-house, lost custom and the consequent profits. He showed the actual receipts of his hotel the year previous to the obstruction complained of, the actual daily receipts during its continuance, and such receipts for some months after the obstruction was removed; also that the expenses were in the same, or in about the same, ratio to the receipts during the whole period. On this state of facts Woodruff, J., thus discussed the right to damages and the proof of them: "When it is borne in mind that the plaintiff kept a refectory and boarding-house for the resort of daily visitors for their various meals, and of transient persons for their lodgings, it is difficult to suggest any other mode of ascertaining the effect upon the plaintiff's business than this. To say that he must prove [156] what persons were prevented from visiting his house, and what meals they would have taken and paid for, is to suggest a mode of proof obviously impracticable; and if it was done, it would still leave the same inquiry, what would have been the profits upon the meals they took and paid for, which is now objected to. The loss of custom, and the consequent loss of profits, is the very matter to be recompensed in this action, and the cases to which we are referred are not analogous. In De Winte v. Wiltse[3] the plaintiff recovered for the loss of the rent he had been accustomed to receive for a house he had erected to let as an inn, or tavern, although, in general, in actions for the breach of contract, loss of profits are not recoverable;[4] and purely contingent or speculative profits, it is sometimes said, are not the subject of recovery. This is a

[1] Hayden v. Florence Sewing M. Co., 54 N. Y. 221. See Brockway v. Thomas, 36 Ark. 518.

[2] St. John v. Mayor, 13 How. Pr. 527.

[3] 9 Wend. 325.

[4] See Blanchard v. Ely, 21 Wend. 350; Dorwin v. Potter, 5 Denio, 306; Giles v. O'Toole, 4 Barb. 261.

somewhat loose statement of the proposition, which does not exclude all reference to probable profits. It is undoubtedly true [that profits are recoverable], under certain circumstances, in every sense; for example: A. agrees to let a tavern-house to B., and afterwards refuses to give a lease. The actual value of the house, contrasted with the sum paid, or to be paid, therefor is the damage sustained; and yet the elements of value consist in location, good-will, if any, the long habit of travelers to resort to a well-known stand, and like circumstances, and the experience of the past must necessarily enter into the estimation of either the witnesses or the jurors. On the other hand, if a house be hired for a dwelling, the cost of another having equal advantages is the only guide in determining the damages."[1]

There is no reason for applying a more favorable rule to a party injuring another's business by an act which is both a tort and a breach of contract, as is the case when a landlord disturbs the possession of his tenant, than to one who so disturbs a possession and impairs a business merely as a tort-feasor; though in many cases of tort the jury is permitted to award compensation upon less certain proof than that ordinarily required in actions upon contracts. Hence, when the action for disturbance of possession is based upon the [157] tort, as it must be when brought against one standing in no privity to the plaintiff, and as it may be even against the landlord, its form may have some influence on the required certainty of proof. But where there is a legal standard of damages, and this equally measures the compensation due to the injured party, whether the act complained of is a tort or a breach of contract, any evidence which would suffice in the one form of action to prove that act and its consequences ought to be accepted as sufficient in the other for the same purposes. If there be any such rule as that loss of profits constitutes no ground or element of damages, it is not a universal nor a general rule. There are numerous cases, even for breach of contract, in which profits have been properly held to constitute not only an element but the measure of damages.[2] When it

[1] Wilkes v. Hungerford Market Co., 2 Bing. N. C. 281; Lacour v. Mayor, 3 Duer, 406; Marquart v. La Farge, 5 Duer, 559.

[2] Allison v. Chandler, 11 Mich. 558. See vol. 1, §§ 53–74.

is advisedly said that profits are uncertain and speculative and cannot be recovered when there is an alleged loss of them, it is not meant that profits are not recoverable merely because they are such, nor because they are necessarily speculative, contingent and too uncertain to be proved; but they are rejected when they are so; and it is probable that the inquiry for them has been generally proposed when it must end in fruitless uncertainty; and, therefore, it is more a general truth than a general principle that a loss of profits is no ground on which damages can be given.[1] In an early case[2] a defendant agreed to let the plaintiff have the use of certain mills for six months for 10*l*., which was shown to be the full rental value; but damages for being deprived of the use to the amount of 500*l*. were given with the sanction of the court by reason of the stock laid in by the plaintiff.[3]

[1] The text is quoted with approval in Brigham v. Carlisle, 78 Ala. 243, 249.

[2] Nurse v. Barns, T. Raym. 77.

[3] In Green v. Williams, 45 Ill. 206, the defendant had rented a store to the plaintiff for a year, in which the latter intended to carry on business as a milliner. Before the term commenced the defendant leased and gave possession to another. The court said the plaintiff is entitled to recover all expenses necessarily incurred by her in consequence of the defendant's refusal to give possession, so far as said expenses are declared for; but she is not entitled to recover profits that she might have made by conducting her business upon the demised premises. Such damages are remote, speculative and incapable of ascertainment. Besides, it does not appear that the plaintiff was not able to find another store equally favorable to her business. Olmstead v. Burke, 25 Ill. 86; Giles v. O'Toole, 4 Barb. 261. "If, however, it had appeared that her business was unavoidably suspended in consequence of the defendant's breach of his contract, we are of opinion she should receive, not speculative profits, but interest during such suspension on the amount of capital invested in her business, and for the time beingly ing idle. Freeman v. Clute, 3 Barb. 424." See De La Zerda v. Korn, 25 Tex. Sup. 188; Rhodes v. Baird, 16 Ohio St. 573.

In Dobbins v. Duquid, 65 Ill. 464, the lessor of premises used by the lessees in carrying on the business of dealing in wood and coal, after the destruction of the buildings thereon by the great Chicago fire in 1871, and before the expiration of the term, leased the premises to other parties and put them in possession. This was supposed to be done by some forgetfulness or mistake. The court held that the lessor was liable to the prior lessees, in any event, for the difference between the rent to be paid and the actual rental value of the property, and also for any loss to their business which could not reasonably have been avoided. The plaintiff was prevented from recovering anything under this last ruling by having refused the defendant's

§ 869. Same subject. A case recently decided in Wisconsin involved the question of a lessor's liability for the loss of the lessee's profits. The lease was made with knowledge of the existence of an outstanding demise. The lessee had been and was then carrying on business in the vicinity of the leased premises. After considering and applying the general rules of damages which have been stated, the court, by Lyon, J., said that if the plaintiff hired the store for the purpose of continuing his former business therein, and the defendant knew that fact and executed the lease with knowledge that he could not give possession of the store at the stipulated time, he took the risk of the plaintiff being able to procure another suitable store for his business. The inability of the lessee to do so would render the lessor liable for the damages resulting to the former's business. This is plainly within the rule of Hadley v. Baxendale, because, under such circumstances, the parties may fairly be considered to have contemplated that the breach of the covenant would necessarily destroy or greatly impair the value of plaintiff's business. If he recovered therefor he cannot also recover the value of his lease, because such value is necessarily a factor in estimating the damages to the business.[1] In such a case he may, however, recover money paid as rent and the expense incurred in removing goods to the leased store, they having been taken there with the lessor's consent, and removing them therefrom. . . . "We agree with Mr. Justice Paine[2] that to ascertain the value of a business an injury to the profits thereof is necessary. Probably *value* and *net profits* are convertible terms as applied to a business. Yet the law in many cases gives damages for breaches of contracts based on prospective profits when they are fairly within the contemplation of the parties, are not too remote and conjectural, and are susceptible of being ascertained with reasonable certainty.

offer of other premises near to those which had been demised, the court holding that it was the plaintiffs' duty to make ordinary and reasonable effort to prevent any loss to their business. By declining the defendant's offer they failed in that duty.

[1] Smith v. Wunderlich, 70 Ill. 426, 433.

[2] In Shepard v. Milwaukee Gas L. Co., 15 Wis. 318.

If the plaintiff shows himself entitled to recover damages to his business, the character, extent and value of his established business when the lease was executed and before will furnish a guide to the jury in assessing the prospective and probable value thereof had the plaintiff been permitted to transfer it to the store" in question. "Carried on in the immediate vicinity of the old stand, and by the same person, presumably the business would have been equally prosperous. This presumption may be rebutted by proof of facts and circumstances tending to show that the business would probably have been less remunerative had it been so continued. It was said in argument that no case can be found which gives damages for the loss of anticipated profits because a landlord fails to give possession at the time agreed upon. This is scarcely a correct statement. The case of Ward v. Smith[1] seems to be just such a case. It is conceded that if the plaintiff had not a business already built up and established in the same vicinity, which, with his good-will, could have been transferred to the store in question, there would have been no basis upon which to estimate the prospective value of the business which the plaintiff would have done there had he obtained possession and carried on the business therein. In such case profits would probably be too conjectural and uncertain to be the basis of a recovery."[2] A comparatively recent English case appears to proceed upon a view differing from that suggested in the closing sentences of the extract quoted. The lessor delayed giving the lessee possession of the premises, which he knew were desired for the purpose of establishing the business of oil refining. Counsel contended that the rule of Hadley v. Baxendale did not apply; and that damages could not be given for loss of prospective profits, though the rule of the Scotch law is otherwise.[3] In answer, Fry, J., observed that the defendant must have known that the plaintiff's business could not be carried on without possession of the premises, and awarded damages at £250.[4] In Ontario this case is not

[1] 11 Price, 19. This case was ruled before Hadley v. Baxendale, and is said by Armour, J., not to be authority now. Marrin v. Graver, 8 Ontario, 39, 45.

[2] Poposkey v. Munkwitz, 68 Wis. 322, 333.

[3] Dunlop v. Higgins, 1 H. of L. Cas. 381.

[4] Jaques v. Millar, 6 Ch. Div. 153,

recognized as authority for the recovery of profits, and the liability of a lessor therefor is denied by a majority of the court of queen's bench.[1]

Profits may be recovered in New Hampshire if an established business is interrupted. Where water was diverted from a lessee so that he had to discontinue the business for which he had obtained the lease, it was ruled that the making of profits was the presumable object of the business, and their loss could be reasonably anticipated by both parties as the result of the lessor's act.[2] A landlord ousted a tenant [158] during his term, and the latter brought trespass. Not having re-entered it was held he could recover damages for the ouster, and all the necessary or natural consequences thereof,

overruled on another question in Marshall v. Berridge, 19 id. 233. Fry, J., said in the principal case: "Damages are claimed in addition to the specific performance of the agreement in respect of the delay which was caused by the defendant's wilful refusal to perform his contract, *and the consequent loss of profit to the plaintiff.* I think I am at liberty to consider what would have been the value of the possession of the premises to the plaintiff for the period between the 5th of September, 1876, and the time when he actually obtained possession of other premises. I shall not attempt to explain in detail the motives which operate on my mind. But I am entitled to have regard to the damages which may be reasonably said to have naturally arisen from the delay, or which may be reasonably supposed to have been in the contemplation of the parties as likely to arise from the partial breach of the contract."

[1] Marrin v. Graver, 8 Ont. 39.

[2] Crawford v. Parsons, 63 N. H. 438.

In a recent case in the New York court of common pleas the lease was of a market, and the right to recover for injury to business was denied. The action was in trespass, though the acts complained of amounted in law merely to an eviction. The court applied the doctrine that the profit to be made by the lessee was not the subject of the contract between him and the lessor, but a specific article, and not the right to make a profit. Denison v. Ford, 10 Daly, 412; Engelsdorf v. Sire, 18 N. Y. Sup. 907. Referring to Shaw v. Hoffman, 25 Mich. 163, where a tenant was evicted from a sale and boarding stable on July 11th, and brought suit in January following, claiming as items of damage the loss of profits he would have made by boarding the horses of third persons, and also his loss by boarding his own horses at another stable where he was obliged to pay more than he could have boarded them for himself, and where it was held that these were proper elements of damage, the judge who wrote the opinion in the New York case first cited said that it has not been and never will be followed.

The recovery of profits against a lessor is also refused in Iowa. Alexander v. Bishop, 59 Iowa, 572.

including those resulting from breaking up his business, but not for the value of the unexpired term or the *mesne* profits.[1]

Damages on the basis of the excess of the rental value above the stipulated rent is wholly independent of the consideration of any special use of the premises, the rental value being merely the actual or market value. Hence, if the lessee is prevented by the lessor from taking possession, and has incurred any expenses for that purpose, they are an additional item of damages; and for the same reason, if, after taking possession, the lessee establishes a profitable business, which is broken up by eviction, or impaired by enforced suspension or transfer to another place, any damage resulting therefrom which can be established with the requisite certainty may be recovered, in addition to that computed on the basis of the [159] rental value. The recovery of the value of the lease has sometimes been supposed to include any damage done to [160] the lessee's business.[2] This is obviously a mistake where

[1] Smith v. Wunderlich, 70 Ill. 426.

[2] In Smith v. Wunderlich, 70 Ill. 426, McAllister, J., thus discusses this question: "There is no evidence tending to show that after the ouster was consummated they (the plaintiffs) made any lawful re-entry, or brought any action for forcible entry and detainer to recover possession, but, on the contrary, they brought this action to recover for the ouster, before the term expired, and, by the instructions now in question, the jury were directed, in assessing damages, to first allow plaintiffs the rental value of the premises above the rent they were paying, for the residue of the term, and then *any* loss sustained in their business as a necessary consequence of the ouster, after the time it occurred. The words *any loss* would, of course, include the loss of profits which they would have realized, if they had not been ousted, by the use of the premises in carrying on their business. The jury could not understand it otherwise, because the basis was laid for estimating prospective profits, by showing what had been the net profits of the business for the month next previous to the ouster, which included not only their own time and labor, but the use of the premises in producing them. It is obvious that the plaintiffs could not realize the advanced rental value over and above what they had to pay for rent, as an income independent of the profits derived from using the premises in conducting their business, without renting or otherwise disposing of them to another party; and common experience teaches us that they could not do that, and still retain them, to be used for carrying on their business.

"There may be cases where, from the peculiar circumstances of the disseizee's business, and the actual rental value of the premises, the difference between the actual rental value and what it was paying as rent would not be full compensation for

the rental, rather than the special, value to the lessee is estimated.[1]

§ 870. Same subject. An injury to business must [164] consist mainly of a loss of profits, though it often involves

the loss in having his business broken up by the disseizin. Where such is the case the plaintiff has been permitted to make his election, and instead of recovering the rental value demand compensation for the loss of profits in his business occasioned by the ouster. The case of Chapman et al. v. Kirby, 49 Ill. 211, though an action on the case, and not trespass, was decided upon that principle; but it seems to us that to allow as a measure of damages both the advanced rental value, and prospective profits, which could be realized only by the use of the premises by the plaintiffs themselves, would be to establish mere arbitrary rules of damage, devoid of sense or justice either in their basis or application. But aside from improperly uniting the two grounds of damage, is the rule as to the rental value, under the circumstances of this case, a correct one? It is laid down by the instruction under consideration, without qualification, and is in effect, that where a tenant for years is ousted by strangers — we say strangers, because there is no allegation in the declaration about the tenancy, or one of the defendants being lessor,— the disseizee, without a subsequent re-entry, may bring trespass for the disseizin immediately after it is effected, and recover as one species of damage the value of the unexpired term. Suppose the term has five, ten or twenty years to run. Surely there can be no such rule as that; because, if there were, applicable to terms for years, why not upon the same principle extend it to any greater estate? Suppose, again, that the plaintiffs' unexpired term had five years to run, and, without any re-entry, they had waited four years before bringing this suit, and then another year had elapsed before trial, the statute of limitations would not have been transcended; but could they recover *mesne* profits, or the rental value for that entire period? If for five months, why not for five years? The answer to these queries is to be found in the established rules of the common law. . . .

"In the case at bar the plaintiffs' term had not expired, and did not expire until several months after this suit was brought. There was ample time for them to have brought an action of forcible entry and detainer, and thus have regained possession. That done, the law, by a kind of *jus postliminii*, or right of reprisal, would regard the possession as having been all along in them (3 Black. Com. 210); and then after the expiration of their term they would be entitled to recover, as *mesne* profits, the value of their lease or term; for, as a general rule, the annual value of land is the measure of *mesne* profits. Adams on Eject. 391; Sedg. on Dam. 124. The theory on which such recovery could be had would be, that the trespass was continued to the end of the term." See Ashley v. Warner, 11 Gray, 43.

[1] Dobbins v. Duquid, 65 Ill. 464.

In Rhodes v. Baird, 16 Ohio St. 473, the action was brought upon a contract made January 1, 1858, by which the defendant agreed to furnish twenty-seven acres of land to the plaintiff on which to plant a peach orchard; also a dwelling-house, certain pasturage, fuel, and about thirty

other incidental losses. In an Iowa case[1] where a lessee was refused possession of a farm to be worked on shares for a year the court said: "By the contract the plaintiff not only secured a place in which to live, but also employment for him-

acres of tillable land. In consideration of this agreement the plaintiff agreed to set out two thousand peach trees on the tract of twenty-seven acres, and to assist in the cultivation of a peach orchard thereon, and in the business of raising and selling fruit therefrom. It was further agreed that the expenses were to be borne by the parties in equal portions, and that the number of trees should be increased until the entire twenty-seven acres should be planted. The agreement was to last ten years or longer if the orchard should continue to bear fruit and prove profitable. A lease was to be made to the plaintiff embodying those terms. After he had been in possession and planted two thousand peach trees, defendant refused to execute the lease, and plaintiff was evicted from a part of the premises when the peach trees were about two years old. On the trial a witness who had the special knowledge to qualify him to testify as an expert was asked the following questions: First. What is the average life of a peach orchard in this county? Second. Taking the average of crops for the last ten or fifteen years in this county, how many crops may be reasonably expected from a peach orchard during its life? Third. Taking the average of prices for the last ten or fifteen years, what would be the future profits of [161] a peach orchard of budded trees in this county upon an average crop? Fourth. Taking the probabilities of crops in the future, and the average price of peaches for the last ten or fifteen years, what would be the value per tree of such a peach orchard, two years old, with the privilege of having them stand on the land for the life of the orchard? The witness testified, under objection, in answer to these questions, "that the average life of peach orchards in this county, in ordinary good locations, is about twelve to fifteen years, and that taking the average of peach crops for the last ten or fifteen years in this county he was of opinion that a peach crop might reasonably be expected, from an orchard in this county, about once in three or four years, after it began bearing and during its life. And that taking the average of prices for the last ten or fifteen years in this county, the future profits of a peach orchard of budded trees in this county, upon an average crop, would be probably, at a low estimate, about one dollar and fifty cents per tree in the orchard for each crop; that he knew no market value for peach trees about two years old in such an orchard; that he never knew or heard of one selling at that age, and that judging from what a peach orchard would probably produce, and the probable price of peaches, he would be of the opinion that such an orchard would be worth about one dollar and fifty cents per tree."

There was testimony tending to show that the plaintiff was to have a certain house to live in and pasturage for five or six head of horses and cattle, and about thirty acres of other land of the defendant to till during

[1] Adair v. Bogle, 20 Iowa, 238.

self during a year's time. If the defendant, without cause, refused to let the plaintiff into possession, what is the direct consequence? It is that he may be deprived of employment,

the continuance of said contract, and that he had been prevented from the use thereof by the defendant. The plaintiff as a witness, being a farmer, gave evidence tending to show the yearly value of the rent of the house, the profits he might probably have realized from said thirty acres of land during the ten years which he said the contract was to continue, and the value of the pasturage to him for the same time. A judgment having been recovered of $1,000 by the plaintiff, it was reversed on error by reason of the admission of the foregoing testimony. White, J., delivering the unanimous opinion of the court, said: "The testimony excepted to by the plaintiff in error related to the probable future profits of a peach orchard not yet grown, to the profits the plaintiff would probably have made from the thirty acres, and to the value of the pasturage to him during the time. The testimony was offered in chief by the plaintiff, as furnishing the basis on which his damages were to be assessed by the jury. It was uncertain and speculative in its nature, and must have been, in a great degree, conjectural. The general rules as to the measure of damages are well understood. The difficulty lies in making a proper application of them to particular cases. It is a well established rule that the damages to be recovered for a breach of a contract must be shown with certainty, and not left to speculation or conjecture. In the practical application of this general rule, others have been adopted as guides in ascertaining the required certainty, as (1) that the damage must flow naturally and directly from the breach of the contract; that is, must be such as might be presumed to flow from its violation; and (2) must be not [162] the remote but the proximate consequence of such breach. In cases where the damages may be estimated in a variety of ways, that mode should be adopted which is most definite and certain. In the present case, as respects the property, the immediate and proximate consequence of the breach of the contract by the eviction was the loss of the use of the premises for the term. To the extent that the damages depended on the loss of the use of the property, its market value at the time of the eviction, subject to the performance of the contract on the part of the plaintiff, furnished the standard for assessing the damages. If it had no general market value, it should have been ascertained from witnesses whose skill and experience enabled them to testify directly to such value, in view of the hazards and chances of the business to which the land was to be devoted. Griffin v. Colver, 16 N. Y. 489; Giles v. O'Toole, 4 Barb. 261; Newbrough v. Walker, 8 Gratt. 16. This would only be applying the same principle for ascertaining the value of property which, by reason of its limited use, had no general market value, which is adopted with reference to proving the present worth of the future use of property, which, by reason of its being in greater demand, has such market value. In the case of property of the former description the range for obtaining testimony as to the value is, of course, more circumscribed than it is in the case of property of the latter description. But in either case the proving the

as well as a home in which to reside. Therefore, a reasonable allowance might, in proper cases, be made to the lessee of a farm for necessary loss of time in looking for another place,

value of the property by witnesses having competent knowledge of the subject is more certain and direct than to undertake to do so by submitting to the jury, as the grounds on which to make up their verdict, the supposed future profits.

"The profits testified to in the present case were remote and contingent, depending on the character of the future seasons and markets, and a variety of other causes of no certain or uniform operation. Neither did the amount of the plaintiff's expenditures, made in obtaining or performing the contract, furnish the measure of his damages, or constitute the fact to which his evidence in chief, on the question of damages, ought to have been directed. For this would be to allow the plaintiff, in case he had made a bad bargain, to charge his losses resulting therefrom upon his adversary; and, on the other hand, if his contract had been a profitable one, to deprive him of its benefits. In regard to the question objected to, and kindred inquiries, it may also be remarked that we do not doubt it would be the right of a party, on cross-examination, to propound such questions to the witnesses who might have testified to the value of the property in question. This could be done in order to ascertain the grounds of their judgment and as tending to test its correctness."

This opinion seems to sanction the admission of the opinions of expert witnesses to prove the value of property having no market value; and yet that the statement in chief of the material facts on which the opinions are based is error; that such facts are only to be elicited on cross-examination. If the damages for the loss of the use of the property are its value at the time of the eviction, subject to the performance of the contract on the part of the plaintiff in error, as the opinion asserts, [163] the meaning must be the value enhanced by considering the benefits which would have accrued from the performance of the contract by the party who has in fact abandoned it. How shall the value of those benefits be ascertained? Undoubtedly by consideration of all the facts *pro* and *con* which show what are the probabilities or certainties as well as hazards and chances of the business. It is believed to be the province of the jury to consider these, and that opinions derive their chief value, when sound, from them.

In Allison v. Chandler, 11 Mich. 542, trespass was brought against the landlord to recover damages for ousting his tenant from the demised premises. In the opinion of Christiancy, J., is an interesting discussion of the elements of damage as well as of the proper modes of proof. He says: "The law does not require impossibilities, and cannot therefore require a higher degree of certainty than the nature of the case admits. And we can see no good reason for requiring any higher degree of certainty in respect to the amount of damages than in respect to any other branch of the cause. Juries are allowed to act upon probable and inferential as well as direct and positive proof. And when, from the nature of the case, the amount of the damages cannot be estimated with certainty, or only a part of

or seeking other employment, where such lessee sustains such loss as the direct result of the lessor's wrongful act, and uses due diligence and reasonable exertions to prevent the [165]

them can be so estimated, we can see no objection to placing before the jury all the facts and circumstances of the case having any tendency to show damages, or their probable amount, so as to enable them to make the most intelligible and probable estimate which the nature of the case will permit. This should, of course, be done with such instructions and advice from the court as the circumstances of the case may require, and as may tend to prevent the allowance of such as may be merely possible, or too remote or fanciful in their character to be safely considered as the result of the injury. . . . The justice of the principles we have endeavored to explain will, we think, be sufficiently manifest in their application to the present case. The evidence strongly tended to show an ouster of the plaintiff for the balance of the term by the defendant's act. This term was the property of the plaintiff; and as proprietor he was entitled to all the benefits he could derive from it. He could not by law be compelled to sell it for such sum as it might be worth to others; and, when tortiously taken from him against his will, he cannot justly be limited to such a sum, or the difference between the rent he was paying and the fair rental value of the premises, if the premises were of much greater and peculiar value to him on account of the business he had established in the store, and the resort of customers to that particular place, or the good-will of the place, in his trade or business. His right to the full enjoyment of the use of the premises, in any manner not forbidden by the lease, was as clear as that to sell or dispose of it, and was as much his property as the term itself, and entitled to the same protection from the laws. He had used the premises as a jewelry store and place of business for the repairing of watches, making gold pens, etc. This business must be broken up by the ouster, unless the plaintiff could obtain another fit place for it; and if the only place he could obtain was less fitted and less valuable to him for that purpose, then such business would be injured to the extent of this difference; and this would be the natural, direct and immediate consequence of the injury. To confine the plaintiff to the difference between the rent paid and the fair rental value of the premises to others, for the balance of the term, would be but a mockery of justice. To test this, suppose the plaintiff is actually paying that full rental value, and has established a business upon the premises, the clear gains or profits of which have been an average of $1,000 per year; and he is ousted from the premises and this business entirely broken up for the balance of the time; can he be allowed to recover nothing but six cents for his loss? To ask such a question is to answer it. The rule which would confine the plaintiff to the difference between such rental value and the stipulated rent can rest only upon the assumption that the plaintiff might (as in case of personal property) go at once into the market and obtain another building equally well fitted for his business, and that for the same rent; and to justify such a rule of damages, this rule must be

loss or to reduce the amount.[1] The last proposition, as to loss of time, is quite near the line (often difficult to trace, if not mysterious) which divides direct and proximate from remote and consequential damages; but, qualified as above stated, we deem it correct. Damages claimed to result from failure to get another farm would, in ordinary cases, if not, indeed, in all cases, be beyond the boundary line which separates recoverable damages from those which are not recoverable."[2] A less extended liability is imposed on the lessor in California. In an action there by the lessee of farming land for a breach of the covenant of possession the recovery was held to properly include all that could have been netted on the farm, during the year he was to occupy it, by an average farmer; if the plaintiff owned the stock and utensils with which to carry on farming operations that fact might be considered; but damages were not recoverable because of the loss of his labor or the loss of the use of his teams.[3]

§ 871. **Mitigation of damages by lessee.** In such a case if the lessee finds other employment it merely answers the claim for such loss, and will not otherwise reduce or mitigate the damages recoverable for breach of the contract. Where a defendant leased her farm to the plaintiff on shares for a year, and refused him possession, in an action for the breach it was proved that the plaintiff earned $1,000 during the year in a different business, and the trial court allowed this fact to go to the jury in mitigation of damages. This was held to be

taken as a conclusive presumption of law. . . . The plaintiff in this case did hire another store, the best he could obtain, but not nearly so good for his business; his customers did not come to the new store, and there was not so much of a thoroughfare by it, not one quarter of the travel, and he relied much upon chance custom, especially in the watch repairing and other mechanical business. This injury to the plaintiff's business was as clearly a part of his damages as the loss of the term itself. . . . Now, if the plaintiff is to be allowed to recover for this injury to his business, it would seem to follow, as a necessary consequence, that the value of that business, before the injury as well as after, not only might but should be shown as an indispensable means of showing the amount of loss from the injury." Shafer v. Wilson, 44 Md. 268. See Glass v. Garber, 55 Ind. 336.

[1] See Attix v. Pelan, 5 Iowa, 336, *arguendo*, and cases there cited.

[2] Williams v. Oliphant, 3 Ind. 271. See Yeager v. Weaver, 64 Pa. St. 425.

[3] Rice v. Whitmore, 74 Cal. 619.

erroneous. Thompson, C. J., said: "The logic seemed to be that because he was an industrious man he was not within the same rule of compensation that one not so would be. There are undoubtedly cases in which such facts do mitigate damages. Such commonly occur in cases of the employment of clerks, agents, laborers and domestic servants for a year or a shorter determinate period. But I have found no case where a disappointed party to a contract for a specific thing or work, who, taking the risk from necessity of a different business from that which his contract, if complied with, would have furnished, and shifting for himself and family for employment for them and his teams, is to be regarded as doing it for the benefit of a faithless contractor." After alluding to the rule which confines the plaintiff's recovery to damages which are the proximate consequence of the defendant's wrongful act, the learned judge added interrogatively: "Is it not, therefore, equally just and logical that whatever shall have the effect to mitigate damages shall have some proximate relation to the contract?"[1] It has been held to [166] be the duty of a plaintiff who sues for compensation for injury to his business by eviction to make reasonable efforts to moderate or prevent such loss by obtaining other premises on which to carry on the business.[2] But he is not bound to go away from the vicinity in which he was doing business when he made his contract with the defendant, nor to take premises not reasonably well adapted to his needs.[3] And it has also been held that whether he is obliged to exert himself for that purpose or not, if he does in fact obtain other premises, and thus prevent an entire loss of the business, the damages will be mitigated accordingly.[4] But where the lessee of a part of the premises suffers a constructive eviction and to protect his interests takes a lease of the whole at an increased rent and for a longer term, which he sold at a profit, it has

[1] Wolf v. Studebaker, 65 Pa. St. 459. See vol. 2, § 713.

Where there are several lessees the defendant cannot show that one or more of them has or have obtained other leases or employment from which they have reaped better results than they might have obtained under his lease. Baumier v. Antiau, 79 Mich. 509.

[2] Dobbins v. Duquid, 65 Ill. 464; Green v. Williams, 45 Ill. 206; Poposkey v. Munkwitz, 68 Wis. 322, 331.

[3] Poposkey v. Munkwitz, 68 Wis. 322.

[4] Chandler v. Allison, 10 Mich. 460.

been ruled that such lease was an independent transaction by which the lessor incurred no responsibility, and from which he should not be allowed to claim a benefit.[1]

§ 872. **Lessor's covenant to repair, etc.** The obligation of the landlord to repair rests solely upon express contract; an undertaking to repair will not be implied from custom,[2] nor enlarged by construction.[3] It is the same in respect to rebuilding after destruction by any casualty, and as to improvements or additions.[4] The lessor's exemption from liability for repairs and the consequences of non-repair rests on the principle that the lease is a conveyance; that the lessee has full possession and control of the demised property; the lessor has no right of entry except so far as it has been reserved; the lessee stands in the place of the owner. In other words, the obligation to repair follows the right of possession. When the reason for the rule does not exist the rule does not apply. Hence when an appurtenant attached to and made for the accommodation of several different tenements, leased to divers tenants, remains in the possession of the landlord, though it is used by the lessees, he is bound to keep it in a reasonably safe condition for use.[5] If there is an undertaking by the lessor to erect and complete a building for the use and occupation of a tenant, the liability of the former in respect

[1] Fitzgibbons v. Freisem, 12 Daly, 419.

[2] Wehrman v. Priest, 12 Mo. App. 577.

[3] Hopkins v. Ratliff, 115 Ind. 213; Davidson v. Fischer, 11 Colo. 583; Bowe v. Hunking, 135 Mass. 380; Lynch v. Speed, 15 Daly, 207; Witty v. Matthews, 52 N. Y. 412; Doupe v. Genin, 45 N. Y. 119; Post v. Vetter, 2 E. D. Smith, 248; Clark v. Babcock, 23 Mich. 164; Sherwood v. Seaman, 2 Bosw. 127; Brown v. Barrington, 36 Vt. 40; Brewster v. De Fremery, 33 Cal. 341; Estep v. Estep, 23 Ind. 114; Kahn v. Love, 3 Ore. 206.

An oral agreement to make repairs is collateral to the written lease and may be proved by parol. Chapin v. Dobson, 78 N. Y. 75; Mann v. Nunn, 43 L. J. (C. P.) 241; Clenighan v. McFarland, 11 N. Y. Supp. 719.

On the failure of a lessor to keep his covenant to repair fences so as to protect crops against stock the tenant may recover for damage done the crops by his own stock. Rowe v. Baber, 93 Ala. 422.

[4] Id.; Vanderpool v. Smith, 2 Daly, 135; Loader v. Kemp, 2 C. & P. 375.

[5] Sawyer v. McGillicuddy, 81 Me. 318; Milford v. Holbrook, 9 Allen, 17; Elliott v. Pray, 10 id. 378; Shipley v. Fifty Associates, 101 Mass. 251; Readman v. Conway, 126 id. 374; Looney v. McLean, id. 33; Bold v. O'Brien, 12 Daly, 160; Donohue v. Kendall, 50 N. Y. Super. Ct. 386.

to damages for a breach is not distinguishable from that which arises from a contract to give possession of one already erected. An omission to repair, however, is not an eviction.[1] The lessor will be chargeable with the difference between the rent to be paid and the rental value; and if the contract be made for a particular use by the lessee the rental value for that use will be the standard.[2]

In a late case in New York the defendant let to the plaintiff a hotel and certain adjoining premises, covenanting to tear down the old building and erect a new one on such premises, to be used in connection with the hotel, the new building to be completed and the plaintiff put in possession by a specified time. The plaintiff was then occupying the hotel and a [**167**] building upon a portion of the adjoining premises under a former lease; he removed the furniture from the rooms in that building and stored it while the new one was being erected. The defendant failed to complete the new building within the specified time. In an action for breach of the covenant the court say: "The rent of the whole premises embraced in the lease was to commence with the term, although the plaintiff would necessarily be required to await the erection and completion of the new structure before he could have the beneficial enjoyment of that part of the demised premises. The lease was made with reference to these circumstances, and an allowance to the plaintiff of the rental value of the rooms in the new building during the time he was deprived of them by the defendant's default, based upon the consideration of the use to which they were to be applied, and which was contemplated by both parties when the lease was executed, affords to the plaintiff only a just indemnity, and subjects the defendant to no greater liability than it may fairly be supposed he intended to assume when the covenant was made."[3]

If the lessor undertakes to keep the premises in repair the damages for breach will, in general, be the decrease in rental

[1] Speckels v. Sax, 1 E. D. Smith, 253; Lewis v. Chisholm, 68 Ga. 40.

[2] Myers v. Burns, 35 N. Y. 269; Berrian v. Olmstead, 4 E. D. Smith, 279; McEwen v. Dillon, 12 Ont. 411; McCoy v. Oldham, 1 Ind. App. 372.

[3] Hexter v. Knox, 63 N. Y. 561. Compare Prescott v. Otterstatter, 79 Pa. St. 462.

value resulting from the non-repair;[1] and in ascertaining this decrease it is proper to take into consideration the special use of the premises which was contemplated when the lease was made; and this consideration will also have a controlling influence in fixing the standard of repair.[2] The tenant may recover for the loss of the use of rooms rendered untenantable for want of repair.[3] The damages recoverable are only such as can be ascertained and fixed with reasonable certainty; the profits anticipated from the future public performance of a vocalist are not of that character.[4] It has been ruled that the lessor cannot mitigate the damages resulting from his neglect to repair by showing that his lessee had sublet the premises and received the same amount for rent as he was liable to him for.[5] On the breach of a contract to heat leased premises the damages cannot exceed the reasonable cost of supplying sufficient heat to make up the difference between the amount furnished and that stipulated for.[6] If repairs made are not such as the tenant is entitled to, but are of advantage to him, the lessor's liability will be diminished to the extent that they are beneficial.[7] If they are negligently made the lessor will be liable for resulting damages.[8]

§ 873. **Lessee's duty concerning repairs.** The lessee must give the landlord notice to make repairs when needed, unless the lease shows an intention that the latter shall take notice from his own observation. This intention will not be implied [168] where the lease does not give him the right to enter and view the premises.[9] The rule is that notice to perform is necessary whenever the fact on the occurrence of which the right to claim performance depends lies more peculiarly within the knowledge of the party claiming such right.[10] If the landlord refuses to repair on receiving notice, the tenant is entitled to do so at the former's expense, and that is held to be his duty

[1] Myers v. Burns, 35 N. Y. 269.

[2] Id.; Ward v. Kelsey, 38 N. Y. 80; Parker v. Meadows, 86 Tenn. 181.

[3] Id.

[4] New York Academy of Music v. Hackett, 2 Hilt. 217.

[5] Watson v. Hooton, 4 Ill. App. 294.

[6] McCormick v. Stowell, 138 Mass. 431. See Russell v. Giblin, 16 Daly, 258; Manhattan S. Works v. Koehler, 45 Hun, 150.

[7] McEwen v. Dillon, 12 Ont. 411.

[8] Butler v. Cushing, 46 Hun, 521.

[9] Gerzebek v. Lord, 33 N. J. L. 240; Wolcott v. Sullivan, 6 Paige, 117; Norfleet v. Cromwell, 64 N. C. 1.

[10] Id.; Chitty on Cont. 732; Hayden v. Bradley, 6 Gray, 425.

where it may be done at trifling expense; he cannot neglect it and recover greater damages, suffered in consequence of the premises remaining out of repair, than the repairs would cost.[1] This rule only applies when the repairs can be made with a reasonable expenditure of time and money, the court determining in each case what is reasonable, regard being had to the relative cost, extent of the injury and value of the contract.[2] In Alabama and Michigan the tenant is not bound to cause repairs to be made and thereby limit his recovery to the cost of making them. He may rely upon the lessor's promise and hold him for such damages as are the natural and proximate result of its breach.[3] When this duty rests upon the lessee the lessor's liability is to be determined as of the time he became in default, notwithstanding the former may have been obliged to pay a third person damages for injuries subsequently sustained.[4] If the landlord prevents the tenant from making repairs by repeated promises to make them himself; that is, if the tenant in good faith delays for that reason, he is not prejudiced in his claim to such damages as he may suffer from the continuance of a want of repair.[5]

[1] Wisdom v. Newberry, 30 Mo. App. 241; Parker v. Meadows, 86 Tenn. 181; Dorwin v. Potter, 5 Denio, 306; Hendry v. Squier, 126 Ind. 19; Hopkins v. Ratliff, 115 id. 213; Cook v. Soule, 56 N. Y. 420; Indiana Cent. Ry. Co. v. Moore, 23 Ind. 14; Andrews v. Jones, 36 Tex. 169; Nicholson v. Munigle, 6 Allen, 215; Miller v. Mariners' Church, 7 Me. 51; Fort v. Orndoff, 7 Heisk. 167; Hamilton v. McPherson, 28 N. Y. 72. See Terry v. Mayor, 8 Bosw. 504; Cole v. Buckle, 18 Up. Can. C. P. 286.

[2] Parker v. Meadows, 86 Tenn. 181; Hexter v. Knox, 63 N. Y. 561; Martin v. Hill, 42 Ala. 275; Hinckley v. Beckwith, 13 Wis. 31; McCoy v. Oldham, 1 Ind. App. 372.

[3] Vandegrift v. Abbott, 75 Ala. 487; Culver v. Hill, 68 id. 66; Bostwick v. Losey, 67 Mich. 554 (if the use of the property is dependent upon the repairs being made).

[4] Sparks v. Bassett, 49 N. Y. Super. Ct. 270; Oettinger v. Levy, 4 E. D. Smith, 288.

[5] In Keyes v. Western Vt. Slate Co., 34 Vt. 81, Poland, C. J., said: "If, when the plaintiff requested the defendants to repair the drain, they had refused to do so, it would have been the duty of the plaintiff himself to have done it, and all he could have recovered would have been the costs of the repair. He could not in such case lie by and incur loss for want of the repairs, far beyond the cost of fixing it, and make the defendants liable. If the defendants wrongfully refused to repair, still it was the duty of the plaintiff to conduct like a reasonable and prudent man, and take the course that would be the least detrimental to himself and to the defendants. But if the defendants, on having notice to repair the drain, admitted their liabil-

[169] In an action by a tenant against a landlord who has covenanted to keep the premises in repair for damages for its breach, the defendant cannot excuse his non-performance by proof of the plaintiff's negligence. His contributory negligence does not go to the cause of action upon contract; there is a right of action when the defendant is guilty of a breach by his negligence; but upon the question of reduction of damages the conduct of the plaintiff in failing to exercise due care to prevent injury to himself by the defendant's failure to perform his contract is proper for the consideration of the jury.[1] In New York where the landlord agrees to repair and fails to do so the tenant is held to have two different remedies, at his election. Hunt, J., said: "He could have made the repairs himself and have called upon the plaintiff to refund the expense; . . . or he could have called upon . . (the lessor) . . to take the ordinary responsibility of a party failing to perform his contract, to wit, to pay the damages caused by such failure. . . . In the first case the rule confines the damages to the actual expense, if no special damage is shown, but in the other the cost of repair is not an element in the case. It is as if there was no such right to repair on the part of the lessee, but the claim rested solely in damages."[2] This right of election to repair or to claim damages was declared in a case where the repairs actually made and damages recovered from the landlord for not making others were but a trifle in excess of the rent due. This decision was subsequently affirmed in a case[3] in which the trial court had refused

ity to repair it and promised to do so, and thus kept the plaintiff from making the repairs himself, and thus prolonged the period of loss to the plaintiff so that it exceeded the cost of the repairs, that loss should justly fall on the defendants. It was rather a question whether the plaintiff acted in good faith, and with fair and reasonable prudence, in the course he took in waiting for the defendants to repair, under their assurance, instead of proceeding to make them himself. The defendants when called on should have immediately proceeded to make the repairs themselves, or else have refused, so that the plaintiff could have made them himself. If they omitted to make them on being called on, and kept the plaintiff from doing it by false and delusive promises, they cannot complain of being made liable for the loss occasioned by the delay." Buck v. Rodgers, 39 Ind. 222; Parker v. Meadows, 86 Tenn. 181; Rauth v. Davenport, 60 Hun, 70.

[1] Flynn v. Nash, 11 Allen, 550.

[2] Myers v. Burns, 35 N. Y. 269.

[3] Hexter v. Knox, 63 N. Y. 561.

a request to charge that the plaintiff could not recover for the use of rooms except for the time it would necessarily take to repair them; and that if the plaintiff knew of the defect which caused damage he was bound to have it repaired as soon as could reasonably have been done; and that if he did not do so and damage subsequently accrued, he could not recover therefor. On this refusal the court of appeals remarked: [170] "It is conceded that it was the duty of the defendant to repair the ceilings. Upon his failure to perform it, it was the right of the tenant to make the repairs and charge the expense to the landlord. But he was not bound to make the repairs. He (the lessor) had no right to cast upon the plaintiff the responsibility and the burden of the repairs which he was bound to make. The plaintiff removed his furniture from these rooms; and so far as he could, short of making the repairs himself, limited the injurious consequences of the defendant's neglect."[1] The tenant in making repairs after default of the landlord to make them in pursuance of his contract is not bound to do so in such manner as to literally restore the premises by the same materials and workmanship to their former state; he may exercise a prudent judgment to render the repairs more permanent and useful by substituting better material or workmanship.[2]

§ 874. Liability for special and consequential damages. Such damages may be recovered against a lessor for breach of his contract to repair if they are not remote and are shown with sufficient certainty. Loss of custom to a mill kept idle by the lessor's failure to repair the dam was held to be uncertain and speculative.[3] So of profits anticipated from the future public performance of a vocalist.[4] Damages resulting

[1] Martin v. Hill, 42 Ala. 275; Hinckley v. Beckwith, 13 Wis. 31.

[2] Myers v. Burns, 35 N. Y. 269.

[3] Middlekauff v. Smith, 1 Md. 329; Fort v. Orndoff, 7 Heisk. 167. See Manhattan Works v. Koehler, 45 Hun, 150.

The general rule of damages is the value of the use of the premises while they are untenantable by reason of the lessor's default. Myers v. Burns, 35 N. Y. 269; Hexter v. Knox, 63 id. 561. The lessee cannot recover the amount paid for rooms and meals elsewhere during the time the repairs were being made. Clenighan v. McFarland, 16 Daly, 402.

[4] New York Academy of Music v. Hackett, 2 Hilt. 217. See McHenry v. Marr, 39 Md. 510.

from illness and loss of business,[1] and injuries to animals and the increased food required and the decrease of produce,[2] have been held to be too remote. Where a landlord negligently suffered a chimney upon the demised premises to remain in a ruinous condition, and its fall caused injury to his tenant's property, he was held liable for the resulting damage;[3] and also for a lessee's goods in a store, injured in consequence of gutters being obstructed.[4] In such a case wool belonging to the tenant was alleged to have suffered injury from water escaping from a waste-pipe by negligence of the landlord. The trial court in an action therefor gave these instructions, to which exceptions were overruled: that the evidence must be such that the jury may be able to decide thereon as to the [171] amount of damages; that guesses of witnesses were not sufficient to found a verdict upon; that the judgment of persons having sufficient knowledge and opportunity of judging as to the amount of the wool injured and as to the extent of the injury is competent; that exact accuracy in testimony is not required, but that the jury could not give damages exceeding what they are satisfied of on the evidence; that when the damage was occasioned by different causes, from each of which there was more or less damage to plaintiff's wool, if a portion was from causes for which the defendants were not liable, as from the tide water, the burden of proof was upon the plaintiff to show the damage to the wool from causes for which the defendants were liable, as distinguished from the other causes; and for this damage only could the plaintiff recover.[5] In an action against the lessors of a saw-mill for breach of their contract to repair, whereby the mill was rendered useless to the lessees during the latter portion of their term, it appeared that the lessees at the time of the stoppage had sufficient logs of their own in the mill yard to stock the mill for one-half of the balance of their term, which they were compelled to haul to another mill to be sawed. It was held that they were entitled to recover as damages the

[1] Chadwick v. Woodward, 12 Daly, 309; Collins v. Karatopsky, 36 Ark. 316, 324.

[2] Dorwin v. Potter, 5 Denio, 306.

[3] Eagle v. Swayze, 2 Daly, 140.

[4] Center v. Davis, 39 Ga. 210; Rauth v. Davenport, 14 N. Y. Supp. 69; 60 Hun, 70.

[5] Priest v. Nichols, 116 Mass. 401.

amount paid for hauling their logs to such other mill, and the cost of getting them sawed there, above what it would have cost to saw them at their own mill, and also the profits which they would have made from manufacturing lumber in that portion of their term during which they lost the use of the mill through the fault of the defendants, deducting the time which it would have required to saw their own logs so hauled to another mill; and that to these damages interest might be added at the discretion of the jury.[1] The profits here held to be recoverable were the special rental value of the mill to the plaintiffs.[2]

[1] Hinckley v. Beckwith, 13 Wis. 31; S. C., 17 Wis. 413.

[2] Cole, J., said: "In the first place, we can see no objection to giving the respondents the fair value of the use of the mill for the unexpired portion of the term, subject to the qualifications hereafter mentioned. The mill was of no sort of use to them except to manufacture lumber. And when the motive power gave out, nothing further could be done with it. One of the respondents testified that it was worth for the residue of the term $10.50 per day to manufacture lumber. This being so, why ought they not to recover damages at that rate during the continuance of the lease, excepting therefrom the time they would use it to saw their own logs? We know of no sound principle of law or reason which would be violated in permitting them to do so. It is said that this would be allowing damages on the basis of a calculation of profits, which, it is said, is inadmissible. But the case of Griffin v. Colver, 16 N. Y. 489, to which we are referred by counsel for the appellants, fully sustains the rule we have laid down." After stating the rule of that case the learned judge continued: "In the present case it was very easy to ascertain the profits which were the direct and immediate results of operating the mill for sixty days. The respondents had logs enough on hand to stock the mill for about one-half of that time, and timber standing near the mill sufficient to supply it for the rest of the time. What, therefore, could be made in running the mill, per day, over and above all expenses of rent, labor, etc., was susceptible of exact and definite proof. It is not like profits anticipated from being able to perform some dependent and collateral undertaking to the principal business of running the mill, but related to gains or profits arising from the business itself, and constituting a portion of the contract. The respondents, when they rented the mill, considered what it would be worth to them per year or per month. The profits upon the manufacture of lumber were so much per thousand, and it was therefore an easy matter to ascertain the gross earnings of the mill. We therefore suppose the profits or earnings of the mill would constitute a proper item in estimating the damages resulting from the breach of the agreement to repair. Masterton v. Mayor, etc., 7 Hill, 61; Blanchard v. Ely, 21 Wend. 342."

In Jolly v. Single, 16 Wis. 280, the lessor removed part of a saw-mill, and thereby made it impossible to

§ 875. Removal of fixtures. If a tenant makes improvements of a permanent character which are so annexed as to become part of the realty he can neither remove them nor recover their cost without a special contract to that effect on the landlord's part.[1] Where authority is given a tenant to remove machinery he has put in it is implied that he may do such damage to the freehold in making the removal as in the exercise of ordinary care was necessary.[2] If the removal of fixtures is prevented, contrary to the terms of the lease, the tenant may recover their value as they stand in the building; he is not limited to their worth after removal.[3]

[172] **§ 876. Recoupment.** In actions by either party against the other upon stipulations in a lease the defendant is generally allowed to set up by way of recoupment any cross-claim he may have against the plaintiff arising upon the same [173] contract.[4] In an action to recover rent the lessee has a right to set up as a counter-claim damages arising from breach of an agreement in the lease on the part of the lessor to keep the premises in repair.[5] Where the lease is for a year the fact that the lessee has paid the rent except for the last quarter does not deprive him of the right to counter-claim his damages

run it. It was held that the damages were not confined to the cost of replacing it, leaving the lessee to pay his men out of employ, and lose the use of the mill during the time it necessarily lay idle by reason of the trespass. See Boynton v. Chase, 3 Wis. 456; Buck v. Rodgers, 39 Ind. 222; also Crane v. Hardman, 4 E. D. Smith, 448; Chatterton v. Fox, 5 Duer, 64; Bostwick v. Losey, 67 Mich. 554.

[1] Hedderich v. Smith, 103 Ind. 203.

[2] Hunt v. Potter, 47 Mich. 195.

[3] Bruce v. Welch, 52 Hun, 524; Neiswanger v. Squier, 73 Mo. 192.

[4] Haven v. Wakefield, 39 Ill. 509; Nichols v. Dusenbury, 2 N. Y. 283; Mayor, etc. v. Mabie, 13 N. Y. 151; Dorwin v. Potter, 5 Denio, 306; Thomas v. Wiggers, 41 Ill. 470; Shallies v. Wilcox, 4 Thomp. & C. 591; Cook v. Soule, 56 N. Y. 420; S. C., 45 How. Pr. 340; Wade v. Halligan, 16 Ill. 507; S. C., 21 Ill. 479; Commonwealth v. Todd, 9 Bush, 708; Lindley v. Miller, 67 Ill. 244; Fairman v. Fluck, 5 Watts, 516; Blair v. Claxton, 18 N. Y. 529; Myers v. Burns, 35 N. Y. 269; Guthman v. Castleberry, 49 Ga. 272; Westlake v. De Graw, 25 Wend. 669; Wright v. Lattin, 38 Ill. 293; Murray v. Pennington, 3 Gratt. 91; Benkard v. Babcock, 2 Robt. 175; Lynch v. Baldwin, 69 Ill. 210.

[5] Myers v. Burns, 35 N. Y. 269; Lunn v. Gage, 37 Ill. 19; Coleman v. Bunce, 37 Tex. 171; Crane v. Hardman, 4 E. D. Smith, 339; Guthman v. Castleberry, 49 Ga. 272; Morgan v. Smith, 5 Hun, 220; Vandegrift v. Abbott, 75 Ala. 487; Stewart v. Lanier House Co., 75 Ga. 582.

for the entire term.[1] So if there has been a breach of the covenant for quite enjoyment, the damages therefor may be recouped or counter-claimed in an action by the landlord for rent.[2] If a lease of rooms provides that the lessee shall be boarded by the lessor and the price of rent and board is fixed at a gross sum, the cost to the lessor of boarding the lessee may be deducted from the contract price, the lessee having died before action was brought.[3] In an action for rent by an underlessor, who was a tenant at will, his lessee may [**174**] recoup as for breach of covenant for rent paid to the plaintiff's lessor to save himself from eviction.[4] But in other cases an interference by the owner or chief landlord with the possession of a subtenant is not an eviction for which the intermediate

[1] Cook v. Soule, 56 N. Y. 420; McAlester v. Landers, 70 Cal. 79.

[2] Mack v. Patchin, 42 N. Y. 167; Eldred v. Leahy, 31 Wis. 546; Mayor, etc. v. Mabie, 13 N. Y. 151; Chatterton v. Fox, 5 Duer, 64.

In Mason v. Moyers, 2 Rob. (Va.) 606, pending a suit in chancery by creditors for the sale of their debtor's land, the heirs of the latter leased it for three years from the 1st of April, unless there should in the meantime be a decree of sale, in which case the tenant was to give possession on the 1st of April after the decree. A rent was reserved of $300, to be paid at the end of each year of the tenancy; and according to the true construction of the lease the tenant had a right to the crops growing on the land at the end of every year for which rent should be received. In June of the third year the land was sold under a decree in the creditor's suit, and the tenant applied to the purchasers for permission to proceed with the cultivation of the land; but one of them in the presence of the other (who was one of the lessors) refused, declaring that if the tenant should sow the land the purchasers would reap the crop; and in consequence of this refusal the tenant proceeded no farther with his preparations for a fall crop, though he remained in possession the third year. A few days after the expiration of that year the purchasers sued out an attachment against the tenant for $300 rent to become due the 1st of April, upon the levy of which the tenant gave the sheriff bond and security for the rent. Judgment having been obtained on this bond, it was enjoined as to $200, upon a bill filed by the tenant praying an abatement of the rent according to equity. It was held by a majority of the court: 1, that under the circumstances the purchasers were not warranted in assuming the relation of landlord for the purpose of coercing the payment of $300; 2, that there not having been an actual eviction, there was no remedy at law, and it was competent for the tenant to come into equity upon the ground that he was entitled to an abatement; and 3, the evidence justifying the allowance of $200 as a fair abatement, the injunction should be made perpetual.

[3] Oliver v. Moore, 53 Hun, 472.

[4] Holbrook v. Young, 108 Mass. 83.

landlord is responsible, and does not, as between him and the subtenant, suspend the rent.[1]

If there was fraud or misrepresentation by the landlord in making the lease, by which the lessee suffered damage, he may recoup therefor in an action for rent;[2] but a mere trespass or tort of any character not amounting to an eviction, in whole or in part, cannot be set up in defense to an action for rent.[3] We think these cases do not recognize the principle of recoupment as fully in actions for rent as in other actions. They go upon the rule that unless there is such a disturbance of the tenant's possession as amounts to an eviction, and therefore to a full defense, the disturbance, although it may greatly impair the tenant's beneficial enjoyment, is no defense at all — is wholly excluded. The reasons which sustain the defense of [175] eviction as a bar will equally entitle the tenant to an abatement of the rent or recoupment where the landlord, by unjustifiable acts, lessens the value of the demised premises to his tenant, though the interference does not amount to eviction; and whether such acts are confined to a brief period of time or are continuous, and whether they are acts for which an action of tort would lie or not. By the lease the tenant is vested with an estate which entitles him to sue his landlord as well as any stranger interfering with his rightful enjoyment or evicting him. But in case of eviction the tenant is not confined to his remedy by ejectment or other action of tort; he may set it up as a bar to an action by the landlord for rent; it is held to be a violation of the implied covenant for quiet enjoyment. The implied obligation of the lessor, however, is not simply that he will not evict his tenant,

[1] Luckey v. Frantzkee, 1 E. D. Smith, 47; Lansing v. Van Alstyne, 2 Wend. 563. See Ogilvie v. Hull, 5 Hill, 52.

[2] Allaire v. Whitney, 1 Hill, 484; Cage v. Phillips, 38 Ala. 382; Avery v. Brown, 31 Conn. 398; Staples v. Anderson, 3 Robt. 327; Moberly v. Alexander, 19 Iowa, 162; Wallace v. Lent, 1 Daly, 481. See Meeks v. Bowerman, 1 Daly, 99; Minor v. Sharon, 112 Mass. 477.

[3] Walker v. Shoemaker, 4 Hun, 579; Drake v. Cockroft, 4 E. D. Smith, 34; McKenzie v. Farrell, 4 Bosw. 202; Campbell v. Shields, 11 How. Pr. 565; Vatel v. Herner, 1 Hilt. 149; Bogardus v. Parker, 7 How. Pr. 305; Gleason v. Moen, 2 Duer, 639; Edgerton v. Page, 10 Abb. 119; S. C., 20 N. Y. 281; Bartlett v. Farrington, 120 Mass. 284; Huline v. Brown, 3 Heisk. 679; Keegan v. Kinnare, 123 Ill. 280; Cram v. Dresser, 2 Sandf. 120. See Benkard v. Babcock, 2 Robt. 175; McFadin v. Rippey, 18 Mo. 738.

and that no other person shall do so under a superior title, but equally that he will do no act to prevent or impair the enjoyment of what he has granted by his lease.[1] This defense is

[1] Dexter v. Manley, 4 Cush. 14; Leadbeater v. Roth, 25 Ill. 586; Commonwealth v. Todd, 9 Bush, 708; Eldred v. Leahy, 31 Wis. 546; Sigmund v. Howard Bank, 29 Md. 324; Mack v. Patchin, 29 How. Pr. 20. See Morgan v. Smith, 5 Hun, 220.

In Mayor v. Mabie, 13 N. Y. 151, a lease was made of the franchise or privilege of collecting wharfage, and an action was brought for the stipulated rent. The lease conveyed the right to collect such wharfage upon all vessels of over five tons. The answer set up as a defense that the agents of the plaintiff disturbed the defendant in the enjoyment of the right conveyed; that they entered upon the premises and assumed the entire control of all vessels coming to the slip and pier, etc., and gave preferences, for compensation paid to plaintiff, by which the defendant suffered great losses. The defendant continued to act under the lease and to collect wharfage during his term. Proof of the matters stated in the answer being excluded, the plaintiff appealed. Denio, J., said: "It is not denied but that the acts imputed to the plaintiffs in the answer would, if established, be an infringement of the rights of Mabie, under the grant from the corporation." The court held that there was an implied covenant for quiet enjoyment, and that the acts complained of in the answer were a violation of that covenant; that it was available by way of recoupment. "The main object," said the court, "of a covenant for quiet enjoyment is to protect the lessee from the lawful claims of third persons having a title paramount to the lessor; but such a covenant, when fully written out, [176] provides also for the protection of the lessee against the unlawful entry of the lessor himself. 2 Platt on Cov. 312. . . . It is not, however, every mere trespass by the lessor upon the demised premises which will amount to a breach of this covenant. Although the covenantor cannot avail himself of the subterfuge that his entry was unlawful, and he therefore a trespasser, to avoid the consequences of his own wrong, still, to support the action of covenant, the entry must be made under an assumption of title." 2 Platt on Cov. 319, 320.

In Tinsley v. Tinsley, 15 B. Mon. 458, Marshall, C. J., said: "This action is brought by Samuel Tinsley against Nancy Tinsley and John A. McClure, her surety, to recover damages upon an injunction bond, in the penalty of $300, executed by them for procuring an injunction against the execution of a judgment for restitution, rendered by the Shelby circuit court in favor of Samuel Tinsley against Nancy Tinsley upon a warrant for forcible entry and detainer. The petition alleges the dismissal of the bill and dissolution of the injunction, and claims damages for the costs incurred in defending the injunction suit, and for being kept out of the possession of the land from April, 1850, to September, 1851, alleging the rent for that period to have been worth $600. The defendants in their answers, besides certain denials, . . . set up a defense and counter-claim on behalf of the defendant Tinsley, first, on the ground that during the pendency of the injunction the plaintiff had, by

[177] available not only in actions for rent, but also in replevin or proceedings for the recovery of property distrained.[1]

his threats, prevented her from renting the land to solvent men for $150, and thus making the rent for which he sues; and second, upon the ground that since the injunction was obtained the plaintiff had taken and disposed of the crop of corn growing thereon, and raised by said defendant while the injunction was pending, of the value of at least $250. . . . Section 152 of the code authorizes a counter-claim in behalf of one of several defendants to be set up in answer to the action, and the only restriction which it makes as to the nature of such counter-claim is that it shall be a cause of action arising out of the contract or transaction set forth in the petition (as the foundation of the plaintiff's demand), or that it be connected with the subject of the action. It is not required that the counter-claim itself shall be founded in contract, or arise out of the contract set forth in the petition, but it is sufficient that it arises out of the transactions set forth in the petition, or be connected with the subject of the action. As the petition states the occupation of the land by Mrs. Tinsley during the pendency of the injunction, and claims damages therefor, any interference by the plaintiff which rendered such occupation less profitable or less valuable to the occupant constituted a cause of action arising out of the transaction set forth in the petition, and is connected with the plaintiff's cause of action; and although it amount to a trespass or other tort, it may constitute the ground of a counter-claim. If the crop growing on the land when the plaintiff was restored to the possession was his, to do with as he pleased, his taking and disposing of it would not constitute a cause of action or a counter-claim, but would surely be a good defense, partial or general, to the demand for the rent of that year, or should go in reduction of damages claimed for the withholding of the possession for that year. But as the injunction gave the protection of the law to the occupant during its pendency, and as the bond secured the other party in the rent during such occupancy, such occupant, when his original entry is lawful, and under a lease or permission of uncertain duration, may be regarded as in effect a tenant or *quasi*-tenant, under rent during the pendency of the injunction; and although the defendant may rightfully take the possession on the dissolution of the injunction, it does not follow that he is absolutely entitled to the crop then growing on the land. But as the duration of the occupancy as dependent on the injunction is uncertain, it would seem to be just and reasonable that although, by improvidence or inadvertence, the decree directing immediate restitution, the possession of the land may be rightfully taken, the party turned out before the crop is gathered has the right to the emblements. In this view, which we think is correct, a cause of action arose upon the taking and disposing of the crop by the plaintiff when he obtained possession. This was, therefore, a good counter-claim under the code."

[1] Nichols v. Dusenbury, 2 N. Y. 283; Wade v. Halligan, 16 Ill. 507; Hatfield v. Fullerton, 24 Ill. 278; Lindley v. Miller, 67 Ill. 244; Fairman v. Fluck, 5 Watts, 516; Westlake v. De Graw, 25 Wend. 669. See Anderson v. Reynolds, 14 S. & R. 439.

CHAPTER XXI.

CARRIERS.

SECTION 1.

ACTIONS BY CARRIERS.

§ 877. Breach of contract to furnish goods for shipment.
878. Measure of damages on charter-parties.
879. Recovery for partial breach.
880. Carrier must mitigate his loss.
881. Shipper's rights in profits made by carrier.
882. Burden of proof.
883. Damages for breach of charter to load with enumerated articles.
884. Carrier's actions for freight.
885. Freight charges as affected by value of property.
886. Discriminations unlawful where conditions same.
887, 888. When freight due and earned.
889. When shipper not liable for freight.
890. When *pro rata* freight due.
891. Same subject; transshipment of freight.
892. Right to freight where cargo insured.
893. Rule for adjusting *pro rata* freight.
894. Charges and expenses where delivery hindered or prevented.
895. Freight under charter to load with enumerated articles.
896. Recoupment against freight.
897. Damages for detention of vessel.

SECTION 2.

ACTIONS AGAINST CARRIERS.

898. General statement of carrier's liability.
899. When damages measured by cost of transportation.
900. Liability for loss of shipper's profits.
901. Increased expenditures; loss of customers.
902. Not liable for remote consequences.
903. Must respond for negligent delay.
904. Limitation of liability by contract.
905. Illustrations of liability for delay; unmarketable property.
906. Loss of market value, quantity or quality.
907, 908. Vindication of the rule stated.
909. Application of the rule to ocean carriage.
910. Delay after notice of arrival.
911. Increased cost of obtaining property.
912. Expense of further transportation.
913, 914. Liability for delay where facts are known.
915. Mental anguish as an element of damage.
916. Carrier's responsibility in caring for property.

§ 917. Burden of proof as to injury or loss.
918. Damages where goods have a market value.
919. Damages for injury or loss of non-marketable property.
920. Interest on damages.
921. Owner's efforts to lessen loss.
922. When damages less than value of goods at destination.
923. Same subject; criticism of the rule stated.
924. Same subject; loss at place of shipment.
925. Same subject; shipper's conduct may affect damages.
926. Qualification of carrier's liability by notice.
927. Liability for partial loss when value limited.
928. Apportionment of damage in case of mutual fault.
929. Liability not mitigated by insurance.
930. Exemplary damages.
931. For what losses carrier responsible.
932. Damages where there are successive carriers.
933. Proof of value.

SECTION 3.

CARRIERS OF PASSENGERS.

934. Nature of their obligations.
935. Damages for refusing to carry.
936. Same subject; loss of time, expense, exposure.
937. Same subject; exemplary damages.
938. Removal of passenger at wrong place.
939. Same subject; consequential damages.
940. Passenger's indiscreet acts not ground of damage.
941. Protection of passengers.
942. Damages for mental suffering.
943. Mental suffering independently of other pain.
944. Past and prospective damages.
945, 946. Proof of damage.
947. Recovery for special loss.
948. Wrongfully placing passenger in second-class car.
949. Mitigation of damages.
950. Exemplary damages.
951. Rule different in some states.
952. Injury to wife, child or servant.
953. Excessive verdicts.
954. Loss of baggage.
955. Measure of damages.
956. Liability of sleeping-car companies.

SECTION 1.

ACTIONS BY CARRIERS.

§ 877. Breach of contract to furnish goods for shipment. [178] Contracts of affreightment are sometimes made for the transportation of property generally, without reference to

any particular route or mode of conveyance; such a contract is one for particular work; other contracts are more specific, and consist of an undertaking on the part of the freighter to furnish cargo for a particular vessel for a voyage or a stated period of time; such are contracts to employ the vessel, and are like a contract of service. On breach of the former by the party agreeing to provide goods for carriage the measure of damages is the same as upon other contracts for particular works: the contract price less the expense and cost of earning it, or the profits of the contract, shown with the requisite certainty, lost by reason of the defendant's non-performance of its requirements.[1]

[1] Bangor Furnace Co. v. Magill, 108 Ill. 656; Stone v. Woodruff, 28 Hun, 534; Wolf v. Studebaker, 65 Pa. St. 59.

In Utter v. Chapman, 38 Cal. 659, the contract appears to have been a general one, but the court say: "The case is argued upon the theory that the grain was to be transported by the plaintiff's steamer," and it was decided upon that theory. See S. C., 43 Cal. 279.

A very interesting case was decided in Maine in 1877. Its leading facts are thus stated in the opinion by Barrows, J.: "The plaintiff, having been engaged since 1868 in running a stage between Dexter and Greenville, carrying railroad passengers on through tickets as well as local passengers, and having a contract for carrying the mail which was to expire July 1, 1873, and being agent of the Eastern Express Co., from which business and the transportation of freight he realized considerable sums annually, and being the owner of stage property on the line to a considerable amount, and having purchased in the fall of 1871 a steamboat to run on the lake between Greenville and Mt. Kineo, on the 18th of June, 1872, made a written contract with the defendants whereby he agreed 'to run a first-class stage line from Dexter to Greenville by the most direct line, for the conveyance of travel coming from or going to' the defendants' railroad, according to a certain time-table, the details of which were inserted in the contract and made subject to changes in the time-table of the railroad company; in consideration of which the defendants agreed to give him 'the exclusive right of ticketing between Dexter and Greenville for the term of five years from the 1st day of July, 1872,' at a fixed rate. The time-table provided that he should leave Dexter at a certain hour, arrive at Greenville at a certain time, and leave Greenville for Kineo and arrive at Kineo at the times mentioned in the schedule. Round-trip tickets were issued by the defendants from Boston and points east of Boston to Kineo and return by Frye's stages from Dexter and by steamboat. The plaintiff was to receive $2.50 per passenger each way for passengers carried on through tickets. Dissatisfaction arose between the parties. Defendants claimed that there was a failure to perform on the part of the plaintiff (which was negatived by the verdict), and notified him May 5, 1873, that for

[179] § 878. **Measure of damages on charter-parties.** Where, however, the action is against the charterer of a ship for not loading it or any particular vehicle the measure of [180] damages is the amount of freight which would have

that reason they had contracted with other parties to do the work from July 1, *prox.*, and that he must discontinue operations under the contract at that time. His contract for carrying the mail expired at the same date. Another party secured it for the next four years; and he lost the express business because by the rule of the express company that was always given to those who had the mail contract, to whom also the defendants, under the contract bearing a general similarity to the one previously made with the plaintiff, gave the exclusive right of ticketing between Dexter and Greenville. . . . The defendants claimed that the measure of damages was the difference between what plaintiff was to receive, which was $2.50 each for carrying the through passengers, and what it would actually or probably cost to carry each passenger, and this without reference to any other contracts or any other business. The judge ruled *pro forma* that the contract did cover the distance between Greenville and Kineo, and instructed the jury to find specially what amount of damage, if any, the plaintiff had sustained between Greenville and Kineo, if the defendants had wrongfully and without sufficient cause terminated the contract, and include it with the other damages in their general verdict." The trial court instructed the jury as to the second position: "What was the plaintiff to do? Of what was the plaintiff deprived? The plaintiff is deprived of the exclusive right of ticketing between Dexter and Greenville for the term of four years from July 1, 1873. The Plaintiff had the exclusive right to transport passengers from Dexter to Greenville at a specified rate of compensation. Now the loss the plaintiff has sustained is the profits upon the carriage of passengers between the points indicated." Referring to the situation of the plaintiff in regard to his preparation and equipment for the transaction of this business, the jury were instructed that "the plaintiff had obviously the right and the expectation of passengers from other sources, such as way-passengers, express profits, etc. Now, bearing this in mind, what are the elements of damage? The number of passengers; the price of carriage; the cost of carriage; if profits, the gains which would have been made are the losses which have been sustained. If Frye was so situated that he, in connection with other business, at little relative cost could carry passengers cheaply, — more cheaply than anybody else,— it is his good fortune, of which he is entitled to reap the benefits. The measure of damages, then, is the loss of profits which would have been made by carrying the passengers under the contract, as stipulated in the contract." . . . The jury were informed that "while the bargain itself might not be valuable to him, yet it might be of value to him in connection with his other business, situated as he was;" that upon the evidence produced, "loss upon the coaches and horses, if sold, would not be an element of damage;" nor would the loss of the plaintiff in attempting to carry on the contract after notice from the defendants that

been earned if the charter-party or other agreement to furnish loading had been performed, deducting the expenses of earning it, and also any profit which the ship or vehicle [181] earned during the period over which the charter extends.[1] A charge to the jury in such a case, which was affirmed, limited the deduction for the freight earned by the ship to the time "between the expiration of the lay-days and the time when the employment of the ship under the charter would have ended."[2] In a similar case in New York the instruction, which was affirmed, was that "the defendant should be charged with the full amount of the freight which he had agreed to pay

they had terminated it; nor the loss of the way-travel by means of the competing line to which the defendants transferred their contract. "The only loss is his being deprived of the carriage of passengers from Dexter to Greenville and back. That is all the company agreed to give him; it is all he has lost. . . . The measure of damages is just what he has lost by not being permitted to perform the contract which he made; that is, what the gains would have been after deducting the expenses. Whatever the cost was, that should be deducted from the receipts, whatever they were, and the balance is the gain; and the gain only is that to which he is entitled. He is likewise entitled to interest, not as interest, but by way of damages, from the date of the writ." In reviewing exceptions to the instructions, Barrows, J., said: "We think the defendants have no just cause to complain of the substantial overruling of the second position which they took. If by reason of its connection with other business in which he was engaged, the plaintiff could transport passengers to and from the defendants' cars without largely increasing his outlay, the legitimate profits of the contract to him were proportionately increased, and the wrongful termination of it by the defendants, which the jury have found, necessarily occcasioned to him a greater loss; and the matters to which reference was made by the presiding judge were so obvious in their nature that it cannot but be supposed that both parties entered into the contract with an eye to them as existing facts. The contract did not contemplate the exclusive devotion of the plaintiff's time and property to the transportation of the defendants' passengers, nor would there be any propriety in measuring the plaintiff's profits in the performance of the contract, and his consequent loss in being deprived of it, by the standard that the defendants claimed to set up. The nature of the contract was such that its terms would inevitably be affected by the other contracts and business to be carried on in connection with it; and the claim that damages for its breach should be estimated 'without reference to any other contracts or any other business,' cannot be sustained." Frye v. Maine Central R. Co., 67 Me. 414. See Richmond v. Dubuque, etc. R. Co., 40 Iowa, 264.

[1] Stone v. Woodruff, 28 Hun, 534; Watts v. Camors, 10 Fed. Rep. 145; Jordan v. Eaton, 2 Hask. 236; The Gazelle and Cargo, 128 U. S. 471, 487; Smith v. McGuire, 3 H. & N. 554.

[2] Smith v. McGuire, 3 H. & N. 554.

under the charter, and for the purpose of determining it the jury must find how much cargo the vessel could safely have carried. The defendant should then be credited with the amount of the schooner's earnings during the time that an average passage . . . with the lay-days would have occupied.[1] If necessary preparations have been made to receive the cargo the charterer agreed to furnish, the expense thereof may be recovered.[2] Where the ship is described in the charter-party to be of a certain tonnage the description is not a warranty, and an agreement to furnish a cargo will be construed to require the freighter to put on board the quantity of goods the ship was capable of carrying with safety.[3] The stipulation is not that the owner should receive and the freighter put on board a cargo equivalent to the tonnage described in the charter-party, but that the one should receive a full and complete cargo, not exceeding what the ship was capable of receiving with safety, and that the other should put such a cargo on board.[4] Abbott, C. J., said: "It is, indeed, quite impossible that the burden of a ship — as described in [182] the charter-party — should, in every case, be the measure of the precise number of tons which the ship is capable of carrying. That must depend upon the specific gravity of the particular goods; for a ship of given dimensions would be able to carry a larger number of tons of a given species of goods, that were of a great specific gravity, than she would of another of less specific gravity, and the freighter would therefore pay freight in proportion to the specific gravity of the goods."[5]

§ 879. **Recovery for partial breach.** The same rule applies as to the measure of damages where there is only a partial breach of the contract to furnish cargo. The controlling principle, whether the breach is total or partial, is full indemnity for all the carrier has lost through the shipper's default.[6] The

[1] Ashburner v. Balchen, 7 N. Y. 262; Dean v. Ritter, 18 Mo. 182; Bradley v. Denton, 3 Wis. 557; Heilbroner v. Hancock, 33 Tex. 714; Loud v. Campbell, 26 Mich. 239.

[2] Watts v. Camors, 10 Fed. Rep. 145; Bulkley v. United States, 19 Wall. 37.

[3] Hunter v. Fry, 2 B. & Ald. 421; Ashburner v. Balchen, 7 N. Y. 262.

[4] Hunter v. Fry, *supra*.

[5] Id.

[6] Bailey v. Damon, 3 Gray, 92; Bangor Furnace Co. v. Magill, 108 Ill. 656.

Where the contract was to furnish

mode of ascertaining the amount of damages for the breach of an executory agreement must, of course, vary in different classes of cases. If it were a contract to employ the plaintiff to build a house, and pay him an agreed price for the entire work, and the defendant prevented performance, the proper rule is the difference between the sum agreed to be paid and the sum it would have cost to perform. That rule does not meet the cases of contracts for freight as they are generally made. It does not meet the case of a vessel engaged in carrying merchandise generally for all who may apply, [**183**] and making up her cargo from various owners of goods. Such a ship must usually sail on or about a given day to fulfill her other contracts, thus having no time or opportunity to fill up a deficient cargo, and also necessarily incurring all the expenses that would have been incident to the voyage had the shipper fulfilled his particular contract to furnish a certain amount of goods. On the other hand, if the shipper's contract were to fill the entire ship with his goods at a certain freight, upon his refusal or neglect to fulfill it the carrier might abandon the whole voyage, and engage in some new adventure equally or more profitable, and thus all future expenses incident to the first voyage be saved. Here it is quite obvious the damages would be much less than in the case of a voyage that must be performed notwithstanding the failure of a single individual customer to ship goods according to his contract. So, too, if under no obligation to other shippers to sail at a given day, or if that day is remote, and the demand for transportation of goods such as to afford full opportunity to fill up the ship before that day, these circumstances would materially affect the amount required to be paid by the shipper to the carrier to indemnify him for the non-performance of the contract. It seems, therefore, proper that all the attendant circumstances be brought before the jury in each particular case to enable them to estimate the proper sum to be awarded as damages for the breach of a contract of this nature. The carrier is to receive full indemnity. He is to be made as good,

a cargo of "about one hundred and fifty tons," and only one hundred and six tons were supplied, an allowance of five tons only was made on account of the indefiniteness of the language. Parker v. Tiers, 29 Fed. Rep. 800.

in a pecuniary point of view, as if the shipper had furnished the goods according to his contract, if the carrier has not been guilty of *laches* as to substituting other freight, or adopting other available arrangements to mitigate the loss, or to avoid the expenditure incident to the proposed voyage.

§ 880. **Carrier must mitigate his loss.** But if by proper and reasonable efforts the carrier can substitute other goods in lieu of those the charterer was to furnish, he is bound to do so, and to the extent of the freight thus received this should go in reduction of the damages. Nor is the reduction necessarily confined to his receipts from goods actually substituted. The carrier may have been remiss in his attempts to fill up his ship, or have neglected to avail himself of opportunities [184] presented by other offers of goods, and if guilty of negligence in these respects, this may be a ground for a deduction from the entire sum stipulated to be paid by a shipper for freight of certain articles which were not furnished to the carrier. It may be also that the carrier was under no obligation to others to prosecute the proposed voyage, and might have abandoned it for another and more profitable employment of his ship; and in that case he ought not to pursue such voyage for the mere purpose of charging the defaulting shipper with the gross sum he stipulated to pay for transporting his goods to a distant port.[1] Upon a contract to furnish three cargoes at a foreign port, if the master pursues his voyage, but the freighter has no freight there, the master is not bound to go to another port in search of freight, but is bound to seek freight at the port designated, and obtain it if possible, and if after such endeavor he is compelled to return empty the rule of damages is the contract price.[2] So when a party contracts to load a ship to a given amount of tons, at a stipulated price per ton, and falls short in shipping the whole number, the owner or master is entitled to recover in the nature of damages freight for deficiency; but where in such case goods are offered by a third person to be shipped to an

[1] Bailey v. Damon, 3 Gray, 92; Bradley v. Denton, 3 Wis. 557; Utter v. Chapman, 38 Cal. 659; S. C., 43 id. 279; Heckscher v. McCrea, 24 Wend. 304; Harries v. Edmonds, 1 C. & K. 686; Murrell v. Whiting, 32 Ala. 54.

[2] Bradley v. Denton, *supra;* Duffie v. Hayes, 15 Johns. 327; Stone v. Woodruff, 28 Hun, 534.

amount sufficient to make up the deficiency, though at a reduced rate of compensation, but still at current prices, the owner or master is bound to receive such goods, and place to the credit of the original charterer the net earnings in respect to such substituted cargo, after making all reasonable deductions resulting from the circumstances of the case.[1] [185]

[1] Greenwell v. Ross, 34 Fed. Rep. 656; Heckscher v. McCrea, *supra*.

In Utter v. Chapman, 43 Cal. 279, the freighter made a total breach of the contract on his part, and the carrier earned during the time a performance of the contract would have occupied $341.24, but in earning this, and in a reasonable effort to earn other sums, which efforts the court had decided it was the carrier's duty to make, he incurred an expense of $777. This net loss of $435.16 he claimed as part of his damages to be added to the net profit he would have made by performing the contract. The court said: "The correct interpretation of our decision on the former appeal is that the plaintiffs are entitled to recover only the actual loss which they suffered from the breach of the contract; and if it appeared that during the space of time which would have been requisite for the performance of the contract by them they had, or by the use of reasonable diligence might have, realized a profit from the use of the boat or barge equal to or exceeding the profit which they would have made by performing the contract, in that event they would have suffered no loss, and would have been entitled to nominal damages only. The burden of proof was on the defendant to show that the boat and barge had or might have realized a profit. And if the net earnings did not equal or exceed the profit which the plaintiff would have made by performing the contract, then such net earnings would reduce, *pro tanto*, the amount of the plaintiffs' loss. But we did not decide nor intend to intimate that the defendant stood in the relation of a guarantor, incurring the hazard of whatever loss the plaintiff might sustain by reason of a fruitless effort to obtain a profitable employment for the boat and barge. It was incumbent on the defendant to show, if he could, that a profit had been or might have been realized by the boat and barge; and, failing in this, the only result would have been that the plaintiffs would have recovered the difference between the contract price and the cost of performing the contract. But if a person should charter a ship for a number of months, or for a long voyage, and should immediately thereafter repudiate the contract, and refuse to perform it, no one, I apprehend, would seriously contend that the owner could send the vessel on a long and expensive voyage in a fruitless effort to obtain profitable employment for her during the term of the charter-party without the consent of the charterer, and thereby fasten upon the latter the whole expense of the voyage. In such case the proper measure of damages would be the difference between the contract price and the cost which the owner would have incurred if the contract had been performed, subject only to such reduction as the charterer would have been entitled to on his proving affirmatively that the ship had, or might by a reasonable effort have,

The carrier is not bound to anticipate a failure on the part of the shipper to furnish full cargo, and accept in advance an offer of other goods; but after a breach of his contract it is the duty of the carrier to accept the offer of the goods the shipper had contracted to furnish, though at a reduced freight, to save the latter from damages to that extent.[1]

§ 881. **Shipper's rights in profits made by carrier.** It was covenanted in a charter-party providing for an outward and return cargo at a given freight per ton on a voyage from [186] London to St. Petersburg that if political or other circumstances should prevent the shipping of a return cargo or discharging the outward cargo after waiting a specified time, the master should be at liberty to return, and the freighters should at once pay him 2,500*l*. The freighters procured a policy of insurance by which the underwriters agreed to pay a total loss in case the ship was not allowed to load a cargo at St. Petersburg on the chartered voyage. The contingency of not being permitted to unload, and consequently of reloading, happened; thereupon, the master, judging for the best, instead of returning immediately to London, proceeded to Stockholm, where, after disposing of the outward cargo to disadvantage, he brought home a Swedish cargo and earned freight thereon. In an action by the freighters on the policy of insurance it was held that, as they would be entitled to deduct from the sum payable to the master for dead freight the amount of the freight received by him on the return cargo from Stockholm, though such intermediate voyage was not originally contemplated by the contracting parties, but was undertaken upon the emergency, therefore the underwriters were entitled to make the same deduction from the total loss stipulated for by the policy, every contract of insurance being in its nature a contract of indemnity.[2] In a subsequent case under a similar charter, the master returned direct, bringing back the outward cargo, but took in other goods as freight, and the court held that he was entitled to receive the gross sum stipulated, and also to retain the freight earned. Lord Mansfield said: "Since the homeward cargo could not be obtained, the defendants were, I suppose, to have their load

earned a profit during the term of the charter-party."

[1] Greenwell v. Ross, 34 Fed. Rep. 656; Harries v. Edmonds, 1 C. & K. 686.

[2] Puller v. Stainforth, 11 East, 232.

brought back, though it is not so expressed; and it may be conjectured that the reason why the deed is so inaccurately drawn was that the parties inferred that if the load should not be unloaded it would come back to London on the same terms on which the ship would return empty in case there was no return cargo; but that is inconsistent with the other clause which makes the dead freight payable on the ship's arrival at any port in England; for certainly the charter-party imposes on the plaintiff no obligations to bring back the load to London. This makes a very extraordinary [187] case; and none of the cases mentioned by Mr. Abbott, or elsewhere, apply to afford a rule for the present case. Because, even supposing that the captain is bound by his covenant to bring back the load for the 2,700*l.*, it is nothing more than a contract to bring back a certain quantity of goods, not according to a rate of freight proportioned to any certain bulk or weight, but merely as a wagoner might agree for a gross sum to carry goods in his own wagon from London to Exeter, or elsewhere. Now considering this as a mere contract to bring certain goods to England, I see no reason why the captain may not earn what else he can by taking other goods on board for his own benefit. In common cases of charter-parties there usually is a covenant that the freighter will supply a certain quantity of homeward freight at the freight port, and if he does not, the plaintiff has his action on the covenant against him. But suppose, instead of leaving the damages open, he stipulates, if I cannot provide a cargo for you I will pay you so much; would not the owner in that case have a right to take goods on board for his own account. His ship is at full liberty for him to make any other profit of, and in such a case he doubtless would insist on more or less liquidated damages, according to the chance he foresaw of getting freight home from the place where he was going; and in such a case I see no reason why the person who had stipulated to pay such liquidated damages should be discharged from any part thereof on account of the profit which the plaintiff might make by the cargo supplied by any other person. I was at first much staggered by the case in the court of king's bench, which is very similar;[1] but there the captain

[1] Puller v. Stainforth, *supra*.

did not bring home the load, but instead thereof went to Stockholm, and there sold the load and got other goods and brought them home. . . . This strong difference subsists between the two cases: there the load was the property of . . . (the freighter), but the load was not brought back; it was sold at Stockholm; and for aught that appears the means which the captain had of obtaining any freight at Stockholm might arise from the use he made of the load [188] there; and on that account, perhaps, the court of king's bench might think that the captain, who had not been authorized or directed to act thus, but had done all this for his own benefit, should not be entitled to that profit, leaving the underwriters to pay the whole 2,500*l*. But in this case, on the best consideration, we think that the defendants are not entitled to deduct from the 2,700*l*. the profit which the captain made."[1]

§ 882. **Burden of proof.** The burden of proof as to the carrier having obtained or having it in his power to obtain other cargo or employment for his ship or other vehicle is on the defaulting freighter.[2]

§ 883. **Damages for breach of charter to load with enumerated articles.** In an action for not supplying a cargo under a charter-party, according to the terms of which different articles of freight are to be paid for at various rates by weight, and the freighter is at liberty to supply what articles he pleases, the average value of freight, calculated upon the various rates of freight in the proportions of the articles usually carried on such a voyage, is the proper measure of damage.[3] If the freighter under a charter-party loads the vessel with commodities wholly or in great part different from those enumerated in the charter-party, he will be liable to damages as though he had performed the contract in the way most favorable to himself and least favorable to the ship-owners;[4] that is, at the lowest amount of freight to which they would have been entitled for a full cargo of enumerated articles taken in the proportions provided by the charter-party.[5]

[1] Bell v. Puller, 2 Taunt. 285. See Stainforth v. Lyall, 7 Bing. 169.

[2] Utter v. Chapman, 43 Cal. 279; Murrell v. Whiting, 32 Ala. 54; Dean v. Ritter, 18 Mo. 182.

[3] Thomas v. Clarke, 3 Stark. 450.

[4] Capper v. Forster, 3 Bing. N. C. 938.

[5] Cockburn v. Alexander, 6 C. B. 791, per Williams, J. Maule, J., said:

§ 884. Carrier's actions for freight charges. Serv- [189] ice may be performed in the transportation of goods on request without any express or tacit agreement fixing the rate of freight. It is then a *quantum meruit* demand,[1] to be ascertained by usage and the reason of the case.[2] Such transactions, however, are rare, and comparatively unimportant. Since the adoption of modern improved methods of transportation the business has assumed large proportions, and been minutely systematized; fixed and detailed rates of through and local freight are generally scheduled and published. Even in the absence of an actual contract the circumstances afford evidence of an implied agreement for specific freights conformable to the published rates of the carrier. Sometimes questions arise in respect to them when there are discriminations inimical to the public interest or in conflict with statutory

"Suppose there were goods, which the charterer might have put on board if he had chosen to do so, and did not,— it may be that he had the option of shipping any one of the enumerated articles; there may have been goods at the port of loading which he might have shipped, but none of the enumerated goods; there may have been goods the loading of which would have been the most profitable to the owner, and the most onerous to the charterer, or the converse may have been the case. Again, suppose there were no goods at all at the place ready for shipment, that would present a totally different state of things; there the non-shipment of a cargo would result from the charterer's inability to ship a cargo. If you could show that there were goods which the charterer might have obtained, then the proper measure of damages would be the non-shipment of that cargo. But, if there were none, it may be that, in ascertaining the damages, an average is to be taken of all possible kinds of goods. It is in that way, I think, that Lord Tenterden arrived at the opinion he expressed in Thomas v. Clarke, viz.: that where there is no cargo at all to be had, the average is to be taken of all possible kinds of cargo; that is, that you are to assume, contrary to the fact, that there are goods of each of the kinds enumerated,— because the obtaining of goods of any one kind, where none are in truth obtained, cannot *a priori* be considered as more probable than the obtaining of any of the others; and taking an average, and assuming that to be the way in which the contract, if performed at all, would probably have been performed, you are to make that the basis of the calculation of freight."

[1] Louisville, etc. R. Co. v. Wilson, 119 Ind. 352; London, etc. Ry. Co. v. Evershed, L. R. 3 App. Cas. 1029; Bastard v. Bastard, 2 Show. 81; Simmes v. Marine Ins. Co., 2 Cranch C. C. 618; Hollister v. Nowlen, 19 Wend. 238; Citizens' Bank v. Nantucket, etc. Co., 2 Story, 35.

[2] 3 Kent's Com. 202, 219; Harris v. Packwood, 3 Taunt. 264; Wallace v. Matthews, 39 Ga. 617; Holford v. Adams, 2 Duer, 471.

regulations. On common-law principles a reasonable compensation may be charged and recovered. The commonness of the duty of a carrier to carry for all, it has been held, does not necessitate a uniform rate of compensation. The tariff of rates, or what is charged to one party, is but matter of evidence to determine whether a particular charge to another is reasonable.[1] If freight has been carried for many years at the schedule price, the shipper not objecting thereto, he cannot recover any money paid, although evidence is given which shows that the price was in excess of a reasonable compensation.[2] But if compensation in excess of the agreed rate is extorted the excess may be recovered,[3] and so if the amount collected is greater than is allowed by law,[4] though the statute fixing the rate has been repealed.[5] A payment made to secure transportation is not made voluntarily so that the payee cannot recover the portion which the payee had no right to exact. A carrier cannot increase its freight charges by wrongfully sending the property shipped by an indirect way, instead of over its direct lines.[6] The *bona fide* indorsee of a bill of lading is liable for freight only according to its terms; he is not affected by the stipulations in a charter-party of which he has no knowledge or notice.[7] If the freight rate agreed upon is

[1] Johnson v. Pensacola, etc. R. Co., 16 Fla. 623; Gaston v. Bristol & E. Ry. Co., 1 B. & S. 112, 154; Baxendale v. Eastern, etc. Ry. Co., 4 C. B. (N. S.) 63; Cleveland, etc. Ry. Co. v. Closser, 126 Ind. 348.

[2] Killmer v. New York, etc. R. Co., 100 N. Y. 395.

[3] Atchison, etc. R. Co. v. Miller, 16 Neb. 661.

It makes no difference whether the shipper has paid the increase of freight or has been obliged to lower the price of the commodity he ships and sells to meet the rate made to another shipper; he may recover in either case. Lake Shore, etc. Ry. Co. v. Scofield, 2 Ohio Ct. Ct. 305.

[4] West Virginia T. Co. v. Sweetzer, 25 W. Va. 434; Peters v. Railroad Co., 42 Ohio St. 275; Heiserman v. Burlington, etc. Ry. Co., 63 Iowa, 732; Osborne v. Chicago, etc. Ry. Co., 48 Fed. Rep. 49.

A railroad company which charges greater compensation for a shorter than for a longer haul, contrary to section 4 of the interstate commerce act, is liable for the excess in the rate charged for the former over that of the latter, multiplied by the number of hundred pounds shipped. The company which makes the overcharge is liable for the whole damages. The jury may allow interest on the amount of the overcharge. Osborne v. Chicago & N. Ry. Co., 48 Fed. Rep. 49.

[5] Graham v. Chicago, etc. Ry. Co., 53 Wis. 473.

[6] Burlington, etc. R. Co. v. Chicago Lumber Co., 15 Neb. 390.

[7] The Querini Stamphalia, 19 Fed. Rep. 123.

based upon delivery during the pending season of navigation, the amount which may be collected on delivery made during the following season, although the delay was unavoidable, may, it seems, be scaled.[1] In a later case the court did not find it necessary to hold in accordance with the foregoing proposition because the delay in delivery was the result of the master's bad faith. The recovery was limited to the highest rate paid when delivery was made, instead of the extra rate agreed upon.[2] According to the weight of authority, a carrier who receives goods in the usual course of business from a connecting carrier without knowledge that the latter was instructed by the consignor to deliver them to another carrier may recover its reasonable charges for forwarding them to a point on its line.[3] If a car is hired for a specified class of goods at a price fixed with reference thereto and the shipper loads goods of another class which are chargeable for at a higher rate, he must pay such rate.[4]

§ 885. Freight charges as affected by value of property. It is settled that when the carrier has not given notice that he would not be answerable beyond a specified sum, unless informed of the value, or has made a special acceptance, it is not the duty of the shipper to state the quality or value of the property offered for shipment.[5] It is the duty of the carrier to make inquiry if he wishes to have a reward proportionate to the value, or to know whether the goods are of that quality for which he has a sufficiently secure conveyance.[6] If inquiry is made the shipper must answer truly at his peril; and if it is not made, and the parcel is received at such price for transportation as is asked with reference to its bulk, weight or external appearance, the carrier is responsible for its loss whatever may be its value.[7] If a car-

[1] Wilcox v. Five Hundred Tons of Coal, 14 Fed. Rep. 49.

[2] Holland v. Seven Hundred, etc. Tons of Coal, 36 Fed. Rep. 784.

[3] Price v. Denver, etc. Ry. Co., 12 Colo. 402; Patten v. Union P. Ry. Co., 29 Fed. Rep. 590; Whitney v. Beckford, 105 Mass. 271. *Contra*, Fitch v. Newberry, 1 Doug. (Mich.) 1.

[4] Smith v. Findley, 34 Kan. 316.

[5] Batson v. Donovan, 4 B. & Ald. 29; Magnin v. Dinsmore, 62 N. Y. 35; Levois v. Gale, 17 La. Ann. 302; Story on Bailm., § 567.

[6] Id.

[7] Orange Co. Bank v. Brown, 9 Wend. 85; Walker v. Jackson, 10 M. & W. 168; Phillips v. Earle, 8 Pick. 182; Relf v. Rapp, 3 W. & S. 21; Little v. Boston, etc. R. Co., 66 Me. 239; Hollister v. Nowlen, 19 Wend. 234.

rier has, without inquiry, unwittingly received a package of great value and charged a disproportionately low freight, and on payment of it undertakes to transport it, he cannot on discovering its true value exact additional payment, where no fraud has been practiced to conceal its real value.[1] But he may protect himself against unknown responsibility by a stipulation in the bill of lading to the effect that the additional freight shall be paid on the total value of the property shipped, if its real value shall prove to be in excess of that stipulated.[2] In such a case a consignee who has notice of the actual value of the property, and pays the freight due, though he is only a factor, is liable for any balance unpaid.[3]

§ 886. Discriminations unlawful when conditions same. [190] The duty to serve alike all who apply for the carriage of goods is founded in the consideration that the calling is a public employment, as the right to accept or reject an offer of business is necessarily incident to all private traffic.[4] "Recognizing this as the settled doctrine," says Beasley, C. J., "I am not able to see how it can be admissible for a common carrier to demand a different hire from various persons for the identical kind of service, under identical conditions. Such partiality is legitimate in private business, but how can it square with the obligations of a public employment? A person having a public duty to discharge is undoubtedly bound to exercise such office for the equal benefit of all; and therefore to permit the common carrier to charge various prices, according to the person with whom he deals, for the same services, is to forget that he owes a duty to the community. . . . The law that forbids him to make any discrimination in favor of the goods of A. over the goods of B. when the goods of both are tendered for carriage must, it seems to me, necessarily forbid any discrimination with respect to the rate of pay for the carriage. I can see no reason why, under legal rules, perfect equality to all persons should be exacted in the dealings of the common carrier, except with regard to the

[1] Baldwin v. Liverpool, etc. Co., 74 N. Y. 125. See Magnin v. Dinsmore, 62 N. Y. 35.

[2] North-German Lloyd v. Heule, 44 Fed. Rep. 100.

[3] Id.

[4] Messenger v. Pennsylvania R. Co., 36 N. J. L. 407, 410.

amount of compensation for his services. The rule that the carrier shall receive all the goods tendered loses half its value as a politic regulation if the cost of transportation can be graduated by special agreement so as to favor one party at the expense of others. Nor would this defect in the law, if it existed, be remedied by the principle which compels the carrier to take a reasonable hire for his labor, because, if the rate charged by him to one person might be deemed reasonable, by charging a lesser price to another for similar services he disturbs that equality of rights among his employers which it is the endeavor of the law to effect. Indeed, when a charge is made to one person, and a lesser charge for precisely the same offices to another, I think it should be held that the higher charge is not reasonable."[1] In the case in which this opinion was given it was held that an agreement by a [**191**] railroad company to carry for certain persons at a cheaper rate than under the same conditions for others is void for creating an illegal preference.[2] The commonness of the right necessarily implies an equality of right in the sense of freedom from unreasonable discrimination; and statutes which require of carrying corporations equality in terms, facilities and accommodations are held to be declaratory of the common law.[3] A carrier may make a valid contract for conveying property at less than his usual rate and for less than a reasonable compensation.

§ 887. When freight due and earned. No freight [**192**] is due before the commencement of the voyage or transportation, although the goods may have been put in possession of the carrier and placed on board of his vessel;[4] but if the shipper retakes his goods after their delivery and acceptance for carriage, the carrier is entitled to compensation for any expense

[1] Messenger v. Pennsylvania R. Co., 36 N. J. L. 407.

[2] Sandford v. Catawissa, etc. R. Co., 24 Pa. St. 378; Palmer v. Grand Junction Ry., 4 M. & W. 749; Parker v. Great Western Ry. Co., 7 M. & G. 253; New England Exp. Co. v. Maine C. R. Co., 57 Me. 188; Chicago, etc. R. Co. v. Parks, 18 Ill. 460.

[3] Sandford v. Catawissa, etc. R. Co., 24 Pa. St. 378; New England Exp. Co. v. Maine C. R. Co., 57 Me. 188; McDuffee v. Portland R. Co., 52 N. H. 430.

[4] Bailey v. Damon, 3 Gray, 92–94; Curling v. Long, 1 Bos. & Pul. 634; Clemson v. Davidson, 5 Bin. 392, 401; Burgess v. Gun, 3 Har. & J. 225; 3 Kent's Com. 223. But see 2 Par. on Cont. 287; Bartlett v. Carnley, 6 Duer, 194.

or trouble he has been put to as well as damages for the breach of contract to furnish them for transportation.[1] A carrier may require prepayment of freight; but if he does not and receives goods, he cannot maintain an action for their carriage until they are delivered at their destination.[2] Freight is not earned until delivery, or what is equivalent thereto, to the consignee or owner at the place of destination,[3] unless it is prevented by the act or default of the shipper.[4] If it becomes impossible to deliver for a cause not attributable to the fault of either shipper or carrier, no freight can be demanded.[5] If the crew abandon a ship because of the perils of the sea, without intending to resume possession of her, and she is afterwards saved through the efforts of the crew of another vessel and brought into port, the cargo owners are not liable to the abandoned vessel for freight.[6] Where some portion of a perishable cargo has been lost by decay, without the fault of the master, and was for that reason left behind on the voyage, the ship-owners are entitled to recover freight on the residue [193] duly transported and delivered,[7] but no freight is payable in respect to the part not carried.[8] So if molasses or liquids have wasted in bulk during the voyage, or live animals die, no freight on the part not delivered is earned.[9] So if a

[1] Id.

[2] Barnes v. Marshall, 18 Q. B. 785.

If common carriers undertake to carry goods without having been previously paid, the law presumes that they consider the possession of the goods as a sufficient security for their expected remuneration; and in conformity with this presumption, it authorizes them to retain their possession at the end of the transit, until they have received satisfaction for their labor, etc.; and this is the foundation of a *lien*. Ang. on Car., § 356.

[3] Lorillard v. Palmer, 15 Johns. 12; Brown v. Ralston, 4 Rand. 504; Price v. Hartshorn, 44 Barb. 655; Clendaniel v. Tuckerman, 17 Barb. 184; Stevens v. Sayward, 8 Gray, 215; Harris v. Rand, 4 N. H. 555; S. C., id. 261; Adams v. Haught, 14 Tex. 243; The Ship Hooper, 3 Sumn. 542; Brittain v. Barnaby, 21 How. (U. S.) 527; The Ann D. Richardson, 1 Abb. Adm. 499; East Tennessee, etc. R. Co. v. Hunt, 15 Lea, 261; Duthie v. Hilton, L. R. 4 C. P. 138.

[4] Id.

[5] Thibault v. Russell, 5 Harr. (Del.) 293; Halwerson v. Cole, 1 Spear, 321; Crawford v. Williams, 1 Sneed. 205; Withers v. Macon, etc. R. Co., 35 Ga. 273; McKibbin v. Peck, 39 N. Y. 262, 270.

[6] The Cito, 7 Prob. Div. 5.

[7] The Brigg Collenberg, 1 Black, 170.

[8] Dakin v. Oxley, 15 C. B. (N. S.) 665, per Willes, J.

[9] Frith v. Barker, 2 Johns. 327; The Cuba, 3 Ware, 260; Duthie v. Hilton,

voyage be broken up by an interdiction of commerce with the port of destination, after its commencement, no freight is payable.[1] But where the cargo is taken at a lump freight, the whole may be recovered on right delivery of part, if the other part be lost without the carrier's fault.[2] Freight has been well defined to be the price payable for the carriage of goods from the port of loading to their port of discharge.[3] If the cargo increases in bulk on the voyage, as by the birth of infants,[4] or the swelling of grain by heating, freight is payable only on the quantity shipped rather than on that delivered.[5] And if the property is delivered in specie, although in a damaged condition, and even if worthless, whether the damage be accidental or by the carrier's fault, freight is earned, subject in the latter case, in this country, to the right of recoupment for such damage.[6] But in the case of an actual loss or destruction by sea damage of so much of the cargo that no substantial part of it remains, as if sugar mats shipped as

L. R. 4 C. P. 138; Nelson v. Stephenson, 5 Duer, 538; Ang. on Carr., § 211; Gibson v. Brown, 44 Fed. Rep. 98.

"If the deterioration proceeds from an intrinsic principle of decay naturally inherent in the commodity itself, whether active in every situation, or only in the confinement and closeness of the hold of a ship, the merchant must bear the loss and pay the freight." Maclachlan on Ship. (3d ed.) 470; Seaman v. Adler, 37 Fed. Rep. 268.

[1] The Saratoga, 2 Gall. 164; Liddard v. Lopes, 10 East, 526.

[2] Merchants' Shipping Co. v. Armitage, L. R. 9 Q. B. 99; Galt v. Archer, 7 Gratt. 307; Leckie v. Sears, 109 Mass. 424.

But payment of a lump sum as freight will not be compelled unless the intent of the parties to that effect has been expressed in clear language in the bill of lading or charter-party. Gibson v. Brown, 44 Fed. Rep. 98.

[3] Gibson v. Sturge, 10 Exch. 637.

[4] Malley, Bk. 2, ch. 4, § 8.

[5] Gibson v. Sturge, 10 Exch. 637.

This rule has been applied where cargoes of cotton in tightly compressed bales have expanded during the voyage or upon being removed from the ship's hold. Shand v. Grant, 15 C. B. (N. S.) 324; Buckle v. Knoop, L. R. 2 Exch. 125, 333; Coulthurst v. Sweet, L. R. 1 C. P. 649. And when the freight was to be computed according to the weight of the property carried (Nine Thousand, etc. Dry Hides, 6 Bene. 199); or according to the number of bushels. Allen v. Bates, 1 Hilt. 221; Hutchinson's Carr. (2d ed.), §§ 453, 454.

[6] McGaw v. Ocean Ins. Co., 23 Pick. 405; Lord v. Neptune Ins. Co., 10 Gray, 109; Hugg v. Augusta Ins. & B. Co., 7 How. 595; Ogden v. General Ins. Co., 2 Duer, 204; Stedman v. Taylor, 3 Ware, 52; Nelson v. Woodruff, 1 Black, 156; Nelson v. Stephenson, 5 Duer, 538; Griswold v. New York Ins. Co., 1 Johns. 205; S. C., 3 id. 321. See *post*, § 896.

sugar and on freight to be paid at so much per ton are washed away so that only a few ounces remain, and the mats are worthless; or a valuable picture has arrived as a piece of spoilt canvass, cloth in rags, or crockery in broken sherds, it may be questioned that any freight would be due. In such instances the proper course seems to be to ascertain from the terms of the contract, construed by mercantile usage, if any, what was [194] the thing for the carriage of which freight was to be paid, and by the aid of a jury to determine whether that thing, or any and how much of it, has substantially arrived.[1]

§ 888. **Same subject.** After the transportation commences under a contract for a specified freight if the shipper prevents delivery at the place of destination, he is nevertheless liable for full freight on receiving the goods at an intermediate point.[2] When goods are shipped and the voyage commenced the right of the ship-owner to full freight has attached; and in case of accident and detention, either by putting back to the port of departure or by stopping at an intermediate one, more or less distant from the port of destination, the shipper has no right, without the consent of the ship-owner, to demand and obtain the goods without paying full freight, in case the ship-owner or the master in his behalf can either refit his own ship within a reasonable time, and proceeds to do so, or within a like time will transport the goods in another vessel.[3] If the master without sufficient cause refuses to

[1] Dakin v. Oxley, 15 C. B. (N. S.) 665.

[2] Braithwaite v. Power, 1 N. D. 455; Palmer v. Lorillard, 16 Johns. 347; Ellis v. Willard, 9 N. Y. 529; Jordan v. Warren Ins. Co., 1 Story, 342; Nelson v. Stephenson, 5 Duer, 538; Merchants,' etc. Ins. Co. v. Butler, 20 Md. 41; Violett v. Stettinius, 5 Cranch C. C. 559; Bradhurst v. Columbian Ins. Co., 9 Johns. 17; Bradstreet v. Baldwin, 11 Mass. 229; Murray v. Ætna Ins. Co., 4 Biss. 417.

A railroad company having no interest in a contract for through transportation made between other parties cannot prevent the consignee from stopping the goods before reaching their line or road; and if they carry them over their line in spite of the consignee's objection they have no right to collect any freight or expenses. Withers v. Macon & W. R. Co., 35 Ga. 273.

[3] McGaw v. Ocean Ins. Co., 23 Pick. 405.

In Hadley v. Clarke, 8 T. R. 259, the defendants contracted to carry the plaintiff's goods from Liverpool to Leghorn. On the vessel arriving at Falmouth, in the course of her voyage, an embargo was laid on her until further orders of the council; it was held that such embargo suspended but did not dissolve the contract, and that even after two years

repair his ship at the intermediate port, and to send on the goods or to procure another vessel for that purpose, he cannot recover freight.[1] In Bork v. Norton,[2] an action for [195] freight, it appeared that the defendant shipped on the plaintiff's vessel at Buffalo merchandise consigned to Chicago. The vessel left C. in October, and having reached Detroit was prevented by ice from proceeding farther until navigation opened in the spring following. On reaching D. the cargo, being somewhat injured, was unladen. During the winter the defendant had the greater part of his goods conveyed to C. by land at a heavy expense. So soon as navigation opened in the spring, the vessel, with that part of the cargo which remained at D., sailed for C., and delivery was there made some time in March. The question was whether the plaintiff was entitled to full freight. The court say: "It may well be matter of doubt whether all the principles of maritime contracts of this nature can apply to the navigation of our lakes and rivers. The facts of this case may test this principle. The defendant is a merchant, and the cargo in question consisted of merchandise. It was important that his goods should be conveyed to C. expeditiously, as the fall and winter sales were of the utmost importance to him. This was known to the master of the vessel. Under such circumstances, was it incumbent on the defendant to wait some four or five months, until the navigation of the upper lakes opened, for the deliv-

when the embargo was taken off, the defendants were answerable to the plaintiff in damages for its non-performance.

[1] Welch v. Hicks, 6 Cow. 504.

In Palmer v. Lorillard, 16 Johns. 348, the bill of lading was for transportation from Richmond to New York. The jury found that the vessel, in the beginning of February, proceeded from Richmond in the prosecution of the voyage, and came to Hampton Roads, but finding the Chesapeake blockaded by a hostile squadron, and that it would be impossible to put to sea without being captured, went into Norfolk, and finally returned to Richmond; that in September following the plaintiffs demanded their goods in order to transport them to New York by land, but the master refused to deliver them unless he was paid half freight. The court held that the contract of affreightment was not discharged by the blockade, and the carriers had a right to retain the goods until they could prosecute the voyage, unless the shipper tendered them the whole freight to which they would have been entitled on its completion.

[2] 2 McLean, 422.

ery of his goods? The vessel arrived at C. some time in March. This would have been very injurious to the defendant, and, indeed, might have been ruinous to him. Such a delay was not within the contemplation of the parties, nor any reasonable construction which can be given to the con- [196] tract. . . . A distinction, it seems to me, may well be drawn between a contract for the transportation of goods upon the high seas and over lakes of but limited extent. In the former case the risks are numerous, and, being well understood, may, to some extent at least, be protected by an insurance. In the latter, if the risks are of the same nature, they are more limited. But the main difference is that transportation by sea is the only means of conveyance in the one case, while in the other, if obstructions on the water occur by ice or otherwise, a land transportation may be adopted; and the contract is made in reference to this fact. It must be an extraordinary case, indeed, where there is an obstruction of the navigation of the lakes by ice for four months that the owner of the goods should be bound to wait this period for their delivery."[1]

§ 889. **When shipper not liable for freight.** Various circumstances will entitle the shipper to demand and take possession of the goods at a place short of the port or place of destination without subjecting him to the payment of full or *pro rata* freight. He may do so, for example, when the carrier refuses or is unable to carry them further;[2] when necessary to save the property from destruction, or when it has been wrongfully disposed of by the carrier.[3] If a ship be disabled from completing her voyage, the ship-owner may still entitle himself to the whole freight by forwarding the goods by some other means to the port of destination; but he has no right to any freight if they be not so forwarded, unless the forwarding be dispensed with, or there be some new bargain. If the ship-owner will not forward them, the freighter is entitled to them without paying anything. One party, therefore, if he forward them, or be prevented or discharged

[1] See Wilcox v. Five Hundred Tons of Coal, 14 Fed. Rep. 49; Holland v. Seven Hundred, etc. Tons of Coal, 36 id. 784; *ante*, § 884.

[2] Portland Bank v. Stubbs, 6 Mass. 422; Welch v. Hicks, 6 Cow. 504.

[3] Western T. Co. v. Hoyt, 69 N. Y. 236; Hunter v. Prinsep, 10 East, 378.

from so doing, is entitled to his whole freight; and the other, if there be a refusal to forward, is entitled to have them without paying any freight at all. The general property in the goods is in the freighter; the ship-owner has no right to withhold the possession from him unless he has earned his freight or is going on to earn it.[1]

§ 890. When pro rata freight due. The principle [197] that an entire contract cannot be apportioned, and that full performance of conditions precedent is necessary to a right of action thereon, applies to contracts of affreightment as well as to others.[2] And so does the principle that if the party entitled to full performance waives it and voluntarily accepts the benefit of partial performance, a promise will be implied to make compensation *pro tanto*. Therefore, where the owner voluntarily accepts the goods before the transportation is completed, and in fact discharges the carrier from further transportation without being compelled thereto by any wrong done by or default or inability of the carrier, a contract to pay freight *pro rata* will be implied.[3] To justify a claim for *pro rata* freight there must be a voluntary acceptance of the goods at an intermediate place in such mode as to raise a fair inference that their further carriage is intentionally dispensed with;[4] mere acceptance at a place short of the destination without regard to other circumstances is not a decisive fact.[5]

[1] Hunter v. Prinsep, 10 East, 378.

[2] Western T. Co. v. Hoyt, 69 N. Y. 236.

[3] Id.; Harris v. Rand, 4 N. H. 261; Rand v. Harris, id. 555; Liddard v. Lopes, 10 East, 526; Cook v. Jennings, 7 T. R. 381; Shields v. Davis, 6 Taunt. 65; Mulloy v. Backer, 5 East, 316; Christy v. Row, 1 Taunt. 300; Vlierboom v. Chapman, 13 M. & W. 239; Luke v. Lyde, 2 Burr. 882; Post v. Robertson, 1 Johns. 24; Scott v. Libby, 2 id. 336; Parsons v. Hardy, 14 Wend. 215; Welch v. Hicks, 6 Cow. 504; Griswold v. New York Ins. Co., 1 Johns. 205; 3 id. 321; Hunt v. Haskell, 24 Me. 339; Crawford v. Williams, 1 Sneed, 205; Rossiter v. Chester, 1 Doug. (Mich.) 154; Law v. Davy, 2 S. & R. 553; Gray v. Waln, id. 229; Caze v. Baltimore Ins. Co., 7 Cranch, 358; Herbert v. Hallett, 3 Johns. Cas. 93; Whitney v. New York Ins. Co., 18 Johns. 208; McGaw v. Ocean Ins. Co., 23 Pick. 405; Hove v. Mason, 1 Wash. (Va.) 264; The Mohawk, 8 Wall. 153; Whitney v. Rogers, 2 Disney (O.). 421.

[4] Vlierboom v. Chapman, 13 M. & W. 238.

[5] See Hurtin v. Union Ins. Co., 1 Wash. C. C. 530; Marine Ins. Co. v. United Ins. Co., 9 Johns. 186; Penoyer v. Hallett, 15 id. 332; Bradhurst v. Columbian Ins. Co., 9 id. 17; Armroyd v. Union Ins. Co., 3 Bin. 445; Escopiniche v. Stewart, 2 Conn. 391;

The ground on which the right to receive *pro rata* freight rests is that the owner who receives the goods at an inter- [198] mediate port has the benefit of their transportation to that place; this benefit is the foundation of an implied promise.[1] The original contract is not executed, and the stipulated freight is not earned; but by the consent of both parties the original contract is relinquished, and then from the beneficial service performed by the one party for the other the law raises a promise, upon equitable considerations, to pay a part of the stipulated freight in the proportion that the service actually done bears to that undertaken to be done.[2] In case the vessel puts back to the port of departure, freights remaining as high as when the shipment was made; or if the detention be at a place from which to the port of destination freights are as high as the freight stipulated to be paid, then no benefit has been conferred on the shipper, no equitable obligation arises to pay freight *pro rata itineris;* and if the shipper consents to take back his goods, and the ship-owner to surrender them, no freight is earned.[3] A mere agreement to accept goods at an intermediate port is not, for the purpose of *pro rata* freight, tantamount to an actual acceptance. To raise an implied promise to pay such freight the goods must be actually delivered and received. Until this is done the owner cannot be considered as having received any benefit from the transportation.[4]

§ **891. Same subject; transshipment of freight.** If the vessel under charter is lost after the commencement of the voyage by one of the causes excepted in the charter, the master is required, in respect to the cargo, to do the best he can for all concerned. It is his duty to the ship-owner, if freight can be saved, to send on the goods by another vessel if it is practicable to do so; but where the cost of transshipment admits of no such saving he seems to have no authority as agent of the ship-owner to hire another vessel to forward them, but in such an emergency he owes a duty to the owner of the cargo to forward or otherwise dispose of it according to his

Brown v. Ralston, 4 Rand. 504; Christy v. Row, 1 Taunt. 300.

[1] Harris v. Rand, 4 N. H. 261.

[2] McGaw v. Ocean Ins. Co., 23 Pick. 411.

[3] Id.

[4] Harris v. Rand, 4 N. H. 261.

interest, and the master may reasonably forward at an enhanced freight where the interest of the freighter will [199] justify it. Where the goods are transshipped by the master in the performance of this duty the increased freight for such transshipment is chargeable on the cargo and to the freighter.[1] And to ascertain the extra freight, the proper rule has been held to be to determine what would be the difference between the amount of freight under the original charter-party for the portion of the goods delivered at the port of destination and the amount of a ratable freight to the port of necessity for the goods saved, added to the freight of the new ship.[2] This appears to be the rule where the freight is adjusted on the assumption that the master at the port of necessity was entitled to freight *pro rata itineris* on the goods being sent forward in the interest of the shipper. But where the delivery at the port of destination is a necessary condition the authority of the master to transship as agent of the ship-owner depends on whether there can be any saving of freight. If the master must pay for the freight onwards more than the freight the owners are to receive for the whole voyage he no longer acts, or has authority to act, as their agent, because they have no interest in the transshipment, but as the agent of the shippers whose goods he forwards.[3] If he transship the goods in case of necessity at less than the original freight, the shipper will derive no advantage from it, but on their right delivery at the destination he will be liable for the stipulated freight.[4]

§ 892. Right to freight where cargo insured. The carrier cannot recover freight for goods lost merely because the owner insured them and collected insurance on their value at the place of delivery.[5] But where the loss in such case is not such as to absolve the carrier from the duty of making effort for the preservation of the property nor so imminent as to

[1] Searle v. Scovell, 4 Johns. Ch. 218; 2 Par. on Con. 298.

[2] Id.

[3] 2 Par. on Con. 298; Crawford v. Williams, 1 Sneed, 295; Thwing v. Washington Ins. Co., 10 Gray, 443. The cases of Lemont v. Lord, 52 Me. 365, and Gibbs v. Grey, 2 H. & N. 22, discuss the principles which limit the powers of the master: the former, as agent of the ship-owner, and the other, as agent of the owner of the cargo. See Coffin v. Storer, 5 Mass. 251; Featherston v. Wilkinson, L. R. 8 Exch. 122.

[4] Shipton v. Thornton, 9 Ad. & El. 314.

[5] McKibbin v. Peck, 39 N. Y. 262.

[200] preclude all hope of such preservation so as to continue the transportation, and the earning of the stipulated freight, and the owner interrupts such efforts by settling with the insurance company as for a total loss, thereby vesting in it the *spes recuperandi*, and whatever could be saved, such settlement will be an acceptance of the property and entitles the carrier to *pro rata* freight.[1]

§ 893. **Rule for adjusting pro rata freight.** The rule adopted by Lord Mansfield in Luke v. Lyde[2] was to ascertain how much of the voyage was performed when the disaster happened which compelled the vessel to seek a port. In United States Insurance Co. v. Lenox[3] it was decided that the true measure of the amount was to be found in the proportion of the voyage performed, not at the place where the accident happened, but that where the cargo was accepted by the owners. This has generally been approved by the American courts as the more correct and equitable rule.[4] A recent and able work on Carriers[5] says: "The rule thus adopted forbids all investigation into the questions of benefit received by the shipper from the partial transportation and of the expense of reshipment from the port of acceptance to destination, and divides the amount due by the terms of the original contract of shipment in the proportion of the distance performed to the whole distance of the voyage as originally contemplated. It is admitted that its strict application to many cases would occasion injustice to the shipper, as where the ship had been obliged by stress of weather to depart from the direct course of the voyage and being wrecked, the expense of sending the goods to their destination is much greater in proportion to the distance than that agreed upon for the entire voyage. This was the case of Coffin v. Storer[6] it which it was said by Parsons, C. J., that "the rule adopted in Luke v. Lyde is manifestly unjust, for it is in that case admitted that the expense of freight to the destined port from the port where the freighter received the goods was as great as from the shipping port, so that he received no benefit from the proportion of the transportation

[1] McKibbin v. Peck, 39 N. Y. 262.
[2] 2 Burr. 882.
[3] 1 Johns. Cas. 377; 2 id. 443.
[4] The Mohawk, 8 Wall. 153; Smyth v. Wright, 15 Barb. 51; Robinson v. Marine Ins. Co., 2 Johns. 323.
[5] Hutchinson (2d ed.), § 462.
[6] 5 Mass. 252.

for which payment was demanded of him. But while these objections to the general rule are admitted to be sometimes well taken, it is said to commend itself on account of its certainty and simplicity of application, and will be followed, except perhaps in cases in which it would cause palpable and serious injustice."

§ **894. Charges and expenses where delivery hindered or prevented.** It is established that when a ship reaches the port of destination, and has waited a reasonable time to deliver goods from her side, the master may land and warehouse them at the charge of the merchant; this he should do rather than throw them overboard. Where they cannot be landed, nor remain where they are, it seems to be a legitimate extension of the implied agency of the master to hold that in the absence of all advice he has a right to carry or send them on to such other place as in his judgment, prudently exercised, appears to be most convenient for their owner; and that the expenses properly incurred in so doing may be charged to him. And if, in the exercise of such judgment, he carries the freight back to the place of shipment, he is entitled to freight, back freight and expenses.[1] The demurrage, and expenses incurred in ineffectual attempts to land at neighboring ports, are not allowable; but are part of the expenses of the voyage.[2]

§ **895. Freight under charter to load with enumerated articles.** Where a ship is chartered to bring home a cargo of enumerated articles at rates of freight specified for each, and the articles are not provided by the charterer, freight must be paid upon average quantities of all the articles, whether the ship return empty or laden with a cargo of articles different from those enumerated.[3] The ship-owner, under such a charter, is entitled to earn the stipulated freight; the amount cannot be reduced either by total failure to load the vessel, nor by loading her with goods of a different de- [**201**] scription.[4] If the charter-party limits the quantity of some of

[1] Gaudet v. Brown, L. R. 5 P. C. 134; 3 Kent's Com. 223.

[2] Id.; Bennett v. Byram, 38 Miss. 17; Morgan v. Insurance Co., 4 Dall. 455. See Burrill v. Cleeman, 17 Johns. 72; Scott v. Libby, 2 id. 336.

[3] Capper v. Forster, 3 Bing. N. C. 938.

[4] See Thomas v. Clarke, 2 Stark. 450.

the enumerated articles, and these are loaded up to the limit and there is a substitution as to the residue of the cargo, the above rule applies to the latter.[1] To effectuate the obvious intention in respect to certainty of the amount of freight, while the charterer takes a wide latitude in selecting cargo according to circumstances not foreseen, arbitrary rules of measurement will be adopted when necessary to conform the cargo to the standard of the contract.[2]

[1] Cockburn v. Alexander, 6 C. B. 791.

[2] By a charter-party it was agreed that a ship should proceed to Baltimore and there load a full cargo of *produce*, and proceed therewith to the United Kingdom, and deliver the same on being paid freight "at and after the rate of 5*s.* 6*d.* per barrel of flour, meal and naval stores, and 11*s.* per quarter of four hundred and eighty pounds for Indian corn or *other grain;*" that the cargo was not to consist of less than three thousand barrels of flour, meal and naval stores; and that not less flour or meal than naval stores was to be shipped. The vessel arrived with a cargo consisting of seven hundred and sixty-nine hogsheads of tobacco, six thousand and forty-seven bushels of bran, two thousand bushels of oats, five thousand oak staves and three barrels of flour. The evidence showed that a quarter of Indian corn or wheat weighing four hundred and eighty pounds would occupy a space of ten and a half cubic feet, and that a quarter of American oats, which weighed upon an average two hundred and seventy-two pounds, would occupy a space of sixteen cubic feet. It also appeared that oats were not a usual shipment from America. Maule, J., said: "The ship arrived at her destination without a full cargo, the freighter being unable to furnish a full cargo. The owner, no doubt, is entitled to compensation for this breach of contract. The cargo the freighter engaged to furnish was a full and complete cargo of produce, which would be satisfied by a shipment of any article of commerce which was usually shipped from the loading port. That being what the parties contemplate and describe, they proceed to stipulate for the rate of compensation which the owner is to receive, which they say is to [202] be as mentioned above. Now that enumerates and specifies certain articles of produce, and the respective prices to be paid for them; it applies the rate in terms to all produce. . . I . . think that the clause in question provides a rate of freight which is to be paid for any description of produce shipped under this charter-party. It is manifest that the intention of the parties was that the cargo should be delivered only on payment of *some* freight; and unless the construction I have mentioned is put upon the charter-party no freight at all would be provided for in respect to any but the actually enumerated articles. Taking it then to be a clause by which the parties intended to regulate the amount of freight to be paid for all descriptions of goods coming within the general term 'produce,' it helps us towards the construction of another part of the instrument, which depends upon the nature of the trade at the loading port. We think — not without some doubts crossing the minds of some

§ 896. Recoupment against freight. The shipper or consignee may recoup against freight any cross-claim against the carrier for negligence or violation of his contract of affreightment by which the former has suffered damage.[1] It is otherwise in England. An exceptional rule there prevails — where there is an agreement for a specific freight no evidence can be given of a deficient performance of a contract not amounting to the breach of a condition precedent, with a view to a reduction of damages.[2] But where the master had sold part

members of the court — that the clause, when speaking of 'Indian corn or other grain,' must be construed to mean other grain *exclusive of oats*, which are a description of grain but recently the subject of exportation from America to England. But as this clause was intended to regulate the freight, not for grain only, but for every description of goods — for which purpose it was necessary that it should ascertain a precise, or reasonably precise, rate of payment,— we think there is sufficient reason for excluding oats as not being within the probable intention of the parties when speaking of 'other grain.' The relation in which oats, according to the evidence given in the cause, stand to other produce, confirms us in this view. With respect to Indian corn, which weighs about four hundred and eighty pounds per quarter, and wheat, 11*s.* per quarter is to be paid. But oats being a grain to which that is not applicable, and not having long been imported from that place, we think they are like any other produce to be brought, the freight of which is not regulated by that stipulation, but that they are to be paid for after a rate to be deduced from the rate of 5*s.* 6*d.* per barrel of meal, and 11*s.* per quarter of Indian corn or other grain of the average weight of four hundred and eighty pounds per quarter. The proper mode, therefore, of estimating the damages will be to assume [**203**] that the stipulated number of barrels of flour was put on board, and the residue of the vessel filled up with other goods, at an amount of freight calculated upon the rule which the parties have laid down, viz.: 5*s.* 6*d.* per barrel of flour, and 11*s.* for every four hundred and eighty pounds of Indian corn or other grain." Warren v. Peabody, 8 C. B. 800.

[1] Bancroft v. Peters, 4 Mich. 619; Dedekam v. Vose, 3 Blatchf. 44; Byrne v. Weeks, 7 Bosw. 372; S. C., 4 Abb. App. Dec. 657; Relyea v. New Haven R. M. Co., 42 Conn. 579; Kennedy v. Dodge, 1 Bene. 215; Nichols v. Tremlett, 1 Sprague, 367; Leech v. Baldwin, 5 Watts, 446; Edwards v. Todd, 2 Ill. 462; Ewart v. Kerr, 2 McMullen, 141; Sears v. Wingate, 3 Allen, 103; Davis v. Patterson, 27 N. Y. 317; Merrick v. Gordon, 20 id. 93; Glendell v. Thomas, 56 id. 194; Snow v. Carruth, 1 Sprague, 324; Hinsdell v. Weed, 5 Denio, 172; Edmundson v. Baxter, 4 Hayw. 112; Hill v. Leadbetter, 42 Me. 572; Kaskaskia Bridge Co. v. Shannon, 6 Ill. 15; Schwinger v. Raymond, 83 N. Y. 192; Dyer v. Grand Trunk Ry. Co., 42 Vt. 441; The Tangier, 32 Fed. Rep. 230. See Lowenburg v. Jones, 56 Miss. 688.

[2] Mayne on Dam. 252; Bornman v. Tooke, 1 Camp. 377; Davidson v. Gwynne, 12 East, 381.

of the cargo without authority Lord Ellenborough held that the owner was entitled to set off the value against the freight notwithstanding the freight had been assigned to a stranger.[1] And it seems also to be settled in England that advances made on freight cannot be recovered, although the ship be lost before coming to a delivery port, and the freight therefore not becoming payable.[2] But in this country the doctrine is settled the other way.[3]

[204] § **897. Damages for detention of vessel.** Demurrage, in the strict sense of the term, means a sum of money due by express contract for the detention of a vessel in loading or unloading one or more days beyond the time allowed for that purpose in the charter-party.[4] Charter-parties usually fix the sum to be paid per day for such delays; sometimes it is fixed by reference to the custom of the port.[5] Wherever payment of freight is the condition of the delivery of goods, and a consignee accepts them, he thereby becomes a party to

[1] Campbell v. Thompson, 1 Stark. 490.

[2] Byrne v. Schiller, L. R. 6 Exch. 325, per Lord Cockburn, C. J.; Hicks v. Shield, 7 El. & Bl. 633; 2 Shower, 283; De Cuadra v. Swann, 16 C. B. (N. S.) 772; Jackson v. Isaacs, 3 H. & N. 405.

[3] Reina v. Cross, 6 Cal. 29; Lawson v. Worms, id. 365; Phelps v. Williamson, 5 Sandf. 578; Emery v. Dunbar, 1 Daly, 408; The Kimball, 3 Wall. 37; Lee v. Barreda, 16 Md. 190; Griggs v. Austin, 3 Pick. 20; Chase v. Alliance Ins. Co., 9 Allen, 311; Atwell v. Miller, 11 Md. 348; Hagedorn v. St. Louis Ins. Co., 2 La. Ann. 1005; Watson v. Duykinck, 3 Johns. 335; Pitman v. Hooper, 3 Sumn. 66. See Mashiter v. Buller, 1 Camp. 84; 3 Kent's Com. 226–228.

[4] Abb. on Shipping (5th Am. ed.), pt. 4, ch. 1; Wordin v. Bemis, 32 Conn. 273; Clendaniel v. Tuckerman, 17 Barb. 184; Blech v. Balleras, 3 Ell. & Ell. 203; Sprague v. West, 1 Abb. Adm. 548.

A railroad company has no lien upon goods for demurrage in the absence of a contract (East Tennessee, etc. R. Co. v. Hunt, 15 Lea, 261; Chicago, etc. Ry. Co. v. Jenkins, 103 Ill. 588, 599; Crommelin v. New York & H. R. Co., 10 Bosw. 77), unless possibly by usage and custom which have acquired the force of law. Burlington, etc. R. Co. v. Chicago Lumber Co., 15 Neb. 390. *Contra*, Miller v. Mansfield, 112 Mass. 260.

The right of a railroad company to impose demurrage charges for a customer's neglect to unload his freight is asserted in Georgia (Miller v. Georgia R. & B. Co., 50 Am. & Eng. R. Cas. 79); and by the Louisville law and equity court. Kentucky Wagon Manuf. Co. v. Louisville & N. R. Co., 11 Ry. & Corp. L. J. 49. The opposing view is held in the Illinois case and the Nebraska case cited in the last preceding paragraph.

[5] Morse v. Pesant, 2 Keyes, 16.

the contract, and incurs not only the obligation to pay it, but also the demurrage for detention in unloading beyond the lay-days.[1] Damages in the nature of demurrage are recoverable for detention beyond reasonable time in unloading where there is no express stipulation to pay them. They are in the nature of demurrage because they are for the detention of the vessel, and measured by the day like demurrage; they are damages because they are recovered for breach of the implied contract of the shipper that he will receive the goods in a reasonable time.[2] What is such time will be determined upon the particular facts. In one case[3] the master was directed to deliver to a railroad company, but the bill of lading which contained the contract did not provide for such delivery; and after arrival of the vessel there was a detention for eight days for twenty other vessels which had arrived earlier to unload in their turn; the court held that there was no unreasonable detention. Butler, J., said: "Influenced by the equity of the case, I had first some doubt whether the finding in respect to the excuse came up to the necessities of their defense. It is not found that the accumulation was owing to any *un-* [**205**] *expected cause*, or that it might not have been foreseen and provided against by proper foresight and diligence. In several cases cited the vessels were detained by a storm or storms, and all arrived together when the weather cleared up. There the elements were the cause. Here the cause is not found, nor is it found that the accumulation was not the result of a previous want of diligence or other fault on the part of the company. Still, it is expressly found that the company did all they could do to hasten the discharge of the vessel after the arrival of the plaintiff, and there is no presumption that they or the defendants expected or could have foreseen the arrival of so many vessels, or were in any way the cause of the accumulation, and we are constrained to hold the excuse

[1] Id.; Dobbin v. Thornton, 6 Esp. 16; Jesson v. Solly, 4 Taunt. 52. See Chappel v. Comfort, 10 C. B. (N. S.) 802; Wegener v. Smith, 15 C. B. 285; Cawthorn v. Trickett, 15 C. B. (N. S.) 753.

[2] Wordin v. Bemis, 32 Conn. 273; Esseltyne v. Elmore, 7 Biss. 69; Clendaniel v. Tuckerman, 17 Barb. 184; The U. S. Bacon v. Transportation Co., 3 Fed. Rep. 344; Scholl v. Albany & R. Iron & S. Co., 101 N. Y. 603; Baldwin v. Sullivan Timber Co., 20 N. Y. Sup. 496.

[3] Wordin v. Bemis, 32 Conn. 273.

sufficient." A somewhat stricter rule was laid down by Judge Drummond in a case of detention from a similar cause. It was held that the plaintiff, the master, was not responsible for the arrival of vessels consigned to the defendants about the same time; that was a risk which the defendants themselves took. The plaintiff reported his arrival on the morning of the 18th, and was detained to the 22d of November, to commence unloading on account of other vessels being there first; but it was held that the charterer of a vessel takes all the risks of delay from unforeseen circumstances, and only one day was allowed as reasonable time for commencing to unload.[1]

If a ship is detained beyond the time allowed by the charter-party the stipulated demurrage is *prima facie* the measure of compensation for the further time; but it is competent for the owner or the freighter to show that this would be more or less than fair compensation.[2] Where the stipulation is to pay a specified sum as demurrage, if the vessel is detained because of delay arising from a designated cause, it will be presumed without proof of actual damage or the amount thereof that delay produced by another cause is equally injurious to the owner of the vessel.[3] If the language of the contract is clear demurrage will be allowed for Sundays intervening between the time when the vessel should have been and when in fact she was at liberty.[4] As between an indorsee of the bill of lading who has purchased the goods and the vessel, the bill is the only contract as respects demurrage. If no reference is made in it to the charter and the indorsee has no notice of it and the bill does not refer to the charter, nor specify a rate of demurrage, the rate must be determined by the value of

[1] Esseltyne v. Elmore, 7 Biss. 69. Compare Crawford v. Jesup & M. Paper Co., 24 Fed. Rep. 303. See on the general subject of excusing detention, Farwell v. Thomas, 5 Bing. 188; Hill v. Idle, 4 Camp. 327; Randall v. Lynch, 2 id. 352; Burmster v. Hodgson, id. 488; Robertson v. Jackson, 2 C. B. 412; Barrett v. Dutton, 4 Camp. 333; Hudson v. Ede, 8 B. & S. 631; id. 640; L. R. 3 Q. B. 412; Erichsen v. Barkworth, 3 H. & N. 601; The Swallow, 27 Fed. Rep. 316; S. C., 30 id. 204.

[2] Moorsom v. Bell, 2 Camp. 616.

[3] Baldwin v. Sullivan Timber Co., 20 N. Y. Sup. 496; Harris v. Jacobs, 15 Q. B. Div. 247.

[4] Baldwin v. Sullivan Timber Co., *supra;* The Oluf, 19 Fed. Rep. 459; Lindsay v. Cusimano, 12 id. 503.

the use of the vessel, though the charter stipulates for an amount in excess thereof, and the charterer shipped the goods.[1] In fixing the amount of demurrage to be paid for detention of a vessel during repairs a deduction should be made from the gross freight of so much as would in ordinary cases be disbursed on account of the ship's expenses in earning the freight.[2] The English merchant shipping act [3] gives the board of trade, if they have reason to believe that a British ship is unsafe, power to order her detention for the purpose of being surveyed. It provides that if it appears that there was not reasonable and probable cause, by reason of the condition of the ship or the act or default of the owner, for the provisional detention of the ship, the board shall be liable to pay the owner of the ship his costs of and incidental to the detention and survey of the ship, and also "compensation for any loss or damage" sustained by him by reason of the detention or survey. The quoted words do not permit the recovery of general damages in respect to the injury to the reputation of the ship-owner as such by reason of the vessel's detention.[4]

Section 2.

ACTIONS AGAINST CARRIERS.

§ 898. General statement of carrier's liability. [206] Common carriers by holding themselves out as such assume and are bound to do what is required of them in the course of their employment, if they have the requisite vessels or vehicles with which to carry,[5] and are offered a reasonable and customary price; and if they refuse without some just ground to transport property in the order in which it is offered,[6] equally as when they have contracted to carry, they are liable to an action.[7] For breach of this duty or contract compensation to

[1] The Pietro G., 39 Fed. Rep. 366.

[2] The Gazelle, 2 W. Rob. Adm. 279.

[3] 39–40 Vict., ch. 80, sec. 6.

[4] Dixon v. Calcraft [1892], 1 Q. B. 458.

[5] The carrier must show affirmatively that he could not, with proper diligence, have furnished transportation after notice given of the purpose to ship. Ayres v. Chicago & N. R. Co., 71 Wis. 372.

[6] H. & T. C. Ry. Co. v. Smith, 63 Texas, 322.

[7] Louisville, etc. Ry. Co. v. Flanagan, 113 Ind. 488; Ayres v. Chicago & N. Ry. Co., 71 Wis. 372; 2 Kent's Com.

the injured party may involve the consideration of an increased expense of carriage otherwise, or an advance in rates of freight as well as injury from delay or deprivation of transportation.[1]

§ 899. When damages measured by cost of transportation. The object of all transportation being to have the use of or opportunity to sell the property at the place of destination, the elements and amount of the loss will depend on the circumstances of each case. If on the refusal of the carrier to receive the goods another carrier can be found without trouble or delay who will take and convey them at the same or less expense or hire, only nominal damages can be recovered, for there is no actual injury.[2] If the subject to be transported be merchandise, and the purpose of the transportation is merely to obtain a better net price than it will sell for where it is, then a refusal of the carrier to fulfill his contract or duty to convey will not wholly deprive the owner of that profit if he [207] can procure the conveyance otherwise at a price that enables him to make the transportation profitable; if the substituted conveyance, by being more expensive, reduces that profit, the increased expense of the transportation is the measure of damages; but if no other conveyance is available, that is, if none can be had at all, or if any which is attainable would be so expensive as to leave no margin of profit, then the owner suffers injury to the extent of the difference be-

599; Pickford v. Grand J. Ry. Co., 8 M. & W. 372.

[1] Where there was a refusal to transport sheep from New York to Newcastle, England, and the charterer sold his right as to a portion of the sheep which were to be carried at an advance on the price he was to pay and shipped the residue to Bristol, England, by another vessel which sailed six days later, but arrived at nearly the same time as the vessel in default, there being no substantial difference between the market prices at the places named, and no market price for the transportation of sheep at New York when the breach of the contract occurred, it was held, no claim for special damages being in question, that the recovery was limited to the loss of profit upon the right to ship, the difference in the actual cost of transporting the sheep taken to Bristol, the expense of keeping them while awaiting shipment and their depreciation and the difference in the market price. The Rossend Castle, 30 Fed. Rep. 462.

[2] Where there is an express contract to carry and the property is delivered at the designated point, the shipper may rely upon its performance, and need not seek other modes of transportation until notified of the carrier's refusal or inability to perform. Louisville, etc. Ry. Co. v. Flanagan, 113 Ind. 488.

tween the value of the property where it is and the value it would have at the place of destination, less the expenses of shipment under the contract to that place. In an action for the refusal by the defendant to perform an agreement to transport corn from New York to Liverpool at a certain price, the plaintiff was held entitled to recover for his damages the difference between the contract price and what he would be compelled to pay for the same services. When a refusal is shown and it appears that the price of transportation has risen before the sailing of the ship, the plaintiff is entitled to damages measured by the rise in the price without showing that he had the corn to ship.[1] If sent by another route or conveyance at a greater expense not unreasonably incurred, the excess of such expense is obviously a proper item of damages.[2] But if the subject to be transported is mere merchandise contracted to be shipped to a better market the owner has not an absolute right to ship by another carrier at such greater expense as such shipment may involve. He has no right to send the goods forward for the mere purpose of charging the increased expense to the defaulting carrier, or where that will be the sole effect. Where the defendant broke his contract to carry salt by vessel, it was held that the owner had no right to send the salt by rail, and recover the difference between the expense agreed on with the defendant and what was paid for transportation by rail.[3] A contract to carry at a specified

[1] Ogden v. Marshall, 8 N. Y. 340; The Flash, Abb. Adm. 119. See Nelson v. Plimpton Fire P. E. Co., 55 N. Y. 480; also Bohn v. Cleaver, 25 La. Ann. 419.

In Lord v. Strong, 6 Mich. 61, the defendant agreed to convey six cargoes at a fixed price, one in August, two in September, one in October, and one in November. He carried five only — one in August, one in September, one in October, and two in November. Freight rates were higher in October than previously, and much higher in November. In the absence of an agreement as to the application to be made of the extra cargo carried in November, it was held that defendant had the right to have it stand as a substituted performance for the cargo which he omitted to carry in October, and was liable only for such damages as resulted from the neglect to transport one of the cargoes which should have been taken in September.

[2] McEwan v. McLeod, 9 Ont. App. 239; Crouch v. Great N. Ry. Co., 11 Exch. 742; Grand v. Pendergast, 58 Barb. 216.

[3] Ward's C. & P. L. Co. v. Elkins, 34 Mich. 439. The court said: Salt is not an article of specific utility for preservation, but an article of merchandise, and only valuable as [208] such. The only advantage he could

price gives a vested right to each party, and the value of it when performance is due should be the basis of recovery. It is not necessary, in analogous cases, to go into the market for, or to procure from another, what had been contracted for in order to be entitled to have its value determined and to recover damages accordingly.[1]

§ 900. **Liability for the loss of shipper's profits.** The difference between the agreed price and the actual cost or value of the service is not the only measure or item of damages recoverable. The carrier's refusal to receive and convey property may deprive the owner of an opportunity to market it at an advanced price, subject him to a loss by a decline, or consequential damage in ulterior transactions of which the carrier had notice at the time of making his contract. An important case in Iowa[2] is an instance of the allowance of such damages. The action was brought to recover on account of [209] the failure and refusal of the defendant to carry a large quantity of oats from Dubuque and other points on the defendant's railroad to Cairo. The plaintiffs were government contractors, engaged in the business of supplying forage for the United States armies during the late rebellion. The court

have gained by a timely shipment, according to contract, would have been the excess of the value of salt in the Chicago market at the date when it should have arrived, beyond what it was worth in Bay City, and the expense of loading, shipment and delivery at his warehouse in Chicago. If there was no such excess in value at that time, then he was not damaged. If there was such an excess, then he was entitled to that and nothing more. He would not have been justified in procuring shipment by rail, if the railroad price would have rendered it unprofitable. There are, no doubt, cases where property is of such a nature, or where the necessity of having it at a certain point is so imperative, that the circumstances may justify employing any transportation which is accessible, and may render the difference in cost of transportation a proper measure of damages. But this can never be proper in regard to ordinary articles of consumption always to be found in the market, and only valuable to the owner for their merchantable qualities. A person has no right to put others to an expense of such a nature as he would not, as a reasonable man, incur on his own account. Ward's C. & P. L. Co. v. Elkins, 34 Mich. 439; Le Blanche v. London & N. W. Ry. Co., 1 C. P. Div. 286; Irvine v. Midland, etc. Ry. Co., 6 L. R. Ire. 55. Compare McEwan v. McLeod, 9 Ont. App. 239; Connal v. Fisher, 10 Rettie (Scotch), 824.

[1] Louisville, etc. Ry. Co. v. Flanagan, 113 Ind. 488.

[2] Cobb v. Illinois Central R. Co., 38 Iowa, 601.

say: "The measure of damages against a carrier for violation of his duty or contract in respect to the transportation of property should be such as to do justice and award full compensation, and no more, to the party injured.[1] Plaintiffs must be compensated for the profit they would have realized, which is the difference between the price they paid, or contracted to pay, for the oats, and the price under their contract with the government, less the freight to Cairo. They must also recover for the sum they paid, or are liable to pay, for the oats purchased by them or agreed to be delivered by the various parties with whom they contracted. If the oats were actually received by them, or were not, and only contracted to be delivered, in either case they must recover the sum paid by them on account of the oats, or on account of their liability upon their several contracts to purchase oats. They must be made whole on account of these outlays, and also, as we have seen, must recover the profits that would have accrued to them." The court also held that "interest on the sums lost by plaintiffs, and for which compensation in this action can be recovered," was an element of damages.[2] In Mace v. Ramsey[3] there was a failure to furnish a boat which had been contracted for for the purpose of conveying excursionists in and around a designated bay. The damages were measured by what such a boat as was to be supplied would have been worth to the person who engaged it for the use to which it was to have been put. Evidence showing that the boat would have been filled with passengers was received.

In a late Massachusetts case, against a carrier for breach [**210**] of an executory contract to carry goods, it was held that the measure of damages is the market value of the goods at the place to which they should have been carried, less the value at the place where the carrier agreed to receive them, and less freight.[4] But it was also held that the fact that their owner

[1] Bridgman v. Steamboat Emily, 18 Iowa, 509.

[2] To the same effect, H. & T. C. Ry. Co. v. Smith, 63 Texas, 322; Gulf, etc. Ry. Co. v. McCorquodale, 71 id. 41.

[3] 74 N. C. 11. To the same effect, Houston, etc. Ry. Co. v. Hill, 70 Texas, 51; S. C., 63 id. 381.

[4] Bracket v. McNair, 14 Johns. 170; O'Connor v. Forster, 10 Watts, 418; Cowley v. Davidson, 13 Minn. 92; Texas P. Ry. Co. v. Nicholson, 61 Texas, 491; Harvey v. Grand Trunk Ry. Co., 2 Hask. 124; S. C., id. 250; Pennsylvania R. Co. v. Titusville, etc. Co., 71 Pa. St. 350.

informed the carrier at the time of making the contract that he made it because he *wished to make* contracts with third persons for the sale of goods to them, and that he did make such contracts afterwards, does not entitle him to recover of the carrier the profits he would have made by such contracts but for the breach of the contract of carriage. Endicott, J., said: "The damages for which a carrier is liable upon failure to perform his contract are those which result from the natural and ordinary consequences contemplated at the time of making the contract of transportation, and a larger liability can be imposed upon him only when it is in the contemplation of the parties that the carrier is to respond in case of breach for special and exceptional damages. In such case the extent and character of the obligation he assumes should be known to the carrier, which in this case was impossible, as the contracts were not then made. The mere knowledge on the part of the defendant that the plaintiff intended to make contracts for the sale of the ties to be transported cannot impose a liability upon the defendant for loss of profits on such contracts. [211] Whether there would be a loss of profits, it was of course then impossible to determine, and probable profits would be incapable of estimation."[1]

§ **901. Increased expenditures; loss of customers.** The defendants agreed, by charter-party, with the plaintiff that their ship should, at a specified time, load one thousand three hundred tons of coal in the river Tyne to be carried to Havre for him. They broke their contract, and the plaintiff had in consequence, first, to hire other vessels at an advanced freight, and also to buy one thousand three hundred tons of coal at an enhanced price. He was unable, according to the custom of the colliery trade in the Tyne, to secure a cargo until he had chartered vessels to carry it. The plaintiff having sued the defendants in respect of both these heads of damage, they admitted their liability to pay the advanced freight, but denied that they were liable for the enhanced price of the coal. At the trial the rise in price at the pit's mouth was not disputed; but it was not directly proved that there had been an equiva-

[1] Harvey v. Connecticut, etc. R. Co., 124 Mass. 421; Houston, etc. Ry. Co. v. Hill, 63 Texas, 381.

A charterer cannot recover the profits he would have made if he had transferred his contract. Bohn v. Cleaver, 25 La. Ann. 419.

lent rise at Havre, and it was held that the fact of the plaintiff having paid the additional price was *prima facie* evidence of damage to that extent, and entitled him, in the absence of evidence to the contrary, to recover.[1] In a late case, decided in the house of lords, it was held that damages were recoverable for loss of customers resulting from such a default of a carrier. The lord chancellor thus affirmed hypothetically that item of damage: "There may have been two or three collieries supplying with coal one of the towns or places mentioned in the case, the owner of one of these collieries being Mr. G., and the other collieries belonging to other persons; the restrictions and the impediments placed in the way of the carriage of coal for Mr. G. may have been such as to supplant him in the supply of coal to that particular place, and to give the supply of coal virtually into the hands of his rival or competitor in trade. That would clearly be a loss of customers, and the loss occasioned by that circumstance, among others, would be a head under which damages might be awarded."[2]

§ 902. Not liable for remote consequences. As is true in other cases, the plaintiff can recover only such damages [212] as are the natural and proximate consequence of the defendant's breach of his contract. A ship's husband covenanted that his ship should at one port take in a quantity of brandy and convey it to another port and there receive a cargo of freight, etc., which the freighters covenanted to supply. The ship did not take the brandy, and the freighters did not furnish a full homeward cargo. In an action on the charter-party by them for not taking the brandy, it was alleged that the failure to furnish the homeward cargo was the consequence, and that in an action by the ship's husband therefor he had recovered damages to a stated amount, and they were put to costs to a stated amount. On the trial Tindal, C. J., interrupted counsel, intimating that these sums could not be recovered, and said the breach of contract for not shipping the brandy should have been set up by the freighters in the former action. He held that the law will not allow so idle a ceremony as for one party to recover a sum that it might be

[1] Featherston v. Wilkinson, L. R. 8 Exch. 122.

[2] Lancashire & Y. Ry. Co. v. Gidlow, L. R. 7 Eng. & Ir. App. Cases, 517. See Richmond v. Railroad Co., 40 Iowa, 264.

recovered back by the other. In answer to the contention that though the damages were not the precise sum recovered before, still that recovery could be considered as a mode of showing the amount to which the plaintiff was entitled, he added: "The damages will be the loss in consequence of not shipping the brandy, and all such damages as are the natural and necessary consequences. Might you not have bought brandy yourselves and charged the difference in the price? No man would be safe if your rule were to prevail. If I contract to transfer stock, and do not, the party with whom I contracted has no right to tell me a month afterwards that if I had transferred the stock he could have bought an estate with the money. There was a case of a man who brought an action against the keeper of a ferry-boat for refusing to carry him across a river, in consequence of which he sustained loss by not being able to keep an appointment. But it was held that he could not recover damages on any such ground." The damages were too remote.[1]

In a recent Irish case the carrier failed to transport horses which he knew were wanted at a certain place by a given time for the purpose of being exposed to inspection preliminarily to an auction sale. In consequence of such neglect the horses were driven, and being in soft condition on account of the feed they had were injured in appearance by the journey, and one of them was lamed. Those sold brought smaller prices than would otherwise have been realized; some were not sold. The evidence was to the effect that the journey would not have injured the horses if they had been fed differently. The carrier's liability was limited to such deterioration as the horses would have sustained if they had been in their usual condition and fit to make the journey, and for the time and labor expended on the road.[2] In an action against a common carrier for refusing to receive and trans- [213] port grain properly stored for transportation it is competent for the plaintiff to give evidence that because of such refusal his grain became heated and spoiled, notwithstanding the fact that such damage resulted from something inherent

[1] Walton v. Fothergill, 7 C. & P. 392.

[2] Waller v. Midland, etc. Ry. Co., 4 L. R. Ire. 376, reversing S. C., 2 id. 520.

in the nature of the grain itself.[1] The deterioration in the quality of animals which are not shipped must be compensated for by the carrier.[2] A carrier who deviates from his agreement or instructions by dispatching the goods from the terminus of his route by a different conveyance or carrier, and thereby subjects them to increased freight, is liable for the difference.[3] The refusal to transport property when the carrier is unable to store it does not authorize its owner to leave it exposed to the elements; he must secure it from damage thereby, and may recover the expense incurred in doing so.[4] The liability of the carrier for property received for shipment attaches at the time it is received regardless of the date of the bill of lading.[5]

§ 903. Must respond for negligent delay. A carrier is liable for damages resulting from delay in transportation where he fails to convey and deliver within the time fixed by his agreement.[6] In the absence of any special contract the law implies an agreement on his part to transport merchandise within a reasonable time.[7] The actual cause of delay, in

[1] Pittsburgh, etc. R. Co. v. Morton, 61 Ind. 539.

[2] Texas P. Ry. Co. v. Nicholson, 61 Texas, 491.

[3] Proctor v. Eastern R. Co., 105 Mass. 512; Monteith v. Merchants' Despatch Co., 9 Ont. App. 282; S. C., 1 Ont. 47; Irvine v. Midland, etc. Ry. Co., 6 L. R. Ire. 55.

In the last case a carrier had agreed to carry hay in large carriages at so much per load. A small quantity was delivered and placed in carriages of less capacity for which the contract price was charged. After the refusal to furnish such vehicles as the contract called for the shipper declined to deliver the balance of the hay, and eventually sold it, after giving notice of his intention to do so, for less than he paid for it. He sued to recover the difference between the cost price and the amount he would have realized if the hay had been carried according to the contract. It was held that his damages were limited to the extra cost of the transportation growing out of the difference in the capacity of the wagons, and this applied only to the quantity of hay delivered.

[4] H. & T. C. Ry. Co. v. Smith, 63 Texas, 322; The Flash, Abb. Adm. 119; St. Louis, etc. Ry. Co. v. Neel (Ark.), 19 S. W. Rep. 963.

[5] St. Louis, etc. Ry. Co. v. Neel, *supra*.

[6] Harmony v. Bingham, 1 Duer, 209; Wilson v. Newcastle & B. R. Co., 18 E. L. & Eq. 523; Cowley v. Davidson, 13 Minn. 92; Sangamon, etc. R. Co. v. Henry, 14 Ill. 156.

The action may be brought on the contract or for neglect of duty; in either case the measure of recovery is determined by the same principles. Baltimore & O. R. Co. v. Pumphrey, 59 Md. 390.

[7] Story on Bailments, § 554*a*; Ward v. New York C. R. Co., 47 N. Y. 29;

the latter case, is open to inquiry and explanation, and unless the carrier be at fault he is not liable for the damages which ensue. He is bound to reasonable diligence; accident or misfortune will excuse him.[1] A common carrier by river navigation, who, owing to the low water, is unable to proceed to the end of the voyage, may unload and store the goods at an intermediate point during the existence of the obstruction, but he is liable for the expense thereof, and is bound to take care of them whilst so detained.[2] When a carrier is liable for a [214] negligent delay in the transportation and delivery of goods intrusted to him, he is liable for such proximate damages as naturally result therefrom,[3] but for no others. Where the delivery of a package of confederate money was prevented by the war and its return to the consignor made impossible by the same cause, though reasonable efforts were made to accomplish the latter, the carrier thereafter ceased to be such and became a bailee. Its duty was to return the money on demand after the restoration of peace. It was not liable for interest during the war, nor for the depreciation in the value of the currency.[4] Where a telegraph company negligently delayed to transmit money to pay a note until the day following the protest thereof, it was held not to be liable for damages to the credit of the maker in the absence of proof of pecuniary loss.[5]

§ 904. **Limitation of liability by contract.** Carriers may to some extent, varying in the different states, limit their

Parsons v. Hardy, 14 Wend. 215; Bowman v. Teal, 23 id. 306; Vicksburg, etc. R. Co. v. Ragsdale, 46 Miss. 458.

[1] Geismer v. Lake Shore, etc. Ry. Co., 102 N. Y. 563; Haas v. Kansas City, etc. R. Co., 81 Ga. 792; Lake Shore, etc. Ry. Co. v. Bennett, 89 Ind. 457; International, etc. Ry. Co. v. Tisdale, 74 Texas, 5; Wibert v. New York & E. R. Co., 12 N. Y. 245; Pittsburg, etc. R. Co. v. Hazen, 84 Ill. 36; Conger v. Hudson R. Co., 6 Duer, 375; Parsons v. Hardy, 14 Wend. 215; Steadman v. Western T. Co., 48 Barb. 97; Blackstock v. New York & E. R. Co., 20 N. Y. 48; Nashville, etc. R. Co. v. Jackson, 6 Heisk. 271; East Tennessee & C. Co. v. Nelson, 1 Cold. 272; Leppard v. Railroad Co., 7 Rich. 409; Faulkner v. South Pacific R. Co., 51 Mo. 311.

[2] Bennett v. Byram, 38 Miss. 17; Braithwaite v. Power, 48 N. W. Rep. 354.

[3] Colvin v. Jones, 3 Dana, 576; Briggs v. New York C. R. Co., 28 Barb. 515; Hadley v. Baxendale, 9 Exch. 341; Baltimore & O. R. Co. v. Pumphrey, 59 Md. 390.

[4] Caldwell v. Southern Exp. Co., 1 Flip. 85.

[5] Smith v. Western U. T. Co., 24 Atl. Rep. 1049 (Pa.).

common-law liability by contract;[1] but by the general current of authority not so as to exempt them from the consequences of their own negligence or misconduct, or that of their agents or servants.[2] In New York, West Virginia, and to some extent in Illinois, contracts limiting their liability for negligence or misconduct of their servants and agents are held valid and effectual.[3] In New York it has been held that when general words in the contract of a carrier limiting his liability may operate without including his negligence or that of his servants, it will not be presumed that they were intended to include it; every presumption is against such an intention, and the contract will not be construed as exempting from liability for negligence unless it is expressed in unequivocal

[1] See Hutchinson on Carriers (2d ed.), ch. 7.

[2] Liverpool, etc. Steam Co. v. Phœnix Ins. Co., 129 U. S. 397; East Tennessee, etc. R. Co. v. Johnston, 75 Ala. 596; St. Louis, etc. Ry. Co. v. Lesser, 46 Ark. 236; Rosenfeld v. Peoria, etc. Ry. Co., 103 Ind. 121; Kansas City, etc. R. Co. v. Simpson, 30 Kan. 645; McFadden v. Missouri P. Ry. Co., 92 Mo. 343; Conover v. Pacific Exp. Co., 40 Mo. App. 31; Merchants' Dispatch T. Co. v. Bloch, 86 Tenn. 392; Southern P. Ry. Co. v. Maddox, 75 Texas, 300; Black v. Goodrich Transp. Co., 55 Wis. 319; Reno v. Hogan, 12 B. Mon. 63; Hawkins v. Great W. R. Co., 17 Mich. 57; Louisville, etc. R. Co. v. Hodges, 9 Bush, 645; Rhodes v. Louisville, etc. R. Co., id. 688; Welsh v. Pittsburg, etc. R. Co., 10 Ohio St. 65; Powell v. Penn. R. Co., 32 Pa. St. 414; Camden, etc. R. Co. v. Baldauf, 16 id. 67; Goldey v. Penn. R. Co., 30 id. 242; Empire T. Co. v. Wamsutta O. R. & M. Co., 63 id. 14; Farnham v. Camden, etc. Co., 55 id. 53; American Exp. Co. v. Sands, id. 140; Adams Exp. Co. v. Stettaners, 61 Ill. 184; The Pacific, Deady, 17; York M. Co. v. Illinois C. R. Co., 1 Biss. 377; Railroad Co. v. Lockwood, 17 Wall. 357; Michigan, etc. R. Co. v. Heaton, 37 Ind. 448; Bank of Kentucky v. Adams Exp. Co., 93 U. S. 174; Welch v. Boston, etc. R. Co., 41 Conn. 333; Jacobus v. St. Paul, etc. R. Co., 20 Minn. 125; Moses v. Boston, etc. R. Co., 24 N. H. 71; Bodenham v. Bennett, 4 Price, 31; Fish v. Chapman, 2 Ga. 349; Jones v. Voorhees, 10 Ohio, 145; Lee v. Raleigh, etc. R. Co., 72 N. C. 236; Ashmore v. Penn. S. T. Co., 28 N. J. L. 180; Atchison, etc. R. Co. v. Washburn, 5 Neb. 117; Ketchum v. American Exp. Co., 52 Mo. 390; Lupe v. Atlantic, etc. R., 3 Mo. App. 77; School District v. Boston, etc. R. Co., 102 Mass. 552; Sager v. Portsmouth, etc. R. Co., 31 Me. 228; Fillebrown v. Grand Trunk Ry. Co., 55 Me. 462; Little v. Boston, etc. R. Co., 66 Me. 239; Goggin v. Kansas, etc. R. Co., 12 Kan. 416; Railroad Co. v. Pratt, 22 Wall. 122.

[3] Westcott v. Fargo, 63 Barb. 349; 61 N. Y. 542; Magnin v. Dinsmore, 56 N. Y. 163; Baltimore, etc. R. Co. v. Rathbone, 1 W. Va. 87; Same v. Skeels, 3 id. 556; Arnold v. Illinois C. R. Co., 83 Ill. 273; Erie Ry. Co. v. Wilcox, 84 Ill. 239; Cragin v. New York C. R. Co., 51 N. Y. 61; Wilson v. Same, 27 Hun, 149.

[215] terms. Accordingly, when by a contract of shipment the carrier, or railroad company, in consideration of a reduced rate, was released for any damage or injury "from whatsoever cause arising," it was held that the exemption did not include a loss arising from his negligence.[1] Where cattle were delivered for immediate shipment, but a written contract was exacted two days afterwards, in an action for damages for unreasonable delay it was held that the contract would be the measure of the obligations of the parties from the time it was made, but that it would not merge any liability the carrier might have incurred previously, there being nothing in its terms to indicate such an intention.[2] Contracts of the nature here treated of do not exempt a carrier from liability for negligently transporting freight beyond its destination and detaining it there.[3]

§ 905. Illustrations of liability for delay; unmarketable property. Common carriers of goods and passengers have a public employment, and owe the public a general duty, independently of contract. They are bound to carry for all persons who apply, unless they have a reasonable excuse for refusing to do so; and to deliver goods at their destination, or at the end of their route to the next carrier in a reasonable time according to the usual course of business, with all convenient speed.[4] A carrier who has no notice that it is important that delivery be made at a certain time is not liable for the value of any special use prevented by an unreasonable delay.[5] The mere omission to transport and deliver property within a reasonable time does not necessarily make the carrier liable for its value. He is liable for the damages caused by such omission, but the owner cannot, on the sole ground of unreasonable delay, refuse to receive the property, and recover as for its conversion.[6] The carrier is chargeable in all

[1] Mynard v. Syracuse, etc. R. Co., 71 N. Y. 180; Holsapple v. Rome, etc. R. Co., 86 id. 275.

[2] Cleveland, etc. R. Co. v. Perkins, 17 Mich. 296.

[3] Bryant v. Southwestern R. Co., 68 Ga. 805.

[4] East Tennessee & G. R. Co. v. Nelson, 1 Cold. 272.

[5] Hales v. London, etc. Ry. Co., 4 B. & S. 56; Murrell v. Pacific Exp. Co., 54 Ark. 22; § —, *infra*.

[6] St. Louis, etc. Ry. v. Mudford, 44 Ark. 439; Scovill v. Griffith, 12 N. Y. 509; Nettles v. Railroad Co., 7 Rich. 190. See Hackett v. Railroad, 35 N. H. 390, 400.

cases of negligent delay with the value of the ordinary use of property having a usable value, after the time when he should have made delivery at the place of destination. When property is not of a perishable nature, nor an ordinary sub- [216] ject of sale in market, nor liable to its fluctuations, but is designed for a particular purpose in a special business, the rule of damages is very different from that applicable to merchandise. For delay in the transportation of machinery, the value of its use for the time it was detained is the measure of damages.[1] In the absence of special damage, interest may be recovered during the period of negligent delay in the transportation of money.[2] So where there is no change in the market value during such a delay of delivery, it has been held that interest may be recovered on that value from the time when delivery ought to have been made.[3] A factor who has accepted a draft for the goods consigned to him may maintain an action against a carrier for negligent delay in their transportation, although it resulted from directions given by the consignor after the shipment was made. His recovery cannot exceed the advances made, expenses and commissions after deducting the value of the goods when they are received.[4]

§ 906. Loss of market value, quantity or quality. The carrier is also liable for any loss on the value of the property pending his negligent delay of transportation whether it results from a decline in the market price or from intrinsic deterioration.[5] This is a damage that the parties are deemed to have contemplated when contracting, and is the direct and immediate consequence of the defendant's breach. As to the decline in market value, Peckham, J., said:[6] "Where a carrier

[1] Priestly v. Northern, etc. R. Co., 26 Ill. 205. But the carrier must have notice of the circumstances. Thomas, etc. Manuf. Co. v. Wabash, etc. Ry. Co., 62 Wis. 642.

[2] United States Exp. Co. v. Haines, 67 Ill. 137.

[3] Cramer v. American Exp. Co., 56 Mo. 524.

[4] Ober v. Indianapolis, etc. R. Co., 13 Mo. App. 81.

[5] Gulf, etc. Ry. Co. v. McCorquodale, 71 Texas, 41; The Suffolk, 31 Fed. Rep. 835; The Nith, 36 id. 86; The Flash, Abb. Adm. 119: East Tennessee, etc. Ry. Co. v. Johnson, 85 Ga. 497; Goldsmith v. Henderson, 50 Fed. Rep. 567; Illinois C. R. Co. v. McClellan, 54 Ill. 58.

[6] Ward v. New York C. R. Co., 47 N. Y. 29.

from mere negligence, from plain violation of duty, omits to transport merchandise beyond a reasonable time, and its market value falls in the meantime, the true rule of damages, in my judgment, both upon principle and authority, is the difference in its value at the time and place it ought to have been delivered and the time of its actual delivery. The rule is simple, and, though it may sometimes operate harshly, easily applied. Sagacious business men rely upon their ability to judge of the market in undertaking large commercial projects. According to their views of the market they send the merchandise by a quick or a slow carrier, and make compensation [217] accordingly. A contrary rule would deprive them of all benefit of a rapid transit. It would be left to the caprice of the carrier when to transport, and the owner could have no relief. It would be no answer to say that the owner might make a special contract for the transportation at a given time. The contract would have to contain a special provision to pay these damages or the carrier's liability would not be altered. If a special contract be needed, I think it falls upon the defendant to make it, or the company will be liable for not delivering in a reasonable time. If the carrier would be liable for these damages upon a special contract to transport by a given time, he clearly would be for a violation of his duty. In the absence of any special agreement the law implies that the carrier agrees to transport in a reasonable time. That is his duty. In failing to do so he not only violates his duty, but also the contract upon which it is based. . . . It is well settled law that a carrier, on an entire failure to deliver, is liable to the market price of the goods at the time and place for delivery.[1] So as to a sale of goods. For all damages to the property while in the custody of the carrier, the measure thereof is to be settled by the market at the place for delivery. This is clearly so as to all inland carriage.[2] If liable for the market price at the time and place for delivery when not delivered at all, it would seem equally rational that if, by reason of the inexcusably negligent delay of the carrier, the value of the goods has depreciated in market, he should be liable to

[1] O'Hanlan v. Great Western Ry. Co., 6 B. & S. 484; Bracket v. McNair, 14 Johns. 170; Sands v. Lilienthal, 46 N. Y. 541.

[2] Bracket v. McNair, *supra*.

the owner to the extent of that depreciation. The purpose of the law is to make the owner whole in each case. . . . Had the goods been injured by improper exposure by the carrier, and thus had become depreciated in their market value, it is clear that the carrier would be liable for the loss. It was his negligence that caused it. Here his negligent delay caused the loss. It did not cause the decline in the general market, but it deprived the owner of his right to the higher market price. The defendant's negligent violation of duty thus deprived the plaintiff of his right and placed this loss upon him. In substance this loss is the same to the plaintiff as if the injury had been done to the property itself, and thus [218] diminished its market value. The injury also is natural and direct. There is no second step; no action of the owner with a third person by contract or otherwise."[1] A carrier negligently in default cannot escape this measure of liability by reason of an increase in the market price after the time he

[1] Sherman v. Hudson R. Co., 64 N. Y. 254; Ingledew v. Northern R., 7 Gray, 88; Kent v. Hudson R. Co., 22 Barb. 278; Medbury v. New York & E. R., 26 Barb. 564; Griffin v. Colver, 16 N. Y. 489; Scott v. Boston, etc. Co., 106 Mass. 468; Smith v. N. H. & N. R. Co., 12 Allen, 531; Cowley v. Davidson, 13 Minn. 92; Weston v. Railroad Co., 54 Me. 376; King v. Woodbridge, 34 Vt. 565; Collard v. South E. Ry. Co., 7 H. & N. 79; Wilson v. Lancashire, etc. Co., 9 C. B. (N. S.) 632; Wilson v. York, etc. R., 18 E. L. & E. 557; New Orleans, etc. R. Co. v. Tyson, 46 Miss. 729; Peet v. Chicago & N. R. Co., 20 Wis. 594; Newell v. Smith, 49 Vt. 255; Sturgeon v. St. Louis, etc. Co., 65 Mo. 569; Illinois C. R. v. Cobb, 64 Ill. 128; Plummer v. Penn. L. Ass'n, 67 Me. 363; Sisson v. Cleveland & T. R. Co., 14 Mich. 489; Bares v. Steamship Co., 3 Wall. Jr. 229; Deming v. Railroad, 48 N. H. 469; Hackett v. B. C. & M. R., 35 N. H. 390, 400; Faulkner v. South P. R. Co., 51 Mo. 311; Devereaux v. Buckley, 34 Ohio St. 16; Kansas P. R. Co. v. Reynolds, 8 Kan. 623; St. L. etc. Ry. v. Mudford, 48 Ark. 502; Birney v. Wabash, etc. Ry. Co., 20 Mo. App. 470; Hamilton v. Western N. C. R. Co., 96 N. C. 398; East Tennessee, etc. R. Co. v. Hall, 85 Tenn. 69; Tompkins v. Kanawha Board, 21 W. Va. 227; Goldsmith v. Henderson, 50 Fed. Rep. 567.

In a recent case this measure of liability was imposed upon the carrier who wrongfully detained a large number of cattle on a claim for demurrage to a small amount. It was contended that it was the shipper's duty to have made an offer of two or three of the cattle as security for the claim. But the court held that he was not bound to do so in order to mitigate the damages for which the carrier might be liable or to pay the demurrage under protest. Such an offer should have come from the carrier. The Suffolk, 31 Fed. Rep. 835.

might have delivered the property. The profit accruing from an accidental rise in the market belongs to the shipper, and it would be an extraordinary misapplication of the principles of justice to allow the carrier to escape all liability for its negligence and dereliction of duty by depriving the owner of the property of any recompense for the wrong done him because of the advance in price.[1]

§ 907. **Vindication of the rule stated.** This rule is based on the principle upon which damages generally are assessed for the breach of a contract to deliver goods. It is compensation for the injury for not having the very thing, *propter rem ipsam non habitam*, at the time and place at which it should have been delivered, including the damages resulting naturally, or according to the usual course of things, from the breach of the contract itself, as well as such as may reasonably be supposed to have been in the contemplation of both parties when they contracted as the probable result of a breach of it.[2] When there is negligent delay in transportation the thing which the owner does not receive when he is entitled to it is goods or their value at the time they were due. The thing which he afterwards receives is goods of a value at a different time, which is not necessarily the same value. The general price of such goods in the market is the appropriate, if not the only, legal evidence of their value at any time in question. If [219] their market value is less when they are actually delivered than it was when they ought to have been delivered, the fall in that value is not a cause, but an incident or consequence of the diminution in their intrinsic or merchantable value, and evidence of the degree of the injury which the owner has suffered by the wrongful act of the carrier. A diminution in the market value of goods by the operation of general laws is an actual loss of a portion of their real and intrinsic value, as much as a change for the worse in their quality.[3] A fall in

[1] Morrison v. I. & V. Florio S. S. Co., 36 Fed. Rep. 569; The Sabioncello, 8 Benc. 90; Rodocanachi v. Milburn, 18 Q. B. Div. 67. See § 919, *post*, where some cases to the contrary, in principle, are discussed.

[2] Cutting v. Grand Trunk Ry. Co., 13 Allen, 381; Hadley v. Baxendale, 9 Exch. 351; 1 Pothier on Obligations, 162, 163; 2 Kent's Com. (6th ed.) 480.

[3] Stone v. Codman, 15 Pick. 301; Monteith v. Merchants' Despatch Co., 9 Ont. App. 282. The text is quoted with approval in St. L. etc. Ry. v. Mudford, 48 Ark. 502, 508.

the market is no more a cause of the diminished value of the goods than a fall in a thermometer or barometer is the cause of a change in the weather.[1] If a common carrier unreasonably delays to transport and deliver goods intrusted to him for carriage, and their value meanwhile falls, the measure of damages in an action against him is the difference between their market value at the time when and the place where they ought to have been delivered and such value at that place on the day when they were delivered; although there was no contract to deliver them within any certain time, and they were not intended to be used for any special purpose at any fixed time, and the carrier finally delivered them in the same condition as when they were received by him.[2] The principle and the measure of damages are the same when the diminished value at the time of the delayed delivery has resulted from the perishable nature of the property.[3] In case of shipping live animals the losses for negligent delay may include not only such as arise from fall in the market, but shrinkage or injury to them occasioned by detention, and care and expense bestowed upon them.[4] The recovery for shrinkage must be limited as to time to what the animals lost between the day they should have reached their destination and the first day thereafter on which they can be sold at a fair price,[5] and for expense to the time of their arrival.[6]

§ 908. Same subject. The damages measured and [220] recoverable by this rule are not consequential, requiring notice to the carrier that the goods were contracted to be shipped for the purpose of sale,[7] nor are they special. This is very

[1] Cutting v. Grand Trunk Ry. Co., 13 Allen, 381.

[2] Id.

[3] Wilson v. Lancashire, etc. Co., 9 C. B. (N. S.) 632; Ingledew v. Northern R., 7 Gray, 86; Illinois C. R. Co. v. Owens, 53 Ill. 391; Hewett v. Chicago, etc. Ry. Co., 63 Iowa, 611.

[4] Sangamon, etc. R. Co. v. Henry, 14 Ill. 156; Smith v. New Haven, etc. R. Co., 12 Allen, 531; Sturgeon v. St. Louis, etc. R. Co., 65 Mo. 569; Chicago, etc. R. Co. v. Erickson, 91 Ill. 613; Cutting v. Grand Trunk Ry. Co., 13 Allen, 381; Welsh v. Railroad Co., 10 Ohio St. 65; Porterfield v. Humphreys, 8 Humph. 497; Black v. Camden, etc. R. Co., 45 Barb. 40; Kansas P. R. Co. v. Nichols, 9 Kan. 235; Wilson v. Hamilton, 4 Ohio St. 722; Ayres v. Chicago & N. R. Co., 71 Wis. 372.

[5] Ayres v. Chicago & N. R. Co., 71 Wis. 372; S. C., 75 id. 215.

[6] Louisville & N. R. Co. v. Trent, 16 Lea, 419.

[7] Devereaux v. Buckley, 34 Ohio St. 16, is opposed to this view. This

clearly illustrated in an English case. A cap manufacturer at C. bought cloth at H., for the purpose of making it into caps which he was in the habit of selling through the country by means of travelers. The cloth was delivered to the defendants on the 15th of March to be carried by their railway to M.; but through the negligence of the company's servants it was sent to another station, and did not reach the plaintiff until the 12th of April, which was too late for his purpose; that is, he did not receive the cloth in time to manufacture it into caps, the season having passed before he could execute the orders obtained by his travelers. According to his uncontradicted evidence the cloth thereby became of less value to him by 100*l.* He also claimed by way of damages the loss of the profits he would have made by the sale of caps that season if the cloth, which could not be procured at C., had arrived in due time. On the trial the jury appealed to the judge for information as to how they were to assess the damages, and were informed by him that they were at liberty to take into consideration the fact that the plaintiff had lost the season in consequence of the non-arrival of the cloth in due time. Acting upon that information the jury found a verdict for [223] the plaintiff for 80*l.* damages.[1] A similar decision was

point was mentioned but not decided in Smith v. New Haven, etc. R. Co., 12 Allen, 531, but was expressly decided in accordance with the text in Cutting v. Grand Trunk Ry. Co., 13 Allen, 381; Deming v. Railroad Co., 48 N. H. 455. This is the rule in Scotland. Keddie v. North British Ry. Co., 14 Rettie, 233.

[1] The expression "loss of the season" being ambiguous, on a rule *nisi* to reduce the verdict to a nominal sum Williams, J., said: "If by the expression 'loss of the season' the jury were induced in assessing the damages to take into their consideration the profits which the plaintiff might have made by the manufacture and sale of caps if the material had reached his hands in due time, we are all of the opinion that they would have misconceived the proper principle on which the damages were to be es- [221] timated, and that there would be a failure of justice if the verdict were allowed to stand. But if we are to assume the meaning of 'loss of the season' to be that the goods, by reason of their not having been delivered in due time, had become lessened in value, that is, if in consequence of the delay they had become of less value to the plaintiff because the articles to be made up would be less marketable as the time for finding customers had gone by, and so the goods were left on the plaintiff's hands, deteriorated or diminished in value, then we do not think there was any mistake in point of law in the direction of the learned

made in the court of exchequer about the same time. The plaintiff, a hop grower in Kent, sent to London by the defendant's railway some pockets of hops consigned to a purchaser. The defendants kept the hops for some days on their

judge." On the question whether the plaintiff was entitled to recover the difference between the value of the goods to him if they had been delivered in proper time, and their value at the time when they were actually delivered, he said: "I am of opinion that the consignee is entitled to recover such difference in value. If it were otherwise great injustice would be done; for instance, — to put a familiar case, — suppose a tradesman at a fashionable watering-place sends an order to a warehouseman in London for a quantity of ribbons or other fancy goods, and they are delivered to a carrier so that they ought to reach him at the beginning of the season, and through the negligence of the carrier their delivery is delayed until the season is over, so that the opportunity for offering them for sale is lost, and, as their novelty or fashion is gone, they remain on hand materially diminished in value, would it not be unjust if the carrier were not made liable in damages for the loss which thus resulted from his negligence? . . . It was evidence for the jury that the defendants by reason of their negligence delivered the cloth to the plaintiff at a time when its value was less by 100*l.* than it would have been if they had been guilty of no negligence. But it is contended on the part of the defendants that whatever may be the dictates of justice in the matter such damages cannot be awarded to the plaintiff without violating the rule laid down by the court of exchequer in Hadley v. Baxendale, 9 Exch. 341. It seems to me, however, that we shall not violate that rule if we hold that the plaintiff is entitled to recover damages in respect to such deterioration in value. It is a damage which [222] fairly and naturally, in the usual course of things, may be said to arise from the defendant's negligence; for if the goods are not delivered at the time they are expected the delay must necessarily superinduce a considerable diminution in their value in the plantiff's hands." Byles, J., concurred in the forgoing opinion, and added, referring to Hadley v. Baxendale, which he said must decide the case in hand: "It is there said that 'where two parties have made a contract which one of them has broken the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either as arising naturally, *i. e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it.' I agree . . . that, as the defendants here knew nothing about the nature of the goods, or of the plaintiff's occupation, profits which might have accrued from making up the cloth into caps and selling them clearly were not within the contemplation of both parties at the time they made the contract as the probable result of the breach of it; and there-

premises in an open vat, whereby a small portion was stained by wet, and the purchaser rejected the whole, as he was entitled to do by the custom of the market. The plaintiff dried the stained hops, and they were rendered as good as ever for actual use, but the staining had depreciated the market value of the bulk. The plaintiff sent the hops to a factor for sale, but at that time their market price had considerably fallen from what it was at the time they ought to have been delivered. Martin, B., said: "It was proved that if they had been brought to market on the proper day they would have fetched a certain price, but, not being brought until a later day, the market price in the meantime fell, and the value of the hops was diminished by the amount of 65*l*. If that be not a direct, immediate and necessary consequence of the defendants' breach of duty it is difficult to understand what would be. It is said that the defendants had no notice of the purpose for which the hops were sent to London; but I think they must have known that they were sent for one of two purposes: either for consumption by the person to whom they

fore loss of profits could not properly enter into the consideration of the jury in assessing the damages here. The difficulty, however, is to distinguish between loss of profits and the difference between the exchangeable value of the goods when received by the carriers, or rather when they ought to have been delivered, and when they were actually delivered. Profits include the increased value arising from the purpose to which the plaintiff intended to apply the goods; whereas, diminution in exchangeable value is only something substracted from the inherent value of the articles themselves. When thoroughly considered, this, I think, will be found to be a sound distinction. It is admitted that deterioration in quality is to be taken into account in estimating the damage the plaintiff has sustained; it is admitted, also, that loss or diminution in the quantity is to be taken into account; and I do not see why a loss in the exchangeable value should not also be taken into account." Wilson v. Lancashire & Y. Ry. Co., 9 C. B. (N. S.) 632; Cutting v. Grand Trunk Ry. Co., 13 Allen, 381; Schulze v. Great Eastern Ry. Co., 19 Q. B. Div. 30. In the last case a parcel containing samples was delivered to a carrier to be forwarded and notice of its contents was given. It did not reach its destination until the close of the season during which the samples could be used for procuring orders, and in consequence they became worthless; others like them could not be procured in the market. The case was considered to be within the rule of that quoted from, and the damages were measured by the value of the samples to the plaintiff at the time they should have been delivered.

were sent, or, as was more likely to be the case, to be sold for profit." [1]

§ 909. Application of the rule to ocean carriage. In a later case in the probate division, the question came up whether a diminution of market value during the time delivery of a cargo shipped in India for London was delayed by a defect of the ship's engine could be allowed as an item of damages, as well as a diminution of quantity by leakage of sugar. The latter only was allowed. The question upon the other item as stated by the court was whether, if there is undue delay on a long voyage at sea, it follows as a matter of course that if between the time when the goods ought to have arrived and the time when they did arrive there has been a fall in the price of such goods damages can be recovered by the consignee. It was answered in the negative.[2] The action

[1] Collard v. Southeastern Ry. Co., 7 H. & N. 79; East Tennessee, etc. Ry. Co. v. Johnson, 85 Ga. 497.

[2] The Parana, 2 Prob. Div. 118, reversing on this question the decision of Sir Robert Phillmore in the admiralty division, 1 id. 452. Mellish, L. J., said: "There is no case, I believe, in which it has ever been held that damages can be recovered for delay in the carriage of goods on a long sea voyage, where there has been what may be called a merely accidental fall in the price between the time when the goods ought to have arrived and the time when they did arrive,— no case that I can discover where such damages have been recovered; and the question is, whether we ought to hold that they ought to be recovered. If goods are sent by a carrier to be sold at a particular market; if, for instance, beasts are sent by railway to be sold at Smithfield, or fish are sent to be sold at Billingsgate, and, by reason of delay on the part of the carrier, they have not arrived in time for the market, no doubt damages for the loss of market may be recovered. So, if goods are sent for the purpose of being sold in a particular season when they are sold at a higher price than they are at other times, and if by reason of breach of contract they do not arrive in time, damages for loss of market may be recovered. Or if it is known to both parties that the goods will sell at a better price if they arrive at one time than if they arrive at a later time that may be ground for giving damages for their arriving too late and selling for a lower sum. But there is in this case no evidence of anything of that kind. As far as I can discover, it is merely said that when the goods arrived in November they were likely to sell for less than if they had arrived in October, for the market was lower. But besides the cases of consignments of goods to be sold at a particular market, cases were cited — and it was on them that the court below proceeded — of the carriage of goods by railway where damages on account of a fall in the market have been recovered. It is said that there can be be no difference between the carriage of goods by railway and the carriage of goods

in which this rule was announced was on the shipping contract. A more recent case applies the principle to an action of tort wherein damages were sought on account of loss of the market against a vessel which through negligence collided

by sea, but it appears to me there may be a very material difference between the two cases. When goods are conveyed by railway, if they are conveyed for the purpose of sale, it is usually for the purpose of immediate sale; and if the cases are examined, I think it will be found that the courts treated them as if the goods were consigned for the purpose of immediate sale. No doubt if goods are consigned to a railway company under such circumstances, the railway company may be reasonably supposed to know that they are consigned for the purpose of immediate sale, and if by breach of contract on the part of the company they do not arrive in time to be sold when the owner intends them to be sold, that may possibly be a ground for giving damages for what is called 'loss of market.'

"The strongest case in favor of the decision of the court below is that of Collard v. South Eastern Ry. Co. (7 H. & N. 79), but there was a good deal of doubt about that case. The goods in that case were hops, and were consigned to a hop merchant in fulfillment of an actual contract. The damages arising from the non-fulfillment of that particular contract could not be recovered, because, of course, the railway company would know nothing about it; but the court came to the conclusion that the case must be treated as if the goods were consigned for the purpose of immediate sale. There were apparently very violent fluctuations going on in the hop market at that time, and it might be taken that the owner had selected his own time for selling his hops when he thought the price was at its best, and by reason of a breach of contract on the part of the railway company — which consisted, it is to be observed, not in delay in delivering the hops, but in actual damage to the hops (the hops were damaged and had to be dried),— it might be considered that there was a loss of market." The same comment was made on Ward v. New York C. R. Co., 47 N .Y. 29. And the opinion continues: "The difference between cases of that kind and cases of the carriage of goods for a long distance by sea seems to me to be very obvious. In order that damages may be recovered we must come to two conclusions — first, that it was reasonably certain that the goods would not be sold until they did arrive; and, secondly, that it was reasonably certain that they would be sold immediately after they arrived, and that that was known to the carrier at the time when the bills of lading were signed. It appears to me that nothing could be more uncertain than either of these two assumptions in this case. Goods imported by sea may be, and are every day, sold whilst they are at sea. If the man who is importing the goods finds the market high, and is afraid that the price may fall, he is not usually prevented from selling his goods because they are at sea. The sale of goods to arrive, the sale of goods on transfer of bill of lading, with cost bills and insurances is a common mercantile contract made every day. It may be that from not having samples of the goods, or from not knowing what is the particular quality of the goods,

with that of the plaintiff.[1] This principle, according to a majority of the Ontario high court and the unanimous opinion of the Ontario court of appeal, does not apply to ocean carriers

the consignee may have difficulty in selling them until they arrive, but that would not affect the question. Nor would it signify that the goods no longer belonged to the original consignee, but to a man who had acquired them by the assignment of the bill of lading whilst the goods were at sea. We were told that in this case the plaintiff was a person who had advanced money on the security of the bills of lading. That possibly may be the case; but whether he has done that or is the purchaser would make no difference. It was said that the goods were sold, and that if the person who sells them does not suffer the damage then the purchaser would suffer the damage. But that is pure speculation. If a man purchases goods while they are at sea no person can say for what purpose he purchases them. He may purchase them because he thinks that if he keeps them for six months they will sell for a better sum, or he may want to use them in his trade. It is pure speculation to enter into the question for what purpose he purchases them. In this particular case the plaintiff did not sell the goods when they arrived, for he sold them some months afterwards, when a further fall had taken place in the market. Of course, he does seek to recover from the defendant that additional loss, but this serves to illustrate how uncertain it is whether he would have sold them. If he did not sell them when they did arrive, but kept them because he thought the market would rise, how can we tell that he would not have done exactly the same thing if the goods had arrived in time. Therefore it seems to me that to give these damages would be to give speculative damages — to give damages when we cannot be certain that the plaintiff would not have suffered just as much if the goods had arrived in time. According to the principles on which the courts have acted in all such speculative and uncertain cases damages ought not to be recovered." See The Success, 7 Blatchf. 551.

The preceding English and American cases which have been cited do not appear to proceed on the principle that damages are given "for loss of market" when the market price declines during the delay of delivery; but on the principle that if the property is worth less when it is delivered after a negligent delay the owner suffers a loss proportioned to the diminution of market value whether he sells or not; that he sustains an injury as real as though the quality had been deteriorated, or the quantity reduced; in the language of Byles, J., already quoted, "diminution in exchangeable value is only something subtracted from the inherent value of the articles themselves." A sale is no more necessary to make the latter loss manifest than it is to sell the residue when a part has been lost in consequence of the delay in order to demonstrate that a portion is less valuable than the whole. The qualification of the rule laid down in the text in Peet v. Chicago & N. R. Co., 20 Wis. 624, appears to be a departure from the general course of decision in requiring the property to be sold at the depreciated price.

[1] The Notting Hill, 9 Prob. Div. 105.

where the delayed delivery is the result, not of ocean transit, but of transmission to a wrong port. In such a case the general rule applies.[1]

[224] **§ 910. Delay after notice of arrival.** Damages measured by the depreciation in the value of the property may be [225] recovered for negligent delay of delivery after its arrival at the place of destination; as where it is occasioned by [226] the carrier's neglect to give the consignee notice of the arrival, when necessary,[2] or when he there exposes it to actual injury, and thereby necessitates delay to prepare it for market.[3]

§ 911. Increased cost of obtaining property. It being the duty of the carrier to deliver the property to the consignee upon application and payment of freight, if he wrongfully refuses to do so and obliges the consignee to repeat his application, he is entitled to be compensated for the time and expense of the extra journey.[4] Where expenses have been incurred, and time and trouble taken in looking for property the delivery of which has been delayed under circumstances justifying such search, they may be recovered for, if the delay [227] has been caused by the carrier's negligence.[5] The ship-

[1] Monteith v. Merchants' Despatch Co., 1 Ont. 47, 78; S. C., 9 Ont. App. 282.

[2] Linn v. New Jersey, etc. Co., 49 N. Y. 442; New Orleans, etc. R. Co. v. Tyson, 46 Miss. 729.

[3] Collard v. Southeastern Ry. Co., 7 H. & N. 79.

[4] Waite v. Gilbert, 10 Cush. 177.

[5] Deming v. Railroad Co., 48 N. H. 455; Murrell v. Pacific Exp. Co., 54 Ark. 22; 14 S. W. Rep. 1098; Savannah, etc. Ry. Co. v. Pritchard, 77 Ga. 412.

In Davis v. Cincinnati, etc. R. Co., 1 Disney (Ohio), 23, the action was brought for damages for the carrier's failure to deliver within a reasonable time a boiler constructed to be used in a steam saw-mill. It was admitted that there had been a breach of the contract for the delivery, and the contest was as to the proper measure of damages. The plaintiff claimed, and was held entitled to recover, first, for the trouble and expense incurred in traveling to ascertain what had become of the boiler, which had been detained about a month beyond the period when it should have been delivered; second, the expenses incurred in the preparations for connecting the boiler with the fixtures and machinery of the saw-mill, it appearing obvious from the character of the construction of the boiler and the point of its destination that it was intended for use, and not for sale in the market.

In a late Wisconsin case it was ruled that the fact that a machine was shipped by a manufacturer to a manufacturing company was not sufficient notice to the carrier that the company intended to use it in its business. "Should we presume — as

per or consignee can, however, recover only for such trouble and expenses as result directly and necessarily from the delay and negligence of the carrier. These he may recover in addition to the loss by depreciation during such delay.[1] Where the defendant had failed to carry and deliver iron according to agreement, the plaintiff was held entitled to recover the expenses incurred in searching for it, and the charges he had to pay to get it.[2] He cannot recover for the time and expenses of going to the place of delivery and waiting there without showing that the carrier had notice at the time of contracting that such journey would be made to receive the goods.[3] The principle of compensation is flexible, and can be readily applied to do justice according to the varying circumstances of particular cases. A carrier having undertaken the transportation of peas shipped in Canada for New York, by his negligent delay was stopped on his way by the freezing of the lakes, and would be detained through the season; he refused to forward the peas by rail or deliver them to the owner except on payment of freight; the owner replevied them and judiciously sent them to the Boston market, and was held entitled to recover the difference between the net proceeds of the sale at Boston and their market value at New York at the time they should have been delivered.[4] If [228] the goods are being transported for an illegal traffic, and the carrier is guilty of unnecessary delay or tardiness, he is not liable for damages resulting from their being thereby exposed to seizure, and actually seized by the government by reason of such illegality.[5] But where a carrier contracted to trans-

we have no right to do — that the defendant had knowledge of plaintiff's business, surely we could not presume that this machine was ordered by it for immediate use." Thomas, etc. Manuf. Co. v. Wabash, etc. Ry. Co., 62 Wis. 642.

[1] Deming v. Railroad Co., 48 N. H. 455; Benson v. New Jersey R. & T. Co., 9 Bosw. 412; Rankin v. Pacific R. Co., 55 Mo. 167; Richmond v. Union, etc. Co., 87 N. Y. 240. See Simpson v. London & N. Ry. Co., 1 Q. B. Div. 274.

[2] Farwell v. Davis, 66 Barb. 73; Chicago & N. Ry. Co. v. Stanbro, 87 Ill. 195; Evans v. Rudy, 34 Ark. 383.

[3] Briggs v. New York C. R. Co., 28 Barb. 515; Woodger v. Great W. Ry. Co., L. R. 2 C. P. 318; Ingledew v. Northern R. Co., 7 Gray, 86; Mississippi C. R. Co. v. Kennedy, 41 Miss. 671; Denver, etc. R. Co. v. De Witt (Colo.), 29 Pac. Rep. 524.

[4] Laurent v. Vaughn, 30 Vt. 90.

[5] Gerhard v. Neese, 36 Tex. 635.

port wheat from Canada to the United States by a certain day, when, as he knew, the reciprocity treaty would expire, and he failed to deliver it at that time, he was held liable to the owner for the duty which he had to pay; it was immaterial that prices rose soon after the day fixed for the delivery so that the plaintiff actually received more after paying the duty than he could have done by selling it on that day.[1]

§ 912. **Expense of further transportation.** Goods were delivered by the plaintiff to a carrier on Thursday to be conveyed to B. It was expected by the plaintiff that they would arrive on the Saturday following, but no notice was given to the carrier of such expectation, that the goods might be ready for the market. On Saturday the plaintiff's clerk proceeded to B., and owing to the non-arrival of the goods until Monday, he was obliged to remove them to S. to sell them there. The delay in delivering being unreasonable, the jury were directed that they were at liberty to give as damages the expense of removal of the goods from B. to S., and the expenses and wages of the clerk if they thought fit. It was a question for the jury whether it was reasonable and proper to send a man to B. If he went down unnecessarily, or remained there an unreasonable time, the defendants ought not to pay the expenses.[2]

§ 913. **Liability for delay where facts are known.** Damages are given against a carrier with reference to a particular use for which property is delivered to him for transportation when such use is brought to his notice at the time of contracting. In a late English case the principle is stated, and said to be settled, that whenever either the object of the [229] sender is specially brought to the notice of the carrier, or circumstances are known to him from which the object ought in reason to be inferred, so that it may be taken to have been within the contemplation of both parties, damages may be recovered for the natural consequences of the failure

[1] Gibbs v. Gildersleeve, 26 Up. Can. Q. B. 471.

[2] Black v. Baxendale, 1 Exch. 410. So far as the recovery of expense is concerned it is doubtful if this case is in harmony with the rule of Hadley v. Baxendale, which was not decided until seven years later. See Woodger v. Great Western Ry. Co., L. R. 1 C. P. 318, and American cases cited in preceding section, denying such liability where the carrier had no notice of the circumstances.

of that object.[1] In this case the plaintiff, the manufacturer, who was in the habit of attending agricultural shows to exhibit samples of his goods, and made a profit by the practice, delivered them upon a show ground, where he had been exhibiting them, to the receiving agent of the defendants, a railway company, to be carried by a particular day to a show ground at another place, when and where a similar show, at which he intended to exhibit, was to be held; but nothing was expressly said about this intention of the plaintiff. The samples did not arrive till after the day stipulated and when the show was over; and the plaintiff lost several days in going to meet them and in waiting for them. In an action for the breach of contract a verdict was given for damages which included a sum for loss of time or loss of profit. The court inferred as matter of fact that the purpose of the plaintiff to exhibit was within the contemplation of the parties, and held that he was entitled to damages on the ground that loss of profit was a natural and probable result of the failure of that purpose; no evidence was necessary of the prospect of making profit at the particular show in question.[2]

The plaintiff is entitled to recover for damages naturally following under circumstances known to both parties when the contract was made. If the special circumstances under which it was actually made were communicated by the plaintiff to the defendant, and thus known to both, the damages resulting from the breach are those which they might reasonably contemplate would be the amount of injury which would ordinarily follow therefrom under those circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party [230]

[1] Simpson v. London & N. Ry. Co., 1 Q. B. Div. 274. The goods were addressed "to the show ground at N."

[2] See Booth v. Spuyten Duyvil R. M. Co., 60 N. Y. 487; Thorne v. McVeagh, 75 Ill. 81; Vicksburgh, etc. R. v. Ragsdale, 46 Miss. 458; Illinois C. R. Co. v. Cobb, 64 Ill. 128; Mace v. Ransey, 74 N. C. 11, stated *ante*, § 900; St. L. etc. Ry. v. Mudford, 48 Ark. 502.

If the carrier wrongfully refuses to deliver goods and the consignee informs him of a contract for their sale, the former is liable for any loss resulting to the latter by a decline from the contract price between the time of refusal and that of actual delivery. Schmidt v. The Pennsylvania, 4 Fed. Rep. 548.

breaking the contract, he, at the most, could only be supposed to have had in contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any such circumstances, from the breach of such a contract.[1] Where a broken part of the machinery of a mill was sent by a carrier to serve as a model for making a new one, and the mill in the meantime was stopped, but these circumstances were not made known, the carrier was not liable for unreasonable delay in the conveyance of the property for damages resulting from such stoppage.[2] When a carrier undertakes to convey machinery necessary to the running of a mill, or material necessary to its working, and has notice of these facts at the time of making the contract, the injury from the mill standing idle, as well as for loss of wages of operatives necessarily unemployed, may be recovered as damages resulting from unreasonable delay on his part.[3]

[1] Hadley v. Baxendale, 9 Exch. 341; Mather v. American Exp. Co., 138 Mass. 55; Silver v. Kent, 60 Miss. 124; Lindley v. Richmond & D. R. Co., 88 N. C. 547; Great Western Ry. Co. v. Redmayne, L. R. 1 C. P. 329; Columbus & W. Ry. v. Flournoy, 75 Ga. 745; Wabash, etc. Ry. v. Lynch, 12 Ill. App. 265; Chicago, etc. Ry. v. Hale, 83 Ill. 360; Baltimore & O. R. Co. v. Pumphrey, 59 Md. 390; Pacific Exp. Co. v. Darnell, 62 Texas, 639; The Henry Buck, 39 Fed. Rep. 211; Murrell v. Pacific Exp. Co., 54 Ark. 22; 14 S. W. Rep. 1098; Thomas, etc. Manuf. Co. v. Wabash, etc. Ry. Co., 62 Wis. 642.

In Savannah, etc. Ry. Co. v. Pritchard, 77 Ga. 412, this measure of liability was imposed without reference to the question of notice. A still-worm for use in the manufacture of turpentine was not delivered until after undue delay. The consignee suffered loss, without fault on his part, by the overflowing of crude turpentine. For such loss the carrier was held responsible. Compare East Tennessee, etc. Ry. Co. v. Johnson, 85 Ga. 497.

[2] Hadley v. Baxendale, 9 Exch. 341; Thomas, etc. Manuf. Co. v. Wabash, etc. Ry. Co., 62 Wis. 642; Cooper v. Young, 22 Ga. 269.

[3] Vicksburg, etc. R. Co. v. Ragsdale, 46 Miss. 458; Cincinnati Chronicle Co. v. White Line T. Co., 1 Cinc. (Ohio), 300; Cooper v. Young, 22 Ga. 269.

In Gee v. Lancashire & Y. Ry. Co., 6 H. & N. 211, this subject came before the court of exchequer. The plaintiffs delivered to the defendants, who were carriers, ten tons of cotton to be carried from Liverpool to Oldham. In the usual course the cotton should have been received on the following day, but did not in fact arrive until four days afterwards. In consequence of the delay a new mill of the plaintiffs was stopped. At the time of the delivery of the cotton to the defendant nothing was said as to the particular inconvenience likely to result from delay in forwarding it; but on the day before

§ 914. **Same subject.** In order to impose on the de- [231] faulting party a further liability than for damages arising naturally and directly, that is, in the ordinary course of things, from a breach of contract, such unusual or extraordinary damages

it was so delivered, and repeatedly on each succeeding day until it arrived at Oldham, one of the plaintiffs called to inquire about it, and on each occasion told the manager of the goods department at the Oldham station that the mill was at a stand solely on account of the non-delivery of the cotton. The plaintiffs proved that during the time the mill was idle they had paid in wages 7*l.*; and that the profit which would have been made if the mill had been at work was 7*l.* 10*s.* It was held a misdirection to instruct the jury to allow these damages as matter of law. Pollock, C. B.: "He (the judge below) assumes this loss to have been sustained in consequence of the non-arrival of the cotton, while in fact it was not in consequence of the non-arrival of the cotton alone, but in consequence of that fact, *and of the plaintiffs having no other cotton in stock.* If it had been established that such is the practice amongst cotton-spinners, so that every carrier must have known that the mill would be at a stand-still until the cotton arrived, the damages would have been properly assessed. And that would be so whether the carrier had notice of the fact, or notice from the well-understood course of business. But the business of life is conducted with reference to the necessity of guarding against certain accidents, and owners of cotton-mills may fairly be expected to guard against the risk of being delayed by having something in stock. Is a railway company bound to take notice that in a particular case a mill would be at a stand if goods were not delivered on a particular day? I think not. I think a carrier is not responsible for such consequences unless distinct notice is given at the time of the sending of the goods to be carried. If the plaintiffs had said, 'Now, there must be no mistake, the cotton must be delivered immediately; it is required for a mill which is actually at a stand for want of it, and if it is not delivered in due time you will be responsible for all the consequences,' probably the railroad company would not have taken it except at a high rate. Common carriers are bound to carry goods at a reasonable rate, but not to incur such responsibility as would be imposed upon them if the direction of the judge in this case were correct. I think that the rule as to damages of this sort was correctly laid down in Hadley v. Baxendale, 9 Exch. 341." Channell, B.: "It cannot be said as a matter of law that these were damages which naturally flowed from the breach of the contract; or that anything had passed to show that they were in the contemplation of the parties when the contract was entered into." Bramwell, B.: "The law on this subject is laid down correctly in Hadley v. Baxendale. To ascertain the damage it is necessary to find out how much better off the plaintiffs would have been if the contract had not been broken. The plaintiffs are not necessarily entitled to recover the whole amount given. Hadley v. Baxendale decides that a defendant is not liable except for such damages 'as may fairly and reasonably be considered, either arising naturally, *i. e.*, according to the usual course of

must have been brought within the contemplation of the parties as the probable result of a breach at the time of contracting. Generally, notice then given of any special circumstances which would show that the damages to be anticipated [232] from a breach would be enhanced has been held sufficient for this effect.[1] It has been held to affect carriers equally with other parties;[2] though they are bound by reason of their public employment to serve all who apply. They may doubtless refuse to undertake the carriage of goods in contemplation of increased responsibility unless their demand for reasonable compensation beyond their ordinary rates, according to [233] the enlargement of their liability, is acceded to.[3] Where

things, from the breach of the contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it.' I am not sure that another qualification might not be added which would be in favor of the plaintiffs in this case, viz., that in the course of the performance of the contract one party may give notice to the other of any particular consequences which will result from the breaking of the contract, and then have a right to say, 'If after that notice you persist in breaking the contract I shall claim the damages which will result from the breach.' But in any case you must first find out the loss sustained by the plaintiff, and afterwards give it him minus any damages excluded by these rules. And I cannot but think that if the judge had left it to the jury to determine the damages in that way, they would probably have given the same sum which they have already given. . . . If the judge had said, as a proposition of fact, 'I think that you will consider that the plaintiffs are entitled to claim for wages,' I doubt if there would have been any objection to the summing up. But he says, 'Where, under circumstances such as exist in the present case, by the neglect of a carrier a manufacturer has no material to carry on his business, he has a *right*, in my opinion, to charge as *legal damage* such loss as naturally and immediately arose *from the stopping of his mill*.' He should have added, 'If the jury are of opinion that the stoppage was the natural consequence of the non-delivery of the goods.' I say this in order that the county court may not suppose on the next trial that we think that these two sums are not recoverable; for I do not say so; and I do not understand that the other members of the court think so."

[1] Hadley v. Baxendale, 9 Exch. 341; Gee v. Lancashire & Y. Ry. Co., 6 H. & N. 211; Baldwin v. United States T. Co., 45 N. Y. 744; S. C., Allen's Tel. Cases, 613; Deming v. Railroad, 48 N. H. 455; Converse v. Burrows, 2 Minn. 191; Paine v. Sherwood, 19 Minn. 315; Sisson v. Cleveland & T. R. Co., 14 Mich. 489.

[2] Id.

[3] Gee v. Lancashire & Y. R. Co., 6 H. & N. 217, per Pollock, C. B.; Riley v. Horne, 5 Bing. 217.

In Horne v. Midland Ry. Co., L. R. 8 C. P. 131, this obligation of carriers to serve all was supposed to neutral-

goods are contracted to be sold at a price fixed, to be delivered at a particular place, and a carrier promises to transport and deliver them in due time, or receives them seasonably to be so delivered if there is no negligent delay; and the carrier [234]

ize the effect of mere notice. In that case the plaintiffs being shoe manufacturers at K. were under a contract to supply a quantity of military shoes to a firm in London for the use of the French army at 4*s.* per pair, an unusually high price. The shoes were to be delivered by the 3d of February, 1871, and the plaintiffs accordingly sent them to the defendant's station at K. for carriage to London in time to be delivered there in the usual course in the evening of that day, when they would have been accepted and paid for by the consignees. Notice was given to the station master — which for the purpose of the case was assumed to be notice to the company — at the time that the plaintiffs were under a contract to deliver the shoes by the 3d, and that unless they were so delivered they would be thrown on their hands, but he was not informed that there was anything exceptional in the character of the contract. The shoes were not delivered in London till the 4th of February, and were consequently not accepted by the consignees, and the plaintiffs were obliged to sell them at 2*s.* 9*d.* a pair. Kelly, C. B.: "A question of very great importance has been raised in the course of the argument to which it is proper to refer, though for reasons I shall presently state I do not think it will ultimately become necessary to decide it — that is to say, the question what the position of a railway company is when goods are intrusted to it for carriage with an intimation of the consequences of non-delivery, such as it was argued on behalf of the plaintiffs existed in the present case. The goods with which we have to deal are not the subject of any express statutory enactment; the case with respect to them depends on the common law taken in connection with the acts relating to the defendant's railway company. Now, it is clear, in the first place, that a railway company is bound, in general, to accept goods such as these, and to carry them as directed to the place of delivery, and there deliver them. But now, suppose that an intimation is made to the railway company, . . in express terms, stating that they have entered into such and such a contract, and will lose so many pounds if they cannot fulfill it, what is then the position of the company? Are they the less bound to receive the goods? I apprehend not. If, then, they are bound to receive, and do so without more, what is the effect of the notice? Can it be to impose upon them a liability to damages of any amount, however large, in respect of goods which they have no option but to receive? I cannot find any authority for the proposition that the notice without more could have any such effect. It does not appear to me that the railway company has any power, such as was suggested, to decline to receive goods after such a notice unless an extraordinary rate of carriage be paid. Of course they may enter into a contract, if they will, to pay any amount of damages for non-performance of their contract in consideration of an increased rate of carriage, if the consignors be willing to pay it; but in the absence of any such contract ex-

so contracts or receives with full notice that they are to be forwarded for delivery on such contract, and of the importance of having them at their destination for a seasonable delivery to the purchaser, the measure of damages for a breach by which the consignor loses the sale is the difference between the contract price and the value of the goods when actually delivered.[1] While the loss of another's money received for transportation by a carrier without knowledge of the purpose for which it is sent will lay him under obligation merely to refund the principal sum with interest; still, when it is seasonably sent for the specific purpose of paying the sender's premium on his life policy, which will lapse if payment be not made at the particular time, and the carrier is informed in relation to the premises, and has a reasonable time to perform the duty undertaken, but negligently fails to perform it, the law will justly hold him primarily, at least, for the net value of the policy which lapsed in consequence of his negligence. Under such circumstances both parties must be presumed to have contemplated that consequence when the money was deposited with the carrier; but these damages may be reduced so far as it was in the plaintiff's power and knowledge to prevent loss by reinstatement or re-insurance.[2] And where in consequence of the carrier's unreasonable delay in the delivery of the plaintiff's account against a third person, it became barred by the statute of limitations, the carrier was held liable for the amount of the account.[3] His liability in such an instance is analogous

pressly entered into, there being no power on the part of the company to refuse to accept the goods, or to compel payment of an extraordinary rate of carriage by the consignor, it does not appear to me any contract to be liable to more than the ordinary amount of damages can be implied from mere receipt of the goods after such a notice as before mentioned." These views did not receive the sanction of the entire court, and the case was decided on the point that the notice was insufficient; it did not inform the carrier of the unusual price of the shoes. See Booth v. Spuyten Duyvill R. M. Co., 60 N. Y. 496.

See vol. 1, § 52, for a discussion of the question as to what extent the notice of peculiar facts must enter into and become a part of the contract in order that responsibility for consequences shall follow; also Holland v. Seven Hundred, etc. Tons of Coal, 36 Fed. Rep. 784.

[1] St. L. etc. Ry. v. Mudford, 48 Ark. 502; Schmidt v. The Pennsylvania, 4 Fed. Rep. 548; Deming v. Railroad, 48 N. H. 455.

[2] Grindle v. Eastern Exp. Co., 67 Me. 317.

[3] Favor v. Philbrick, 5 N. H. 358.

to that which attaches when he carries perishable property; he is liable for it if it becomes worthless by its inherent qualities in consequence of negligent delay in its transportation.[1] It has been held that a dentist cannot recover earnings [235] prevented by the loss of his tools.[2]

[1] See Knapp v. United States & C. Exp. Co., 55 N. H. 348; Parks v. Alta Cal. Tel. Co., 13 Cal. 422; Bryant v. American Tel. Co., 1 Daly, 585.

In Vicksburg, etc. R. Co. v. Ragsdale, 46 Miss. 458, Simrall, J., concludes a masterly review of the cases on the measure of damages against carriers by saying: "We are constrained to concur in the observations of BB. Martin and Wilde, that a splendid effort was made in Hadley v. Baxendale to state the principle in such form as to provide for the more difficult cases, but subsequent experience and discussions have tended to demonstrate that it is not possible, in the nature of things, to declare a fixed rule for many contracts. This much may be accepted as well settled: 1. The proximate and natural consequences of the breach must always be considered. 2. Such consequences as from the nature and subject-matter of the contract may be reasonably deemed to have been in the contemplation of the parties at the time it was entered into. 3. Damages which fairly may be supposed not to have been the necessary and natural sequence of the breach shall not be recovered unless, by the terms of the agreement, or by direct notice, they are brought within the expectation of the parties. 4. Losses of profits in a business cannot be allowed unless the *data* of estimation are so definite and certain that they can be ascertained reasonably by calculation, and then the party in fault must have had notice, either from the nature of the contract itself or by explanation of the circumstances at the time the contract was made, that such damages would ensue from nonperformance. 5. If the contract is made with reference to embarking in a new business (such as sawing lumber for market), the speculative profits which might be supposed to arise, but which were defeated because of a breach of contract which delayed the business, cannot be looked to as an element of damages. These are dependent largely upon other contingencies, skill, industry, energy, the market, supply of material, keeping machinery in order, loss of time by weather or breakage of machinery. 6. If the delay is in the transportation of machinery to be applied to a special use and that is known to the carrier, he is responsible for such damages as are fairly attributable to the delay, such as the value of the use of the machinery, to be tested by its rental price, or other approximate means; the expenses of idle hands, the loss of gain on work contracted to be done for another person, if such work could have been done, if the machinery had been delivered, and the gain thereby definitely ascertained in proper time. 7. The party injured by the delay must not remain supine and inactive, but should make reasonable exertions to help himself, and thereby reduce his losses, and diminish the responsibility of the party in default to him."

[2] Brock v. Gale, 14 Fla. 523.

§ 915. **Mental anguish as an element of damage.** It has been ruled in a recent Texas case, following a series of adjudications in that state which hold that damages for mental suffering may be recovered against telegraph companies for the negligent failure to promptly deliver messages announcing the death or mortal illness of near relatives, that a carrier who neglects without sufficient excuse to promptly forward the corpse of a husband for the transportation of which his wife has contracted is liable to her for the resulting mental distress.[1]

§ 916. **Carrier's responsibility in caring for property.** A common carrier is responsible for the safety of the goods intrusted to him; and bound for their delivery in as good condition as they were received at the place to which he undertook to carry them against all hazards excepting losses caused by the act of God or the public enemy. So the exception is often stated for brevity; but these others are also well settled: [236] he is not liable for losses or injuries from any inherent defect of quality or vice of the thing carried;[2] nor for those arising from the act of the public authorities, or caused by some act or omission of its owner.[3] His liability is not affected by the kind of motive power he employs;[4] and does not depend upon contract, but is imposed by law.[5] He is bound to carry for all persons who apply, and on the common-law liability;[6] though he may, as has been stated, contract with the shipper to abate in some degree its rigor.[7]

§ 917. **Burden of proof as to injury or loss.** Where goods are delivered to a carrier to be transported a promise to pay freights will be implied, and it is not necessary to prove payment or tender thereof in order to hold him liable. And in case of their loss or injury the burden is on the carrier to exonerate himself by proof that it happened by one of the causes for which he was not answerable. Proof of the delivery of the goods and their loss, or injury to them while in

[1] Hale v. Bonner, 82 Tex. 33.

[2] Baldwin v. London, etc. Ry. Co., 9 Q. B. Div. 582.

[3] Hutchinson on Carriers (2d ed.), § 170*a*.

[4] Hall v. New Jersey, etc. Co., 15 Conn. 539.

[5] Thurman v. Wells, 18 Barb. 500; Burkle v. Ells, 4 How. Pr. 288.

[6] Southern Exp. Co. v. Moon, 39 Miss. 822.

[7] See *ante*, § 904.

the carrier's hands, makes out a *prima facie* case against him.[1] But when it appears in a suit against him that the loss or injury proceeded from one of the excepted causes, then the burden is on the plaintiff to show that it resulted nevertheless from the negligence or fault of the carrier.[2] It has, however, been held by respectable authorities that the burden is on [237] the carrier not only to show that the loss happened by one of the excepted causes, but also that it proceeded from that cause without negligence on his part.[3]

§ 918. Damages where goods have a market value. In case of injury to or loss of property by the carrier's fault he is required to make compensation on the basis of its market value at the place of destination. In the former event the measure of damages is the difference between the value of the goods as, or in the condition when, delivered, and what their value would have been if they had not been damaged,[4]

[1] South & N. A. R. Co. v. Wood, 66 Ala. 167; Merchants' Despatch Transp. Co. v. Bloch, 86 Tenn. 392; Western Manuf. Co. v. The Guiding Star, 37 Fed. Rep. 641; Winne v. Illinois C. R. Co., 31 Iowa, 583; Mitchell v. United States Exp. Co., 46 Iowa, 214; Ewart v. Street, 2 Bailey, 157; Jackson v. Sacramento, etc. R. Co., 23 Cal. 268; Davidson v. Graham, 2 Ohio St. 131; Western T. Co. v. Newhall, 24 Ill. 466; Westcott v. Fargo, 63 Barb. 349; Union Exp. Co. v. Graham, 26 Ohio St. 595; Drew v. Red L. T. Co., 3 Mo. App. 495; Grey v. Mobile T. Co., 55 Ala. 387; Choate v. Crowninshield, 3 Cliff. 184; The Mollie Mohler, 2 Biss. 505; Charlotte, etc. R. Co. v. Wooten, 87 Ga. 203.

[2] Lamb v. Camden, etc. R. Co., 46 N. Y. 271; Read v. St. Louis, etc. R., 60 Mo. 199; American Exp. Co. v. Second Nat. Bank, 69 Pa. St. 394; Empire T. Co. v. Wamsutta, etc. Co., 63 id. 14; New Brunswick St. Nav. Co. v. Tiers, 24 N. J. L. 697; The Pereire, 8 Ben. 301; Six Hundred and Thirty Casks, 14 Blatchf. 517; Forbes v. Dallett, 9 Phila. (Pa.) 515; The Invincible, 1 Lowell, 225; Van Schaack v. Northern T. Co., 3 Biss. 394; Alden v. Pearson, 3 Gray, 342; Brauer v. The Almoner, 18 La. Ann. 266; French v. Buffalo, etc. R. Co., 4 Keyes, 108; Hays v. Millar, 77 Pa. St. 238; Hubbard v. Harnden Exp. Co., 10 R. I. 251; Clark v. St. Louis, etc. R. Co., 64 Mo. 440; Clark v. Barnwell, 12 How. (U. S.) 272; Transportation Co. v. Downer, 11 Wall. 129; Lawrence v. New York, etc. R. Co., 36 Conn. 63.

[3] Davidson v. Graham, 2 Ohio St. 131; Graham v. Davis, 4 id. 362; United States Exp. Co. v. Backman, 2 Cin. 251; 28 Ohio St. 144; Erie R. Co. v. Lockwood, id. 358; Union Exp. Co. v. Graham, 26 id. 595; Berry v. Cooper, 28 Ga. 543; Southern Exp. Co. v. Newby, 36 Ga. 635; Swindler v. Hilliard, 2 Rich. 286; Baker v. Brinson, 9 id. 201; Cameron v. Rich, 4 Strobh. 168; Steele v. Townsend, 37 Ala. 247; Grey v. Mobile Trade Co., 55 id. 387.

[4] East Tennessee, etc. R. Co. v. Johnston, 75 Ala. 597; South & N. A. R. Co. v. Wood, 72 id. 451; St. L. etc.

and for goods lost, their market value at the place of destination. The owner is entitled to have the equivalent of the goods at that place, in the condition in which the carrier undertook to deliver them, less the charges for transportation and delivery.[1] This measure of liability applies where there has been a conversion of the property, although the bill of lading stipulates that its value at the place of shipment shall be the measure in case it is lost. The carrier cannot claim any advantage or protection from its wrong-

Ry. Co. v. Phelps, 46 Ark. 485; Heil v. St. Louis, etc. Ry. Co., 16 Mo. App. 363; Lindley v. Richmond & D. R. Co., 88 N. C. 547; Wallingford v. Columbia & G. R. Co., 26 S. C. 258; Louisville & N. R. Co. v. Mason, 11 Lea, 116; Missouri P. Ry. Co. v. Fagan, 72 Texas, 127; In re Petersen, 21 Fed. Rep. 885; Magdeburg General Ins. Co. v. Paulson, 29 id. 530; Western Manuf. Co. v. The Guiding Star, 37 id. 641; Missouri P. Ry. Co. v. Nevin, 31 Kan. 385; Smith v. New Haven & N. R. Co., 12 Allen, 531; Cutting v. Grand Trunk Ry. Co., 13 id. 381; McGregor v. Kilgore, 6 Ohio, 359; The Colonel Ledyard, 1 Sprague, 530; Henderson v. Maid of Orleans, 12 La. Ann. 352; Black v. Camden, etc. R. Co., 45 Barb. 40; Ingledew v. Northern R. Co., 7 Gray, 86; Lewis v. Ship Success, 18 La. Ann. 1. See Marquette, etc. R. Co. v. Langton, 32 Mich. 251.

[1] Louisville & N. R. Co. v. Gilmer, 89 Ala. 534; Same v. Kelsey, id. 287; Wabash, etc. Ry. Co. v. Lynch, 12 Ill. App. 365; Thomas, etc. Manuf. Co. v. Wabash, etc. Ry. Co., 62 Wis. 642; Mobile & M. Ry. Co. v. Jurey, 111 U. S. 584; Rodocanachi v. Milburn, 18 Q. B. Div. 67; Prettyman v. Oregon Ry. & N. Co., 13 Ore. 341; Gray v. Missouri P. R. Co., 64 Mo. 47; Sturgess v. Bissell, 46 N. Y. 462; Marshall v. New York C. R. Co., 45 Barb. 502; Spring v. Haskell, 4 Allen, 112; Whitney v. Chicago & N. R. Co., 27 Wis. 327; Chapman v. Chicago & N. R. Co., 26 id. 295; McGregor v. Kilgore, 6 Ohio, 358; Laurent v. Vaughn, 30 Vt. 90; Gillingham v. Dempsey, 12 S. & R. 183; Louis v. S. B. Buckeye, 1 Handy (Cincinnati Sup. Ct.), 150; Warden v. Green, 6 Watts, 424; Rice v. Ind. & St. L. R. Co., 3 Mo. App. 27; Farwell v. Price, 30 Mo. 587; Nourse v. Snow, 6 Me. 208; Shaw v. S. C. R. Co., 5 Rich. L. 462; Union R. & T. Co. v. Traube, 59 Mo. 355; Atkisson v. S. B. Castle Garden, 28 Mo. 124; Michigan S. etc. R. Co. v. Caster, 13 Ind. 164; Taylor v. Collier, 26 Ga. 122; Arthur v. Ship Cassius, 2 Story, 81; Wallis v. Cook, 10 Mass. 510; Winchester v. Patterson, 17 Mass. 62; Harris v. Panama R. Co., 5 Bosw. 312; Sherman v. Wells, 28 Barb. 403; Van Winkle v. U. S. Mail Steamship Co., 37 Barb. 122; Northern T. Co. v. McClary, 66 Ill. 233; Little v. Boston, etc. R. Co., 66 Me. 239; Cushing v. Wells, etc. Co., 98 Mass. 550; Bailey v. Shaw, 24 N. H. 297; Ringgold v. Haven, 1 Cal. 108; Hart v. Spalding, id. 213; Wolf's Adm'r v. Lacy, 30 Tex. 349; Richmond v. Bronson, 5 Denio, 55; S. B. Emily v. Carney, 5 Kans. 645; Dean v. Vaccaro, 2 Head, 488; Blumenthal v. Brainerd, 38 Vt. 402; Sisson v. Cleveland, etc. R. Co., 14 Mich. 489; Ward C. & P. L. Co. v. Elkins, 34 Mich. 439.

doing by virtue of such a condition, even though it is valid as to a loss occurring otherwise.[1] Where the loss is attributable to mere negligence and there is such a stipulation the consignor may recover freight paid by him.[2] But otherwise there can be no recovery of prepaid freight, even though there has been a total loss of property,[3] unless the owner has, as part of the price of the goods, paid or become liable to pay a sum for freight in advance and they are lost by the carrier's negligence. In such a case the former may, as against the latter, be allowed an amount equal to the freight advanced, and if the carrier happens to be indemnified against that loss by an insurance of the amount of the advanced freight, the insurer of it may sue in his own name for it as part of the damages which the cargo-owner, but for the insurance, would have sustained by the defendant's negligence.[4] If the amount of freight charges is not otherwise shown, the carrier must prove it or there will be no reversible error in not deducting them.[5]

Where goods are negligently lost on the last part of [238] the route, the owner is allowed to recover their value at the place of destination, less the freight. He cannot, however, recover, in addition, the freight paid to another carrier who carried them over the first part of the route.[6] Nor is the carrier entitled to an abatement from the value of cotton consigned to a factor equal to his commissions.[7] If a debt is lost by the carrier's default in the performance of his undertaking, the amount of it is *prima facie* the measure of damages.[8] Where the carrier delivers goods contrary to the instructions of the consignee as to place at the destination, he is liable for their value if the consignee does not obtain them; but the amount of freight for transportation from the place

[1] Erie Dispatch v. Johnson, 87 Tenn. 499.

[2] Thomas, etc. Manuf. Co. v. Wabash, etc. Ry. Co., 62 Wis. 642.

[3] Rodocanachi v. Milburn, 18 Q. B. Div. 67.

[4] Dufourcet v. Bishop, 18 Q. B. Div. 373.

[5] International, etc. Ry. Co. v. Nicholson, 61 Texas, 550.

[6] Northern T. Co. v. McClary, 66 Ill. 233.

[7] Kyle v. Laurens R. Co., 10 Rich. 382.

[8] Zeigler v. Wells, etc. Co., 23 Cal. 179; Knapp v. United States & C. Exp. Co., 55 N. H. 348; Whitney v. Merchants' U. Exp. Co., 104 Mass. 152.

of shipment should be deducted, though not earned. And if the consignee obtains the goods by means of a replevin, it has been held he cannot include in his damages the counsel fees incurred in the replevin suit.[1] If the shipper procures a rebate on the customs duties on imported goods which have been damaged the carrier is entitled to the benefit of it,[2] but not if the duty has not been paid because no judgment can relieve him from the obligation to pay it;[3] nor can any benefit be claimed by the carrier on account of deduction made otherwise than because of the condition of the goods.[4] A carrier is not liable for expenses incurred by the consignor in going to the place where property has been shipped and arrived in damaged condition to investigate the reason for its rejection by the consignee.[5]

§ 919. Damages for injury to or loss of non-marketable property. It is not essential to the recovery of damages for injury to or the loss of property that it shall have a market value at the place to which it is shipped. This consideration only affects the mode of proving the amount of the loss and the elements by which it is to be ascertained, not the right to recover.[6] Where wearing apparel was lost, its value, it was said, might be arrived at by considerations of the cost and actual worth, without reference to what it would sell for in a particular market.[7] Where such property and second-hand books, table furniture, etc., which had no market value, was lost the court said their value to their owner, "not any fanciful price that he might for special reasons place upon them, nor, on the other hand, the amount for which he could sell them to others, but the actual loss in money he would sustain by being deprived of articles so specially adapted to the use of himself and his family," constituted the measure of the carrier's liability.[8] Where building plans were lost the cost of obtaining new ones and the expenses reasonably incurred in doing so measured the recovery. In the absence of the car-

[1] The Boston, 1 Lowell, 464.
[2] The Mangalore, 2 Fed. Rep. 463.
[3] The Surrey, 30 Fed. Rep. 223.
[4] Morrison v. I. & V. Florio S. S. Co., 36 Fed. Rep. 569.
[5] Western Manuf. Co. v. The Guiding Star, 37 Fed. Rep. 641.
[6] Prettyman v. Oregon & N. Ry. Co., 13 Ore. 341.
[7] Denver, etc. R. Co. v. Frame, 6 Colo. 382.
[8] International, etc. Ry. Co. v. Nicholson, 61 Texas, 550.

rier's knowledge of the contents of the parcel or the use to which they were to be put, there was no liability for resulting delay in the erection of the building pursuant to the plans.[1] In a case where there was negligent delay in delivering property and it was also injured, its original cost, the freight paid on it and the difference between the sum and amount received on its sale, less the expense of selling and the value of the time required to sell, was the measure of redress.[2] In a recent Texas case and also in a late case in Massachusetts the question as to the measure of damages where family portraits have been lost has been considered. In the latter state the contention was that the general principle applied, and that the fair market value of the article lost measured the plaintiff's rights. This, the court said, was delusive, because it had no such value. "The just rule of damages is the actual value to him who owns" the portrait, "taking into account its cost, the practicability and expense of replacing it, and such other considerations as in the particular case affect its value to the owner."[3] In the Texas case[4] the trial court directed that in determining the value of the family portraits the jury might look to their original cost and to the probable cost of reproducing and replacing the same as shown by the testimony. In passing upon an exception to this instruction the court said: In regard to a family portrait which might be reproduced, the artist and the subject both being still accessible, it is not perceived why the owner would not be entitled to supply the lost portrait, and to recover of the carrier the cost. This is said to be the owner's right in case of lost articles generally.[5] But when it is impracticable to replace the painting, and where the original cost was incurred at a long time past, and under circumstances differing widely from those affecting the present value, the charge given would be of doubtful applicability, and at all events should be better qualified or explained so as to guard the jury against

[1] Mather v. American Exp. Co., 138 Mass. 55.

[2] Wabash, etc. Ry. Co. v. Lynch, 12 Ill. App. 365.

[3] Green v. Boston & L. R. Co., 128 Mass. 221.

[4] Houston, etc. R. Co. v. Burke, 55 Texas, 323.

[5] O'Hanlan v. Great Western Ry. Co., 6 B. & S. 493; 118 E. C. L. 491.

making the first cost and the cost of replacing the exclusive measure of value.

§ 920. **Interest on damages.** Interest is generally added in this country to the amount allowed as damages, and on the accepted principle which governs its allowance it should be added as a necessary part of the indemnity the shipper or owner is entitled to for the loss of or injury to his goods.[1] It has also been allowed in England under some circumstances.[2] But [239] in some instances, under the influence of early decisions and the reasons upon which they proceeded, the allowance or withholding of interest was left to the discretion of the jury.[3]

[1] St. L. etc. Ry. v. Phelps, 46 Ark. 485; Houston, etc. Ry. Co. v. Jackson, 63 Texas, 209; T. & P. Ry. Co. v. Tankersley, id. 57; Thomas, etc. Manuf. Co. v. Wabash, etc. Ry. Co., 62 Wis. 642; The Nith, 36 Fed. Rep. 86; Western Manuf. Co. v. The Guiding Star, 37 id. 641; East Tennessee, etc. Ry. Co. v. Johnson, 85 Ga. 497; Mote v. Chicago, etc. R. Co., 27 Iowa, 22; Spring v. Allen, 4 Allen, 112; Cowley v. Davidson, 13 Minn. 92; Woodward v. Illinois C. R. Co., 1 Biss. 403; Blumenthal v. Brainerd, 38 Vt. 403; Ludwig v. Meyre, 5 W. & S. 435; Hand v. Baynes, 4 Whart. 204; Whitney v. Chicago & N. R. Co., 27 Wis. 327; Kellogg v. Same, 26 Wis. 223; Robinson v. Merchants' D. T. Co., 45 Iowa, 470; Barton v. Steamship Co., 3 Wall. Jr. 229; Erie Ry. Co. v. Lockwood, 28 Ohio St. 358; Chapman v. Chicago, etc. R. Co., 26 Wis. 295; Cushing v. Wells, etc. Co., 98 Mass. 550; Sherman v. Wells, 28 Barb. 403. See Magnin v. Dinsmore, 62 N. Y. 35, 45.

[2] British Columbia, etc. Co. v. Nettleship, L. R. 3 C. P. 499.

[3] See Wolf's Adm'r v. Lacy, 30 Tex. 349.

In the early case of Smith v. Richardson, 3 Caines (N. Y.), 221, the court say without qualification that interest ought not to be allowed. In subsequent cases the question of interest is treated as one for the jury; they to be guided in their discretion by the circumstances, allowing it where the carrier has been guilty of fraud or other improper conduct, and denying it when he becomes liable without actual fault. Watkinson v. Laughton, 8 Johns. 213; Amory v. McGregor, 15 id. 24; Richmond v. Bronson, 5 Denio, 55.

In Lakeman v. Grinnell, 5 Bosw. 625, the court say: "In most cases interest, when allowed, is given in part at least upon some idea of an equivalent already received by the defendant in the use of the money or property withholden. Hence, it is allowable even in trover; but as against a carrier, in whose hands goods have been lost, or . . wholly destroyed without any fault whatever on his part, no such principle can be invoked. It is impossible that he should have received any advantage whatever from the possession of the goods."

It is to be observed that in trover the consideration of the defendant's benefit from the conversion does not control the right to interest. It is allowed as part of the compensation due the plaintiff.

The decision in Van Rensselaer v. Jewett, 2 N. Y. 135, has been adhered

The rate of interest is governed by the law of the place where the property is delivered.[1] If the action is for breach of the contract interest is due from the time it occurred; if it is in tort, from the date of the injury.[2] There can be no recovery in addition to the statutory rate of interest on account of obligations the shipper incurs to third parties and his liability to them because of the carrier's default.[3]

to: "Whenever a debtor is in default for not paying money, *delivering property*, or rendering services in pursuance of his contract, justice requires that he should indemnify the creditor for the wrong which has been done him; and a just indemnity, though it may sometimes be more, can never be less, than the specified amount of money, or the value of the property or services at the time they should have been paid or rendered with interest from the time of the default until the obligation is discharged."

In Dana v. Fiedler, 12 N. Y. 40, an action for the non-delivery of property, the court said: "Interest is a necessary item in the estimate of damages in this class of cases. The party is entitled on the day of performance to the property agreed to be delivered; if it is not delivered, the law gives as the measure of compensation then due the difference between the contract and the market prices. If he is not also entitled to interest from that time as a matter of law this contradictory result follows, that while an indemnity is professedly given, the law adopts such a mode of ascertaining its amount that the longer the party is delayed in obtaining it the greater shall its inadequacy become. It is, however, conceded to be law that in these cases the jury may give interest by way of damages in their discretion. Now, in all cases, unless this be an exception, the measure of damages in an action upon a contract relating to money or property is a question of law, and does not at all rest in the discretion of the jury. . . . The case of Van Rensselaer v. Jewett establishes a principle broad enough to include this case, and has freed the law from this as well as other apparent inconsistencies in which it was supposed to be involved. The right to interest in actions upon contract depends not upon discretion, but upon legal right; and in actions like the present is as much a part of the indemnity to which the party is entitled as the difference between the market value and the contract price."

Andrews v. Durant, 18 N. Y. 496, was trover. The court said: Interest "is as necessary a part of complete indemnity as the value itself. There is no sense in the idea that interest is any more in the discretion of the jury than the value." In McCormick v. Pennsylvania C. R. Co., 49 N. Y. 303, the plaintiff's baggage was retained and carried off on defendant's train after he decided not to become a passenger, and he had demanded

[1] Mobile & M. R. Co. v. Jurey, 111 U. S. 584.

[2] Illinois C. R. Co. v. Haynes, 64 Miss. 604.

[3] Houston, etc. Ry. Co. v. Jackson, 62 Texas, 209.

[240] § 921. **Owner's efforts to lessen loss.** The owner of property, being bound to exert himself to prevent damage, and to render the injury as light as possible, where he is so situated in respect to the subject in question as to raise that duty, may recover for his reasonable and necessary labor or expense for that object.[1] Thus, in an action against a railroad company for damages to a lot of flour, it was held that a judicious expense incurred by the plaintiff, after the flour had been delivered to him, in rendering it fit for market, might be recovered as damages, as it appeared that such expense was for the defendant's benefit, and lessened the amount for which he would otherwise have been chargeable.[2] So the reasonable cost of recovering mules which the carrier had suffered to escape was held recoverable.[3]

§ 922. **When damages less than value of goods at destina-**
[241] **tion.** Circumstances may have the effect to modify and lessen the liability of a carrier for the full value of lost goods delivered for transportation. Such circumstances may show that the plaintiff's real loss was less than their actual value at the place of destination; they may show a loss of compensation due for carriage by some artifice of the consignor; may show that the plaintiff has induced a want of the care necessary to the safety of the goods. Where the plaintiffs sent by an express company from New York to Memphis a package of watches and watch keys, giving the consignees the option to take and pay for them at a price fixed or return them, the carrier was held liable for that price on their loss, though it was largely below the market price at the place of destina-

that such baggage be delivered to him. If liable for a conversion the court held that interest on the value was recoverable, and as necessary a part of a complete indemnity as the value itself; and that in fixing the damages it was no more in the discretion of the jury than the value.

In Woodward v. Illinois C. R. Co., 1 Biss. 403, an action against a carrier for goods which had been lost by fire, Judge Davis charged the jury to add interest to the value. The jury failing to agree the case was tried a second time (1 Biss. 447), and Judge Drummond instructed the jury that they might, if they chose, allow additional damages by way of interest.

[1] Wabash, etc. Ry. Co. v. Lynch, 12 Ill. App. 365; The Henry Buck, 39 Fed. Rep. 211; Savannah, etc. Ry. Co. v. Pritchard, 77 Ga. 412; Hamilton v. McPherson, 28 N. Y. 72.

[2] Winne v. Illinois C. R. Co., 31 Iowa, 583.

[3] North M. R. Co. v. Akers, 4 Kan. 453. See King v. Shepherd, 3 Story, 349.

tion.[1] Folger, J., said: "It seems clear that the plaintiffs could not demand from the defendant more than would have resulted to them had the defendant made safe carriage and prompt and correct delivery. In that case the plaintiffs would at the farthest have had from their consignees payment for all the goods sent at the price to the consignees fixed upon them by the plaintiffs. The sum of that price, with interest thereon from the day when the goods should in the usual course of carriage have reached the consignees and been accepted by them, will make the damage which would naturally and proximately result to the plaintiffs. Though a [the] rule is sometimes stated thus: that the damages are the value of the goods agreed to be carried and delivered at the place and time of delivery,— that rule is but a branch of the more general one that the damages for a failure to perform are a sum equal to the benefit which would have resulted from a performance of a contract.[2] When the owner and shipper of the goods is himself to take the goods at the place of destination, and there sell them for his own account for what they will there bring, the market value there is the measure of his damages because that would have been his benefit from performance of the contract. But every case is governed by its own facts; and here the price of the goods at the place of destination was fixed by the plaintiffs before they [242] were committed to the carrier. Either that price was to be paid by the consignees, or the goods were to have been returned to the plaintiffs at New York, where they would have been worth to them the market price of them there. No other value to the plaintiffs could have been in the contemplation of both the contracting parties, nor any other damages than such as would result from a failure to obtain that value."

§ 923. Same subject; criticism of the rule stated. This opinion is open to some criticism. It is true, as a general rule, that "the damages for a failure to perform are a sum equal to the benefit which would have resulted from a performance of the contract;" that is, the benefit which would result independently of any special use of which the defaulting party had no notice. This rule does not apply to the benefit in excess of market price derivable from another con-

[1] Magnin v. Dinsmore, 62 N. Y. 35. [2] Sturgess v. Bissell, 46 N. Y. 462.

tract not known to the carrier when his contract was made.[1] The performance of the carrier's contract will give the consignee, whether he be the consignor or not, the benefit of the property at the place of destination after paying the cost of transportation. The carrier can be charged with no more than the market value there unless he has contracted to carry it there to fulfill a contract of sale at a greater price. Why, then, should he be entitled to reduce damages below the market value when the subcontract, of which he had no notice, happens to provide for a sale for less than the true value? Besides, the consignor's action exhausts also the remedy of the consignee, and the damages are in effect measured by the price at the place of shipment.[2] Looking at the possibility of the consignee exercising the option not to purchase, the consignor could have countermanded the direction to return the goods and offered them for sale at the place of destination.[3]

Since the publication of the foregoing observations in the original edition of this work the question passed upon in Magnin v. Dinsmore has been considered by the English courts in Rodocanachi v. Milburn.[4] In that case the action was brought by the shipper and vendor of goods sold "to arrive" at a fixed price. The trial court followed Magnin v. Dinsmore, and held that the measure for the loss of the goods was to be determined by the price at which the sale had been made. The court of appeal differed. Lord Esher, M. R., said: "I think that the rule as to measure of damages in a case of this kind must be this — the measure is the difference between the position of a plaintiff if the goods had been safely delivered and his position if the goods are lost. What, then, is that difference? If the goods are delivered he obtains them, but in order to obtain them he must pay freight in respect of

[1] Rodocanachi v. Milburn, 18 Q. B. Div. 67; The Ship Compta, 5 Sawyer, 137; Caledonian R. Co. v. Colt, 3 L. T. (N. S.) 252; Chicago, etc. R. Co. v. Hale, 83 Ill. 360.

It is held in West Virginia that where the consignor of lost property had sold it at the place it was destined for, the difference between the price he was to receive and that paid by him was the measure of his claim. It does not appear that the carrier had any knowledge of the sale. Tompkins v. Kanawha Board, 21 W. Va. 224.

[2] Thompson v. Fargo, 58 Barb. 575; Blanchard v. Page, 8 Gray, 281; Fenn v. Western R. Co., 112 Mass. 524.

[3] See Smith v. Griffith, 3 Hill, 333.

[4] 17 Q. B. Div. 316; 18 id. 67.

which there is a lien on them. If there were no lien he would be entitled to the goods without paying anything. Upon getting the goods he could sell them. He therefore would get the value of the goods upon their arrival at the port of discharge less what he would have to pay in order to get them. But what is to be the rule in getting at the value of the goods? If there is no market for such goods the result must be arrived at by an estimate, by taking the cost of the goods to the shipper and adding to that the estimated profit he would make at the port of destination. If there is a market there is no occasion to have recourse to such a mode of estimating the value; the value will be the market value when the goods ought to have arrived. But the value is to be taken independently of any circumstances peculiar to the plaintiff. It is well settled that in an action for non-delivery or non-acceptance of goods under a contract of sale the law does not take into account in estimating the damages anything that is accidental as between the plaintiff and the defendant, as for instance an intermediate contract entered into with a third party for the purchase or sale of the goods. It is admitted in this case that, if the plaintiffs had sold the goods for more than the market value before their arrival, they could not recover on the basis of that price, but would be confined to the market price, because the circumstance that they had sold the goods at a higher price would be an accidental circumstance as between themselves and the ship-owners; but it is said that as they have sold for a price less than the market price the market price is not to govern, but the contract price. I think that if the law were so it would be very unjust. I adopt the rule laid down in Mayne on Damages, which gives the market price as the test by which to estimate the value of the goods independently of any circumstances peculiar to the plaintiff, and so independently of any contract made by him for the sale of the goods."

§ 924. Same subject; loss at place of shipment. Where the goods after delivery to the carrier are lost or injured at the port or place of shipment the value at that place governs, instead of the market price at the place of destination.[1] It is

[1] Krohn v. Oechs, 48 Barb. 127; Lakeman v. Grinnell, 5 Bosw. 625; Dusar v. Murgatroyd, 1 Wash. C. C. 13.

otherwise if after the injury occurs the carrier makes an unauthorized sale of the property. Then the shipper may, if he has notice of the sale, claim the amount realized or demand the value of the property at the port of destination at the time the vessel arrived there.[1]

§ 925. Same subject; shipper's conduct may affect damages. A shipper may estop himself from claiming the full [243] value of his property by his conduct when he offers it for transportation, as where it amounts to a representation of value.[2] Thus, where a sealed bag was delivered to the carrier, the servant of the latter giving a receipt for 200*l.*, which the senders stated it contained, while in fact it contained 450*l.*, the court limited the recovery for its loss to the lesser sum, and said: "There was a particular undertaking by the carrier for the carriage of 200*l.* only; and his reward was to extend no further than that sum, and 'tis the reward that makes the carrier answerable; and since the plaintiffs had taken this course to defraud the carrier of his reward they had thereby barred themselves of that remedy which is founded only on the reward."[3] The shipper is bound to deal fairly with the carrier, and if required must give true information of the value of a parcel offered for transportation; if he states the quality and value untruly, either in words or by the manner of marking it, he will be guilty of a fraud, and if entitled to recover at all in case of an accidental loss, will be allowed to do so only according to the value he gave out at the time of shipment.[4]

[1] The Joshua Barker, Abb. Adm. 215.

[2] Elkins v. Empire T. Co., 81* Pa. St. 315.

[3] Tyly v. Morrice, Carthew, 485.

[4] Savannah, etc. Ry. Co. v. Collins, 77 Ga. 376; Relf v. Rapp, 3 W. & S. 21; Dunlap v. International Steamboat Co., 98 Mass. 371; Railroad Co. v. Fraloff, 100 U. S. 24; Hart v. Pennsylvania R. Co., 112 id. 331, 340; Earnest v. Express Co., 1 Woods, 573; South & N. A. R. Co. v. Henlein, 52 Ala. 606; S. C., 56 id. 368; Muser v. Holland, 17 Blatch. 412; Graves v. Lake Shore Ry. Co., 137 Mass. 33; St. Louis, etc. Ry. v. Lesser, 46 Ark. 236; Same v. Weakly, 50 id. 397; Duntley v. Boston & M. R. Co., — N. H. —; 20 Atl. Rep. 327; Durgin v. American Exp. Co., — N. H. —; 20 Atl. Rep. 329; Central R. v. Bryant, 73 Ga. 722; Hill v. Boston, etc. R. Co., 144 Mass. 284; Belger v. Dinsmore, 51 N. Y. 166; Hayes v. Wells, etc. Co., 23 Cal. 185; Magnin v. Dinsmore, 62 N. Y. 35. See Rice v. Indianapolis, etc. R. Co., 3 Mo. App. 27; Southern Exp. Co. v. Moon, 39 Miss. 822; The City of Norwich, 4 Bene. 271; United States Exp. Co. v. Backman, 28 Ohio St. 144; Black v. Goodrich Transp.

A carrier has the right to demand from the employer such information as will enable him to decide on the proper amount of compensation for his services and risk, and the degree of care which he ought to bestow in discharging his trust; and if the owner gives an answer which is untrue in a material point, the carrier will undoubtedly be absolved on general principles from the consequences of any loss not occasioned by negligence or misconduct.[1] If the carrier claims that his liability is limited either by a contract made with the shipper or by the latter's misconduct the burden is upon him to clearly show it.[2]

§ 926. Qualification of carrier's liability by notice. A carrier may qualify his liability by a general notice to all who may employ him to the effect that he will not be re- [244] sponsible for goods above the value of a certain sum unless they are entered as such and paid for accordingly.[3] To affect the employer by such notice it must be brought home to him;[4] but slight evidence beyond its publication is necessary to warrant the inference that it was known.[5] Where the carrier is guilty of negligence or misconduct resulting in the loss of goods intrusted to him his liability is not limited by the valuation put upon them at the time of shipment.[6] The defendant company received at New York for transportation to plaintiffs at St. Louis one package, containing three gross of cases

Co., 55 Wis. 319; Chicago, etc. R. Co. v. Abel, 60 Miss. 1017; Kansas City, etc. R. Co. v. Simpson, 30 Kan. 645; Moulton v. St. Paul, etc. R. Co., 31 Minn. 85, as to the validity of contracts limiting the carrier's liability.

[1] Scammon v. Wells, 84 Cal. 311; Hollister v. Nowlen, 19 Wend. 234; Orange County Bank v. Brown, 9 Wend. 116; Gibbon v. Paynton, 4 Burr. 2298; Pardee v. Drew, 25 Wend. 459; Batson v. Donovan, 4 B. & Ald. 21; Everett v. Southern Exp. Co., 36 Ga. 303; Earnest v. Express Co., 1 Woods, 573; Cincinnati, etc. R. Co. v. Marcus, 38 Ill. 219; Magnin v. Dinsmore, 62 N. Y. 35; Phillips v. Earle, 8 Pick. 182; Little v. Boston, etc. R. Co., 66 Me. 239.

[2] St. Louis, etc. R. Co. v. Smuck, 49 Ind. 302; Rosenfeld v. Peoria, etc. Ry. Co., 103 id. 121.

[3] 2 Greenlf. Ev., § 215; McMillan v. Michigan, etc. R. Co., 16 Mich. 79; Moses v. Boston, etc. R. Co., 24 N. H. 71; Fish v. Chapman, 2 Ga. 349; Judson v. Western R. Corp., 6 Allen, 486; Cole v. Goodwin, 19 Wend. 251.

[4] Id.

[5] Oppenheimer v. United States Exp. Co., 69 Ill. 62; Durgin v. American Exp. Co., — N. H. —; 20 Atl. Rep. 328. See Chicago, etc. R. Co. v. Harmon, 12 Ill. App. 54.

[6] Harvey v. Terre Haute, etc. R. Co., 6 Mo. App. 585.

of "Shallenberger Pills," worth $113.50 per gross. The receipt or bill of lading contained a clause that the holder should not demand more than $50 for any loss or damage, at which "the article forwarded" is valued, and which shall constitute the limit of the liability of the company. The three cases were each separately addressed to plaintiffs, and were then wrapped up with a cover in a single package similarly addressed. But one of the cases reached them. In an action to recover for the loss it was held that the "article forwarded" was the single package, and that plaintiffs were not entitled to recover $50 upon each of the missing cases.[1]

§ 927. Liability for partial loss when value limited. There is a conflict of authority concerning the construction to be given bills of lading which limit the carrier's liability to the invoice value of the goods in the event of loss through his fault, where the loss is but partial. Two federal courts have held that the liability is restricted to the difference between the net proceeds of each article or package damaged and its invoice price, and that if the shipper has received that price from the sale of the damaged goods after deducting the cost of importation, sale, etc., there is no liability upon the carrier.[2] In a Massachusetts case the bill of lading read: "Ship not accountable for any sum exceeding £100 per package for goods of whatever description, unless the value is declared and freight as may be agreed paid thereon, and in event of loss or damage for which the ship is responsible, the liability shall not exceed the invoice or the declared value for the United States customs duty." Referring to the cases cited Holmes, J., said: "We shall not criticise these decisions further than to say that, if they are not distinguishable from the case at bar, we cannot follow them." Considering the language of the bill of lading he observed: "It is plain that these words fix alternative limits of liability — £100 per package if the value is not declared, the declared value when it is declared. In the former case we do not suppose that it would be contended that, if a package brought £100, no damage could be recovered; yet, unless the argument is carried to

[1] Wetzell v. Dinsmore, 54 N. Y. 496. Quebec Steamship Co., 24 id. 285, per Brown, J.

[2] The Lydian Monarch, 23 Fed. Rep. 298, per Nixon, J.; Pearse v

that extent, we see no reason why, in the latter alternative, the ship-owners should escape if the goods bring their invoice value. Looking at the words of the latter branch of the sentence alone, it will be seen that they refer to the event of 'loss or damage for which the ship is responsible,' and therefore in terms presuppose that something is to be recovered in the case for which they provide. The following words: 'the liability shall not exceed,' etc., are apt words to express the outside limit of the sum to be recovered; but both the particular words and the whole structure of the sentence are most inapt to express a stipulation that if the goods are still equal to the invoice value there shall be no recovery at all. . . . As we read the contract the damages are to be ascertained in the usual way, by finding the difference in value between each package as damaged and the same undamaged, and these damages are to be paid by the defendants up to but not exceeding £100 when the value is not declared, or in this case up to but not exceeding the invoice value." [1]

§ 928. Apportionment of damage in case of mutual fault. It is well settled that if property is damaged while in the carrier's possession or under his control he has the burden of proving that the injury was occasioned by a cause for which he is not responsible.[2] In a case in which it was alleged that the cargo was improperly stowed and the defendant claimed that the injury for which recovery was sought was the result of the perils of the sea, the court thought that the last mentioned cause was responsible for but a small amount of the damage done, and as the carrier did not offer proof of the extent of it for which it was not responsible the shipper was awarded compensation for his whole loss.[3] Where the loss resulted from the negligence or misfortune of both parties and it was not practicable to ascertain for how much of it one or the other was responsible, the court adopted the rule applied by courts of admiralty in collision cases when there is mutual fault, and divided the damages equally.[4] But neither of these rules will be applied where the injury or loss results from a cause for which the carrier is only in part responsible, except

[1] Brown v. Cunard Steamship Co., 147 Mass. 58.

[2] *Ante*, § 917.

[3] The Mary Belle Roberts, 2 Sawyer, 1.

[4] Snow v. Carruth, 1 Sprague, 324.

as a last resort. If it is practicable to make an approximate apportionment of it to the several causes of damage that will be done.[1]

§ 929. Liability not mitigated by insurance. A shipper who has received from his insurer part compensation for property lost by a carrier may sue the latter on his contract of bailment, not only in his own right for the unpaid balance due to himself, but as trustee for what has been paid him by the insurer in ease of the carrier,[2] and in the trial of such a case the court will restrain the latter from setting up the insurer's payment of his part of the loss as partial satisfaction.[3]

§ 930. Exemplary damages. The principles upon which such damages are allowed are elsewhere considered.[4] If a carrier wantonly and in gross neglect of his duty and reckless disregard of a consignee's rights wilfully refuses to carry or deliver property, he becomes liable for exemplary damages, including all actual, though remote, losses sustained.[5]

§ 931. For what losses carrier responsible. The carrier is liable for goods which he delivers by mistake to the wrong person,[6] and for any damages resulting from a departure from the contract, or from the consignor's instructions as to the route, mode of conveyance, or the condition of delivery (in the absence of any exigency); in other words, when a carrier [245] accepts goods to be carried with a direction on the part of the owner to carry them in a particular way or by a particular route he is bound to obey it; and if he attempts to perform his contract in a manner different from his undertaking, he becomes an insurer, and cannot avail himself of any exception in the contract.[7] But if it should be shown in

[1] The Shand, 16 Fed. Rep. 520.

[2] Mobile & M. Ry. Co. v. Jurey, 111 U. S. 584; Merrick v. Brainard, 38 Barb. 574; Gails v. Hailman, 11 Pa. St. 515.

[3] Gails v. Hailman, *supra*.

[4] Vol. 1, ch. 9; *infra*, §

[5] Silver v. Kent, 60 Miss. 124; Avinger v. South Carolina Ry. Co., 29 S. C. 265.

[6] Price v. Oswego, etc. R. Co., 50 N. Y. 213; 58 Barb. 599; Adams v. Blankinstein, 2 Cal. 413; Winslow v. Vermont, etc. R. Co., 42 Vt. 700; McCulloch v. McDonald, 91 Ind. 240; Merchants' Despatch & T. Co. v. Merriam, 111 id. 5.

If the person to whom the property is delivered accounts for it to the consignee the carrier is liable for only nominal damages. Rosenfeld v. Express Co., 1 Woods, 131; Jellett v. St. Paul, etc. Ry. Co., 30 Minn. 265.

[7] Wallace v. Swift, 31 Up. Can. Q. B. 523; Ackley v. Kellogg, 8 Cow.

such a case that the loss must certainly have occurred from the same causes if there had been no default or deviation the carrier should be excused. The burden of proof of this fact, however, is on him.[1] Where the carrier was instructed to collect money from the consignee before delivery, and delivered the goods without exacting a compliance with this condition, he was held liable for the amount he was directed to collect.[2] A carrier was instructed to deliver to a factor at a certain market who had been directed not to sell until he received an order to do so; the carrier delivered to a factor at a different market, who had no instructions concerning the article and who sold it immediately. It appearing that the article rose in price from that day until suit was brought against the carrier, it was held that the plaintiff was entitled to recover the highest price reached within that period, the suit having been brought within a reasonable time; and receipt of the proceeds from the factor who made the sale was held not to be a bar.[3]

§ 932. Damages where there are successive carriers. If goods are marked and known to the carrier to be [246] destined to a point beyond the terminus of his route and he becomes liable for a loss of them, or for damages for a negligent delay, there is some diversity as to whether the damages should be estimated with reference to the market value at the end of his route or at the ultimate destination. On principle the value at the latter place should be the criterion. The value in one place and the depreciation in the other, according to the market at the ultimate destination, less the cost of transportation, is the actual loss to the owner; and it is as direct and proximate where there are several carriers as where

223; Forrestier v. Bordman, 1 Story, 45; In re Petersen, 21 Fed. Rep. 885; Maghee v. Camden, etc. R. Co., 45 N. Y. 514; Hinckley v. New York C. R. Co., 56 N. Y. 429; Goddard v. Mallory, 52 Barb. 87; Hastings v. Pepper, 11 Pick. 41; Persse v. Cole, 1 Cal. 369; Steamboat John Owen v. Johnson, 2 Ohio St. 142; The Boston, 1 Lowell, 464; American Exp. Co. v. Lesem, 39 Ill. 312; United States Exp. Co. v. Keefer, 59 Ind. 263; Merrick v. Webster, 3 Mich. 268; Johnson v. New York C. R. Co., 33 N. Y. 610; Wilcox v. Parmelee, 3 Sandf. 610; Whitney v. Merchants' Union Exp. Co., 104 Mass. 152. See Bills v. New York C. R. Co., 84 N. Y. 5.

[1] Maghee v. Camden, etc. R. Co., *supra.*

[2] Id.

[3] Arrington v. Willimington, etc. R. Co., 6 Jones' L. 68.

the whole transportation is let to one. The intermediate carrier who is liable has undertaken the carriage of the goods with a knowledge of their intended destination; therefore the benefit to the shipper of their delivery at that place, and the disadvantage to him of a failure to so deliver them, are within the contemplation of both parties. The damages recoverable from such a carrier should be estimated on the basis of the net value at the place where he knows the owner of the goods intends them to go, for the same reason that in other cases damages are recoverable with reference to the value for any special use which was known to both parties at the time of making the contract. In this view it is immaterial whether the through transportation is undertaken by one carrier, or the goods will be carried by several in a connected line, or by several not connected. In a well-considered Michigan case[1] the contract of the defendant was to transport cattle from Toledo to Buffalo. Their ultimate destination was Albany or New York, but this fact was not stated in the contract. The trial court charged that the plaintiffs could not recover damages for loss by depreciation on account of negligent delay except by reference to the market at Buffalo. Cooley, J., delivering the opinion of the appellate court, said: "If the judge meant the jury to understand by this charge that the damages which the plaintiffs could recover must be confined to the fall in the market at Buffalo, between the time when the cattle should have reached that point and that of their actual [247] arrival, we think he erred. The defendants were informed when they entered into the contract that the ultimate destination was to an Albany or a New York market; and they must be held to have assumed their obligations in reference to that fact. If in fact there was no fall of prices before the cattle had reached Buffalo, but afterwards, and before they could be delivered at Albany, a loss had occurred as the direct consequence of defendants' delay, it would be both illogical and unjust to hold that defendants shall be discharged because the injurious consequence of their act did not result until the cattle were out of their hands. The consequences of delay

[1] Sisson v. Cleveland & T. R. Co., 14 Mich. 489. In accord: East Tennessee, etc. R. Co. v. Johnston, 75 Ala. 597; Atlanta, etc. R. Co. v. Texas Grate Co., 81 Ga. 602; In re Petersen, 21 Fed. Rep. 885.

would attend the cattle to their final destination, just as the consequences of a fatal injury to one of them would attend the animal until his death; and in neither case could the party responsible excuse himself by showing that the actual loss or death did not occur while the property was retained in his possession." It has been held in some cases that the destination as regards the carrier on one of the several routes over which the goods are successively carried is the terminus of his particular route; that if he is liable for a loss the value is to be taken at that point and not at the ultimate place of destination.[1] If a special contract is made for the delivery of property to a connecting carrier so that it may reach its destination by a stipulated time, and it is made for the known purpose of avoiding injury to it by the elements, the first carrier is liable for damages resulting from freezing on the connecting carrier's line as a result of its own negligent delay in transporting the property.[2]

§ 933. Proof of value. The value of property lost or the extent of its depreciation by injury must be ascertained by a money standard from evidence, and cannot be taken upon conjecture.[3] If by the acts of the carrier the plaintiff is prevented from showing it the jury may allow the value of the best quality of such goods.[4] It has been held presumable, in the absence of positive evidence, that a commodity is worth as much at the place of destination as at that of shipment.[5] So if there be

[1] See Lewis v. Steamboat Buckeye, 1 Handy (Ohio), 150; Harris v. Panama R. Co., 6 Bosworth, 312; Marshall v. New York C. R. Co., 45 Barb. 502.

[2] Fox v. Boston & M. R. Co., 148 Mass. 220.

[3] Birney v. Wabash, etc. Ry. Co., 20 Mo. App. 470; Traloff v. New York, etc. R. Co., 10 Blatch. 16.

It has been held that where animals are killed or injured the jury may determine the damages from their ages and qualities and the nature of their injuries, although there is no testimony to their value or the extent they were damaged with reference to the place of delivery, there being evidence of their value in a neighboring state. Louisville & N. R. Co. v. Mason, 11 Lea, 116. The value of a trotting horse may be proved by the opinions of witnesses who testify to its speed and value, if it was capable of making the speed testified to. Reed v. Rome, etc. R. Co., 48 Hun, 231.

[4] Clark v. Miller, 4 Wend. 625; Van Winkle v. United States Steamship Co., 37 Barb. 122; Bailey v. Shaw, 24 N. H. 297.

[5] Rome R. Co. v. Sloan, 39 Ga. 636; St. L. etc. Ry. v. Phelps, 46 Ark. 485; South & N. A. R. Co. v. Wood, 72 Ala. 451.

no market for the goods in question at the place of delivery, the jury, it is said, must ascertain their value by taking the price at the place of shipment, adding the cost of carriage, and al- [248] lowing a reasonable sum for the importer's profit.[1] In cases where the market value of goods is the test of damages the law contemplates a range of the entire market and the average of prices as thus found running through a reasonable period of time; not any sudden and transient inflation or depression of prices resulting from causes independent of the operations of lawful commerce.[2]

The injured party is entitled to recover with reference to the market value at the time of the injury, though subsequent experiments in the use of such goods have resulted in showing that the price was not based on intrinsic worth. Accordingly, in an action against a carrier for a negligent injury to a quantity of mulberry trees which had been delivered for transportation, after the plaintiff had given evidence of their market value at the time the injury occurred, the defendants offered to prove that trees of the same species have since been ascertained by actual experiment to be of no real value; that their market value at the time of the injury was factitious; that they were not worth cultivating with a view to the raising of the silk worm; that those in question were purchased by the plaintiff for the purpose of growing seedlings for sale, and that they were of no value for such purpose the next year after the purchase. It was held that such evidence was inadmissible.[3] The purpose of the plaintiff in purchasing the trees to reproduce the article for the market the next year was but an unexecuted intention; it bound nobody; and he had a right to change it and to turn the property to better account if in his judgment the opportunity offered.[4] Where goods damaged in the course of transportation were received by the consignee with the understanding that the depreciation should be made good to him, and were sold at auction with the consent of the carrier, it was held that, for the purpose of ascertaining the

[1] O'Hanlan v. Great Western R. Co., 6 B. & S. 484; Richmond v. Bronson, 5 Denio. 55; Vroman v. American, etc. Exp. Co., 2 Hun, 512; Wabash, etc. Ry. Co. v. Lynch, 12 Ill. App. 365; Rodocanachi v. Milburn, 18 Q. B. Div. 67, *arguendo*.

[2] Smith v. Griffith, 3 Hill, 333.

[3] Id.

[4] Id.

sum due for such damages, the amount realized from their sale should be treated as their value in their damaged state.[1] The price at which damaged goods sold for at auction is competent evidence as tending to show value, and upon the question of damages, although the defendant had no notice of the sale.[2] The price at which property sold for on the market is not conclusive evidence of its value at the time it was sold;[3] though it has been held to be better evidence than the testimony of experts.[4] But the court refused to so hold where the quantity of damaged property was large, and the proof did not clearly show that the whole of it was injured.[5] In [249] an action against a railway company for damages arising from failure to deliver a certain quantity of whisky as it had undertaken to do the defendants were held entitled to prove that the whisky had been shipped by the plaintiffs in fraud of the United States revenue laws, and no tax had been paid thereon, for the purpose of determining its value; if the tax of two dollars per gallon had been paid it was said the value of the raw material would be enhanced to that extent, and if not paid it would be decreased that amount.[6]

Section 3.

CARRIERS OF PASSENGERS.

§ 934. Nature of their obligations. The obligations or responsibilities of public carriers do not arise altogether nor mainly out of contracts; they are principally imposed by law. The refusal to undertake the conveyance of a passenger without excuse, or when actionable, is merely a violation of a carrier's duty; he has refused to contract; so his duty to carry with care, though it may to some extent be regulated and restricted by contract, is imposed by law, and cannot, as is generally held, be contracted away; hence actions against

[1] The Columbus, Abb. Adm. 97; Jellinghaus v. New York Ins. Co., 4 Sandf. 18.

[2] Guiterman v. Liverpool, etc. Steamship Co., 83 N. Y. 358.

[3] Ayres v. Chicago & N. Ry. Co., 75 Wis. 215.

[4] Hamilton v. Bark Kate Irving, 5 Fed. Rep. 630; Magdeburg General Ins. Co. v. Paulson, 29 id. 530.

[5] The Marinin S., 28 Fed. Rep. 664.

[6] Toledo, etc. R. Co. v. Kichler, 48 Ill. 438.

these carriers are generally in tort for negligence, or for misconduct involving a breach of duty. Contracts, however, are usually made fixing the extent of the route, the mode of conveyance, the kind of accommodations, the time, etc.; and, therefore, actions founded upon such contracts may be maintained. Whether the action be upon the breach of duty or for violation of contract, to the extent that they involve the same acts and omissions, the damages as measured by law are substantially the same.

[250] § 935. **Damages for refusing to carry.** The refusal to take a party who applies in accordance with a carrier's regulations, and who is willing and offers to pay, or has done so in compliance with his rates; or a refusal, after a passenger has been carried over a part of the stipulated voyage or route, to carry him to the end, may entitle him to general, exemplary, special or consequential damages for a great variety of losses and injuries.

§ 936. **Same subject; loss of time; expense, exposure.** If the journey is delayed there will be a loss of time, and the passenger is entitled to compensation for it,[1] and also for any increased expense reasonably incurred during the delay, or to procure other conveyance when necessary. Where a bookkeeper was detained by the fault of the carrier for an unreasonable time, it was admissible to prove the rate of wages at the place of destination for the consideration of the jury in fixing the damages, but not as their measure; and it was proper that the jury should weigh the probabilities that he would have immediate and continued employment had he arrived without such detention.[2] And it has been held in such an action that the fact that there is no evidence of the value of the plaintiff's time does not prevent the jury giving him such compensation as they think reasonable.[3] In an action against a carrier for failure to carry the plaintiff from New York to San Francisco, *via* Nicaragua, according to his agreement, to furnish suitable accommodations, and for negligent detention on the way, and consequent unnecessary exposure to an unhealthy climate, it was held entirely proper to receive evi-

[1] Pennsylvania R. Co. v. Books, 57 Pa. St. 339.

[2] Yonge v. Pacific, etc. Co., 1 Cal. 353.

[3] Ward v. Vanderbilt, 34 How. Pr. 144; 4 Abb. App. Dec. 521.

dence as to how much he was exposed to the sun and rains while crossing the isthmus, and to show that the climate there was bad, so that the jury could determine whether his sickness was caused by the defendant's negligence or breach of duty. It was also held that the time he lost by reason of his detention on the isthmus, his expenses there and on his return to New York, the time he lost by reason of his sickness [251] after he returned, and the expenses of such sickness, so far as it was occasioned by the defendant's negligence or breach of duty, were legitimate and legal damages which he was entitled to recover; and the defendant having refused to convey him from the isthmus to his destination, he was entitled also to recover the money he had paid for his passage on the stipulated voyage.[1]

§ 937. Same subject; exemplary damages. In another case the plaintiff was allowed to show in aggravation of damages his physical condition unfitting him to bear the exposure to which he was subjected in consequence of the carrier's neglect to stop his boat according to his advertisement and take him on board; and it was held that exemplary damages might be recovered if the carrier's conduct was wilful or capricious.[2] Such damages have been allowed where there was a wilful, reckless or capricious neglect to stop a train at a station where it should have stopped on being signaled to do so, independently of the health of the person who desired to become a passenger.[3]

§ 938. Removal of passenger at wrong place. The right to recover the passage money or fare paid in advance, where, by the carrier's fault, the plaintiff is not carried; his right to be compensated for loss of time while delayed by such fault; to have refunded any personal expenses reasonably incurred during such detention, and any extra expense prudently paid to procure other conveyance to make or continue the journey, or to return when it has been interrupted and must be abandoned, is clear, and rests upon the most obvious principles of

[1] Williams v. Vanderbilt, 28 N. Y. 217; Bonsteel v. Vanderbilt, 21 Barb. 26.

[2] Heirn v. McCaughan, 32 Miss. 17; § —, *post.*

[3] Wilson v. New Orleans & N. R. Co., 63 Miss. 352; Alabama, etc. R. Co. v. Sellers, 93 Ala. 9. Compare Martin v. Columbia & G. R. Co., 32 S. C. 592.

justice.[1] If a carrier engages to put a person down at a given place and does not do so, but puts him down somewhere else, it must be in the contemplation of everybody that the passenger put down at the wrong place must get to his destination or to his starting place somehow or other. If there are means of conveyance for getting there he may take them and the carrier is responsible for the expense; but if there are no means the carrier must compensate him for personal incon- [252] venience and the other actual injurious concomitants of such a predicament, and of any available method of extrication.[2] Where a passenger has bought a ticket and is carried beyond the station for which he is ticketed without any fault on his part he has a right of action for at least nominal damages though he suffers no actual injury, and for such actual injury as he may in fact suffer.[3] The rights of a passenger who is wrongfully set down at an improper place are not affected by the state of his health or the ignorance of the

[1] The Zenobia, Abb. Adm. 80; Le Blanche v. London, etc. R. Co., 1 C. P. Div. 286; Hamlin v. Great Northern Ry. Co., 1 H. & N. 408; Porter v. The New England, 17 Mo. 290; Hobbs v. London, etc. R. Co., L. R. 10 Q. B. 111; Denton v. Great Northern Ry. Co., 5 E. & B. 860; Cranston v. Marshall, 5 Exch. 395; Brown v. Chicago, etc. Ry. Co., 54 Wis. 342; Railway v. Dean, 43 Ark. 529; Pennsylvania R. Co. v. Connell, 112 Ill. 295; Chicago, etc. Ry. Co. v. Brisbane, 24 Ill. App. 463; Southern K. Ry. Co. v. Rice, 38 Kan. 398; Baltimore & O. R. Co. v. Carr, 71 Md. 135; Patterson v. Detroit, etc. R. Co., 56 Mich. 172; Dorrah v. Illinois C. R. Co., 65 Miss. 14; Pennsylvania R. Co. v. Spicker, 105 Pa. St. 142.

[2] Brown v. Chicago, etc. Ry. Co., 54 Wis. 342; Evans v. St. Louis, etc. Ry. Co., 11 Mo. App. 463; Winkler v. Same, 21 id. 99; Lake Shore, etc. Ry. Co. v. Rosenzweig, 113 Pa. St. 519; I. & G. N. Ry. Co. v. Terry, 62 Tex. 380; H. & T. C. R. Co. v. Rand, W. & W. (Texas), 100; Paddock v. Atchison, etc. R. Co., 37 Fed. Rep. 841; Schumaker v. St. Paul & D. R. Co., 46 Minn. 39; 48 N. W. Rep. 559; Alabama, etc. R. Co. v. Sellers, 93 Ala. 9.

The fact that a passenger from whom illegal fare is exacted is obliged to borrow money to pay it is too remote to be a basis for awarding damages; and so is the fact that comments were made on the transaction by other passengers. Hoffman v. Northern P. R. Co., 45 Minn. 53.

[3] East Tennessee, etc. R. Co. v. Lockhart, 79 Ala. 315; Alabama, etc. R. v. Wilkinson, 77 Ga. 75; Louisville, etc. R. Co. v. Mask, 64 Miss. 738; Kansas City, etc. R. Co. v. Fite, 67 id. 373; Trigg v. St. Louis, etc. Ry. Co., 74 Mo. 147; Brown v. Memphis & C. R. Co., 7 Fed. Rep. 51; Thompson v. New Orleans, etc. R. Co., 50 Miss. 315; New Orleans, etc. R. Co. v. Hurst, 36 Miss. 660; Porter v. The New England, 17 Mo. 290; Sunday v. Gordon, Blatchf. & H. 569; Pittsburgh, etc. R. Co. v. Nuzum, 50 Ind. 141; Thompson's Car. Pass. 66.

carrier concerning it, though the consequent injuries may be greater than they would otherwise have been.[1] A female passenger who is carried beyond her destination and obliged to alight some distance therefrom and walk back through a rain may show that she had an infant in her arms. Such testimony tends to prove the wilfulness of the wrong in ejecting her where there was no shelter; and this whether regard is had to the infant *per se* or the mother's natural solicitude for it, or whether it be regarded only as one of the impediments which disabled her from sheltering herself from the rain.[2]

The immediate purpose of a traveler is to reach some given destination; but a journey is generally taken for some ulterior object. The carrier undertakes that the former shall be accomplished so far as his route is concerned; and if he is advised of the latter when his contract is made he is held to engage with reference to it, and damages for a violation of his agreement or duty will be given accordingly. The same tests apply which govern generally, and by which remote, uncertain and speculative consequences are excluded from consideration. Each case must, therefore, be determined on its peculiar facts. An exceptional case was finally decided by the federal supreme court on appeal from a decree in admiralty.[3] The libelant took passage in 1856 on the respondent's vessel at Acapulco for San Francisco; he tendered his fare, and while on board demeaned himself properly. On the voyage the respondent transferred him against his will to another vessel which took him back to Acapulco. The libelant was unable to obtain passage on any other vessel from that place to his intended destination. He went thence to Aspinwall, New Grenada, to try and get a passage thence to San Francisco; but a line of steamers previously existing there, and on which he expected to go, had been discontinued, its last vessel having set off two or three days before his arrival. Finally, through charity, he obtained

[1] Brown v. Chicago, etc. Ry. Co., 54 Wis. 342; Paddock v. Atchison, etc. R. Co., 37 Fed. Rep. 841; Fell v. Northern P. R. Co., 44 id. 248; Louisville, etc. R. Co. v. Falvey, 104 Ind. 409; Same v. Snyder, 117 id. 435; Louisville, etc. R. Co. v. Sullivan, 81 Ky. 624. *Contra*, Pullman Palace Car Co. v. Barker, 4 Colo. 344. This case has been severely criticised. See Brown v. Railway Co., 54 Wis. 342, 360; Louisville, etc. Ry. Co. v. Falvey, 104 Ind. 409, 428.

[2] Alabama, etc. R. Co. v. Sellers, 93 Ala. 9.

[3] Pearson v. Duane, 4 Wall. 605.

a passage to New York, where he was without means and dependent on charity for subsistence. He was confined in a hospital there for several months, and physically unable to attempt a voyage to San Francisco until 1860. The special circumstances which induced the respondent to put him off his [253] vessel and send him back, and which made it impossible for him to get other transportation to his intended destination, were not known to the respondent when he received him as a passenger, but were made known on the voyage. Those circumstances were the previous forcible expulsion of the libelant from San Francisco by the vigilance committee, and a certainty that if he returned by the respondent's vessel, or any other, while that committee held control of San Francisco, he would be killed. Four thousand dollars damages had been awarded to him in the court below, and on the basis and amount of damages the supreme court said the award was excessive, bearing no proportion to the injury received; that he was entitled to compensation for the injury done him by being put on board the other vessel, so far as that injury arose from the act of the respondent in putting him there. But the outrages which he suffered at the hands of the vigilance committee; his forcible abduction from California and transportation to Acapulco; the difficulties experienced in getting to New York and his inability to procure a passage from either Acapulco or Panama to San Francisco cannot be compensated in this action. The obstructions he met with in returning to California were wholly due to the circumstances surrounding him, and were not caused by the respondent. Every one, doubtless, to whom he applied for passage knew the power of the vigilance committee, and were afraid to encounter it by returning an exile against whom the sentence of death had been pronounced. The respondent had no malice or illwill towards the libelant, and, as the evidence clearly shows, excluded him from his boat in the fear that, if returned to San Francisco, he would be put to death. It was sheer madness for the libelant to seek to go there. Common prudence required that he should wait until the violence of the storm blew over and law and order were restored. The court reduced the recovery to $50.

§ 939. **Same subject; consequential damages.** If the object of a passenger's journey is known to the carrier when he

undertakes his transportation damages for delay or defeat of it by the latter's fault may be recovered. The master of a schooner who had taken passage on a steamer to rejoin his vessel and was carried past his destination was held entitled to recover not only his personal expenses and loss of [254] time, but damages in the nature of demurrage for the detention of his vessel which was awaiting his return.[1] Such damages must be shown with certainty to have resulted necessarily and solely from the carrier's default. Thus, a carrier who failed to carry a passenger within the appointed time to the place for which he had taken passage was held not liable for his consequent inability to do an errand there, nor his expenses and the injury to his business because of his absence during a sojourn of several days, without some evidence that if he had seasonably arrived he might have performed his errand, and thereupon would have promptly returned, and that he could not with proper effort accomplish his errand by reason of such delay. A traveler who sustains damages because of circumstances peculiar to himself cannot recover therefor unless he has given the carrier notice of the facts. Thus, a theatrical manager who is prevented from reaching his destination in time to give a performance for which tickets have been sold cannot recover from the carrier money refunded to the persons who purchased them.[3] If a carrier advertises to leave and to arrive at given places at stated times, or so as to make specified connections with carriers beyond, such advertisements are guaranties to persons acting upon them, and on failure to fulfill he is liable for personal expenses at hotels, and the cost of substituted conveyances when necessary to the passengers' purposes, and loss of time consequent on not leaving or arriving in accordance with the advertisement.[4] Mere inconvenience will be ground of damages if it is capable of being stated in tangible form; the difference between what a passenger ought to have and did have; between the contracted conveyance and the

[1] The Canadian, 1 Brown, Adm. 11.

[2] Benson v. New Jersey, etc. T. Co. 9 Bosw. 412.

[3] Georgia R. v. Hayden, 71 Ga. 518. See Carsten v. Northern P. R. Co., 44 Minn. 454.

[4] Cranston v. Marshall, 5 Exch. 395; Denton v. Great Northern Ry. Co., 5 E. & B. 860; Hamlin v. Same, 1 H. & N. 408; Le Blanche v. London, etc. Ry. Co., 1 C. P. Div. 286; Heirn v. McCaughan, 32 Miss. 17.

necessity to go on foot or by such other means as were available.[1] And where the action is for a tort, the breach of duty, and sickness is the natural and proximate result, damages therefor may be recovered.[2]

§ 940. Passenger's indiscreet acts not ground of damages. It has been held that where the damages are produced by other agencies than those causing the injury, or even by agencies remotely connected with those causing it, they cannot be regarded as proximate or proper for compensation, but [255] only where the injury flows from the wrongful act as its natural concomitant, or as the direct result. Where speculation or conjecture has to be resorted to for the purpose of determining whether the damages result from the wrongful act or from some other cause, the law rejects them for that reason.[3] This was declared in a case where a train failed to stop at a station where a passenger was waiting for it to be carried to another station; he thereupon walked to his place of destination in very cold weather, and in consequence became sick; it was held that the sickness, and loss which it caused him, did not result directly from the defendant's breach of duty. If his business required it he was at liberty to hire another conveyance, and the company would have been liable for such loss or injury as he suffered in waiting for or procuring it, and such as his business might suffer on account of the delay, but he had no right to inflict injury on himself to enhance the amount of his damages.[4] There is an obvious difference between the predicaments in which a carrier's breach of duty or contract may leave his customer; in one, the carrier refuses to receive him at a home, or at an intermediate, station where he can remain to choose between

[1] Hobbs v. London, etc. Ry. Co., L. R. 10 Q. B. 111; Baltimore & O. R. Co. v. Carr, 71 Md. 135; Cincinnati, etc. R. Co. v. Eaton, 94 Ind. 474.

[2] Id.; Francis v. St. Louis T. Co., 5 Mo. App. 7; Walsh v. Chicago, etc. R. Co., 42 Wis. 23; Brown v. Same, 54 id. 342; Serwe v. Northern P. R. Co., 50 N. W. Rep. 1021; 48 Minn. —.

[3] Indianapolis, etc. R. Co. v. Birney, 71 Ill. 391.

[4] Chicago, etc. Ry. Co. v. Brisbane, 24 Ill. App. 463; Louisville, etc. R. Co. v. Fleming, 14 Lea, 128; Wright v. California R. Co., 78 Cal. 360; Gulf, etc. Ry. Co. v. Head, 4 Tex. Civ. Cas. 313; 15 S. W. Rep. 504; Texas & P. Ry. Co. v. Cole, 66 Texas, 562; Francis v. St. Louis T. Co., 5 Mo. App. 7. Compare I. & G. N. Ry. Co. v. Gilbert, 64 Texas, 536.

other modes of conveyance to pursue his journey or return; in another, he may be set down where there is no shelter and consequently where he cannot remain, whence there is no conveyance, and he is obliged to pursue his journey or seek the nearest shelter on foot in such weather as may happen at the time. In the former, there is no warrant to incur any personal hazard on the carrier's responsibility. In the latter, he has placed the passenger in a situation where he cannot remain and from which there is but one mode of escape. The ills incident to that situation, and the dangers connected with that mode of extrication, whether inevitable or fortuitous, the carrier is responsible for; if injury happens without the contributory negligence of the plaintiff, it results from the carrier's fault and breach of contract by natural and necessary sequence.[1]

[1] East Tennessee, etc. R. Co. v. Lockhart, 79 Ala. 315; Lake Erie & W. Ry. Co. v. Fix, 88 Ind. 381; Louisville, etc. R. Co. v. Mask, 64 Miss. 738; Serwe v. Northern P. R. Co., 50 N. W. Rep. 1021; 48 Minn. ——; Williams v. Vanderbilt, 28 N. Y. 217; Brown v. Chicago, etc. R. Co., 54 Wis. 342.

An item of damage in Hobbs v. London, etc. Ry. Co., L. R. 10 Q. B. 111, was rejected, which, on the principle stated in the text, should have been allowed, unless the form of the action was such as to exclude it. The facts are stated in vol. 1, § 57, and need not be repeated. The item disallowed was for the sickness of a passenger who was obliged to walk in consequence of being put down at a wrong place. In regard to it Cockburn, C. J., said: With regard to the second head of damage the case assumes a very different aspect. I see very great difficulty, indeed, in coming to any other conclusion than that the 20*l.* is not recoverable; and when we are asked to lay down some principle as a guiding rule in all such cases, I quite agree with my brother Blackburn in the infinite difficulty there would be in attempting to lay down any principle or rule which shall cover all such cases; but I think that the nearest approach to anything like a fixed rule is this: that to entitle a person to damages by reason of a breach of contract, the injury for which compensation is asked should be one that may be fairly taken to have been contemplated by the parties as the possible result of the breach of contract. Therefore you must have something immediately flowing out of the breach of contract complained of, something immediately connected with it, and not merely connected with it through a series of causes intervening between the immediate consequence of the breach of contract and the damage or injury complained of. To illustrate that, I cannot take a better case than the one before us. Suppose that a passenger is put out at a wrong station on a wet night, and obliged to walk a considerable distance in the rain, catching a violent cold, which ends in a fever, and the passenger is laid up for a

[257] § 941. **Protection of passengers.** In a recent case,[1] which received very thorough consideration, it was held that "the carrier's obligation is to carry his passenger safely and properly, and to treat him respectfully, and if he intrusts the performance of this duty to his servants the law holds him responsible for the manner in which they execute the trust. The law seems to be now well settled that the carrier is [258] obliged to protect his passenger from violence and insult, from whatever source arising.[2] He is not regarded as an in-

couple of months, and loses through his illness the offer of an employment which would have brought him a handsome salary. No one, I think, who understood the law, would say that the loss so occasioned is so connected with the breach of contract as that the carrier breaking the contract could be held liable. Here, I think, it cannot be said the catching cold by the plaintiff's wife is the immediate and necessary effect of the breach of contract, or was one which could be fairly said to have been in the contemplation of the parties. . . . The wife's cold and its consequences cannot stand upon the same footing as the personal inconvenience arising from the additional distance which the plaintiffs had to go. It is an effect of the breach of contract in a certain sense, but removed one stage; it is not the primary but the secondary consequence of it. . . . The party is entitled to take a carriage to his home. Suppose the carriage overturns or breaks down, and the party sustains bodily injury from either of these causes, it might be said, 'If you had put me down at my proper place of destination, where by your contract you engaged to put me down, I should not have had to walk or go from Esher to Hampton in a carriage, and should not have met with the accident in the walk or the carriage. In either of these cases the injury is too remote, and I think that is the case here. It is not the necessary consequence, it is not even the probable consequence, of a person being put down at an improper place, and having to walk home, that he should sustain either a personal injury or catch a cold. That cannot be said to be within the contemplation of the parties, so as to entitle the plaintiff to recover, and to make the defendants liable to pay damages for the consequences." See Thompson's Car. Pass. 566–7.

In a similar case recently decided in Wisconsin, where the action was for the tortious breach of duty, the injuries of the wife from the exposure were held to be the natural and proximate consequence of leaving her three miles short of her destination at night, under such circumstances that she had to walk that distance. She was made sick and had a miscarriage by reason of it. A verdict for $2,500 was sustained. Brown v. Chicago, etc. R. Co., 54 Wis. 343. This case has been often cited and generally followed in recent cases. See vol. 1, §§ 36, 48.

[1] Goddard v. Grand Trunk Ry., 57 Me. 202, 213.

[2] Pittsburgh, etc. Ry. v. Hinds, 53 Pa. St. 512; Flint v. Norwich, etc. T. Co., 34 Conn. 554; Chamberlain v. Chandler, 3 Mason, 242; Nieto v. Clark, 1 Cliff. 145; Baltimore, etc. R. Co. v. Blocher, 27 Md. 277; Louisville & N. R. Co. v. Ballard, 88 Ky. 159.

surer of his passenger's safety against every possible source of danger; but he is bound to use all such reasonable precautions as human judgment and foresight are capable of to make his passenger's journey safe and comfortable.[1] He must not only protect his passenger against the violence and insults of strangers and co-passengers,[2] but, *a fortiori*, against the violence and insults of his own servants.[3] . . . The law requires the common carrier of passengers to exercise the highest degree of care that human judgment and foresight are capable of to make his journey safe. Whoever engages in the business impliedly promises that his passenger shall have this degree of care. In other words, the carrier is conclusively presumed to do what, under the circumstances, the law requires him to do. We say conclusively presumed, for the law will not allow the carrier by notice or special contract even to deprive his passenger of this degree of care. If the passenger does not have such care, but on the contrary is unlawfully assaulted and insulted by one of the very persons to whom his conveyance is intrusted, the carrier's implied promise is broken, and his legal duty is left unperformed, and he is necessarily responsible to the passenger for the damages he thereby sustains. The passenger's remedy may be either in *assumpsit* or tort, at his election. In the one case he relies upon a breach of the carrier's common-law duty to support his action; in the other upon the breach of his implied promise. The form of the action is important only upon the question of damages. In actions of *assumpsit* the damages are generally limited to compensation. In actions of tort the jury are allowed greater latitude, and in proper cases may give exemplary damage."

[1] McElroy v. Nashau, etc. R. Co., 4 Cush. 400; Du Laurans v. First Division, etc. R. Co., 15 Minn. 49; Carroll v. Staten Island R. Co., 58 N. Y. 126; Johnson v. Winona, etc. R. Co., 11 Minn. 296; New Orleans, etc. R. Co. v. Allbritton, 38 Miss. 242; Bryant v. Rich, 106 Mass. 180; Bowen v. New York C. R. Co., 18 N. Y. 408; Craker v. Chicago & N. R. Co., 36 Wis. 657; Memphis, etc. R. Co. v. Whitfield, 44 Miss. 466; Caldwell v. New Jersey Steamboat Co., 47 N. Y. 282; Baltimore, etc. R. Co. v. Breinig, 25 Md. 378.

[2] King v. Ohio & M. Ry. Co., 22 Fed. Rep. 413.

[3] Murphy v. Western & A. R., 23 Fed. Rep. 637.

[259] § 942. **Damages for mental suffering.** The carrier must make compensation according to the nature of the injury when the proper action is brought; such injury may consist of personal inconvenience,[1] sickness,[2] loss of time,[3] bodily and mental suffering, loss of capacity to earn money from personal injury, pecuniary expenses, disfigurement or permanent physical or mental impairment. There is no precise rule by which the extent of recovery for pain and suffering can be measured; but it is well established they are to be compensated when they result from injuries received by the party suing from the wrongful acts or culpable negligence of the defendant. The determination of the amount is committed to the judgment and good sense of jurors, subject to practical revision by the court to correct and relieve from manifest excess;[4] and it is now established that not only bodily pain, but, connected with it, mental suffering — anxiety, suspense, fright, sense of wrong from insult or indignity,— may be treated, when the facts will justify it, as an element of the [260] injury for which compensation should be allowed.[5] The

[1] Hobbs v. London, etc. Ry. Co., L. R. 10 Q. B. 111; Baltimore & O. R. Co. v. Carr, 71 Md. 135; Cincinnati, etc. R. Co. v. Eaton, 94 Ind. 474; Northern C. Ry. Co. v. O'Connor, 24 Atl. Rep. 449 (Md.).

[2] Brown v. Chicago, etc. R. Co., 54 Wis. 343; *ante*, § 938.

[3] Williams v. Vanderbilt, 28 N. Y. 217; Ward v. Same, 34 How. Pr. 144; S. C., 4 Abb. App. Dec. 521; Pennsylvania R. Co. v. Books, 57 Pa. St. 339.

[4] Walker v. Erie Ry. Co., 63 Barb. 269; Ransom v. New York & E. R. Co., 15 N. Y. 415; Blake v. Midland Ry. Co., 10 E. L. & E. 437; S. C., 18 Q. B. 93; Linsley v. Bushnell, 15 Conn. 225; Lincoln v. Saratoga, etc. R. Co., 23 Wend. 425; Canning v. Williamstown, 1 Cush. 451; Klein v. Jewett, 26 N. J. Eq. 474; McKinley v. Chicago, etc. R. Co., 44 Iowa, 314; Ohio, etc. R. Co. v. Dickerson, 59 Ind. 317; Whalen v. St. Louis, etc. R. Co., 60 Mo. 323; Morse v. Auburn, etc. R. Co., 10 Barb. 621; Curtiss v. Rochester, etc. R. Co., 20 Barb. 282; 18 N. Y. 534; Johnson v. Wells, etc. Co., 6 Nev. 224; Fairchild v. California Stage Co., 13 Cal. 599; Illinois C. R. Co. v. Barron, 5 Wall. 90; Verrill v. Minot, 31 Me. 299; Laing v. Colder, 8 Pa. St. 479; Pennsylvania R. Co. v. Kelly, 31 Pa. St. 379; Same v. Allen, 53 id. 276.

[5] Louisville & N. R. Co. v. Whitman, 79 Ala. 328; Tennessee, etc. R. Co. v. Lockhart, id. 315; Railway v. Dean, 43 Ark. 529; Indianapolis, etc. R. Co. v. Stables, 62 Ill. 313, modifying Illinois C. R. Co. v. Sutton, 53 Ill. 397, where it was ruled that mental suffering cannot be recovered for unless the physical injury was wilfully inflicted; Hannibal, etc. R. Co. v. Martin, 111 Ill. 219; Pennsylvania R. Co. v. Connell, 112 id. 295; Lake Erie & W. Ry. Co. v. Fix, 88 Ind.

mind is no less a part of the person than the body, and the sufferings of the former are sometimes more acute and lasting than those of the latter.[1] Indeed, the sufferings of each frequently, if not usually, act reciprocally on the other. The dismay and the consequent shock to the feelings which is produced by the danger attending a personal injury not only aggravate but are frequently so appalling as to suspend the reason and disable a person from warding off the avoidable consequences.[2] Where a conductor on the defendant's railroad, by the use of some force, kissed a female passenger, the jury assessed the damages at $1,000, and the verdict was sustained on the ground that it was right and proper to take into consideration, and give liberal damages for, her terror and anxiety, outraged feelings and insulted virtue, mental humiliation and suffering, although exemplary damages were

381; Chicago, etc. R. Co. v. Holdridge, 118 id. 281; Shepard v. Chicago, etc. Ry. Co., 77 Iowa, 54; Southern K. Ry. Co. v. Rice, 38 Kan. 398; McGinnis v. Missouri P. Ry. Co., 21 Mo. App. 399; I. & G. N. Ry. Co. v. Gilbert, 64 Texas, 536; St. Louis, etc. Ry. Co. v. Mackie, 71 id. 491; H. & T. C. R. Co. v. Rand, W. & W. (Texas), 100; Ricketts v. Chesapeake & O. Ry. Co., 33 W. Va. 433; Stutz v. Chicago & N. Ry. Co., 73 Wis. 147; Wightman v. Same, id. 169; Gallena v. Hot Springs R., 13 Fed. Rep. 116; Murphy v. Western & A. R., 23 id. 637; Fell v. Northern P. R. Co., 44 id. 248; Serwe v. Northern P. R. Co., 50 N. W. Rep. 1021; 48 Minn. ——; Missouri P. Ry. Co. v. Kaiser, 18 S. W. Rep. 305; 82 Texas, 144; Canning v. Williamstown, 1 Cush. 451; Pennsylvania & O. Canal Co. v. Graham, 93 Pa. St. 290; Smith v. Pittsburgh, etc. R. Co., 23 Ohio St. 10; Chicago, etc. R. Co. v. Flagg, 43 Ill. 365; Muldowney v. Illinois C. R. Co., 36 Iowa, 462; Meagher v. Driscoll, 99 Mass. 281; Craker v. Chicago & N. R. Co., 36 Wis. 657; Ripon v. Bittel, 30 Wis. 614; Ransom v. New York, etc. R. Co., 5 N. Y. 415; Quigley v. Central P. R. Co., 11 Nev. 350; McKinley v. C. & N. W. R. Co., 44 Iowa, 314; Seger v. Barkhamsted, 22 Conn. 290; Masters v. Warren, 27 Conn. 293; Lawrence v. Housatonic R. Co., 29 Conn. 390; Taber v. Hutson, 5 Ind. 322; Cox v. Vanderkleed, 21 Ind. 164; Fairchild v. California Stage Co., 13 Cal. 599; Illinois, etc. R. Co. v. Barron, 5 Wall. 90; Hamilton v. Third Ave. R. Co., 53 N. Y. 25; Baltimore, etc. R. Co. v. Blocher, 27 Md. 277; Nones v. Northouse, 46 Vt. 587; 2 Greenlf. Ev., § 267.

If insulting or abusive words are applied to a passsenger while he is being ejected from a train he may recover for the injury thereby done to his feelings, but not on the independent ground that the same words tended to bring him into ignominy and disgrace. Southern K. Ry. Co. v. Hinsdale, 38 Kan. 507.

[1] Seger v. Barkhamsted, 22 Conn. 290; McKinley v. C. & N. W. R. Co., 44 Iowa, 314.

[2] Id.

held not recoverable.[1] A passenger who is wrongfully ejected from a train may recover for the indignity put upon him.[2]

In an Iowa case an action was brought against a railroad company for personal injury caused by a brakeman beating the plaintiff while he was attempting to enter a car, and an instruction that the jury might allow damages, among other things, "for the outrage and indignity put upon him," was approved. The court say: "Mental anguish arising from the injury, that is, pain caused by the wound or broken arm, constitutes an element of compensatory damages, and we, on principle, are unable to see why mental pain arising from or caused by the nature and character of the assault whereby the wound was inflicted or the arm broken should not also be an element of such damages. The one is as easily estimated and determined as the other, and practically the two cannot be separated or distinguished. The party injured cannot tell where one ends and the other begins. The . . . damage arising from either or both cannot be accurately computed, [261] and, from the nature of things, they are so blended together they cannot be separated or distinguished. The attempt, therefore, to draw a line or make a distinction between the two, and to assign one to the class of exemplary, and the other to compensatory, is futile. The distinction is too fine to serve any practical purpose in the determination of causes by courts and juries."[3]

§ **943. Mental suffering independently of other pain.** It has been held that, in order to make a wrong-doer liable in damages for mental suffering, it must be connected with bodily injury,[4] or the injury by which it is produced must be

[1] Craker v. Chicago & N. Ry. Co., 36 Wis. 657.

[2] Pennsylvania R. Co. v. Connell, 112 Ill. 297; S. C., 127 id. 419; 26 Ill. App. 594; Lake Erie & W. Ry. Co. v. Fix, 88 Ind. 381; Shepard v. Chicago, etc. Ry. Co., 77 Iowa, 54; Southern K. Ry. Co. v. Rice, 38 Kan. 398; Same v. Hinsdale, id. 507; Philadelphia, etc. R. Co. v. Rice, 64 Md. 63; Carsten v. Northern P. R. Co., 44 Minn. 454; McGinnis v. Missouri P. Ry. Co., 21 Mo. App. 399; Allen v. Camden & P. F. Co., 46 N. J. L. 198; Delaware, etc. R. Co. v. Walsh, 47 id. 548; International, etc. R. Co. v. Wilkes, 68 Texas, 617.

[3] McKinley v. C. & N. W. R. Co., 44 Iowa, 314; Smith v. Pittsburgh, etc. R. Co., 23 Ohio St. 10; Hamilton v. Third Ave. R. Co., 53 N. Y. 25; Quigley v. Central P. R. Co., 11 Nev. 350, 370.

[4] Victorian Ry. Commissioners v.

attended by circumstances of malice, insult or oppression;[1] and that a simple exposure to averted danger is not a ground of recovery unless it was wanton and produced injury.[2] We conceive the correct rule to be that mental suffering or nervous shock may be recovered for whenever it is the natural and proximate result of the wrong done, if such wrong gives the injured party a cause of action.[3] In a recent Irish case there was a recovery where the "nervous shock" preceded any other injury, and where there was no element of wilfulness. The court reached the conclusion that there is no distinction between "nervous shock" and physical injury.[4]

§ 944. Past and prospective damages. The damage recoverable for bodily pain and suffering are not limited to that which is past where the proof renders it reasonably certain that the party must suffer in the future. In estimating the pecuniary loss in such cases all the consequences of the injury, future as well as past, are to be taken into consideration, including bodily pain which is shown by the proof to be reasonably certain will necessarily result from the injury.[5] Such

Coultas, 13 App. Cas. 222 (stated at some length and discussed in vol. 1, §§ 21–24); Johnson v. Wells, etc. Co., 6 Nev. 224; Illinois C. R. Co. v. Sutton, 53 Ill. 397. This case held that the physical injury must be wilfully inflicted in order that mental suffering might be recovered for. That proposition has been receded from. Indianapolis, etc. R. Co. v. Stables, 62 id. 313.

It is held by the circuit court of appeals, fourth circuit, that in an action against a carrier for the breach of a contract to furnish, and transport a passenger on, a special train, damages cannot be recovered for mere disappointment and mental suffering resulting from delay in starting on a journey to see a sick parent. Wilcox v. Richmond & D. R. Co., 52 Fed. Rep. 264.

[1] Dorrah v. Illinois C. R. Co., 64 Miss. 14; Trigg v. St. Louis, etc. Ry. Co., 74 Mo. 147; Randolph v. Hannibal, etc. Ry. Co., 18 Mo. App. 609.

[2] Trigg v. St. Louis, etc. Ry. Co., 74 Mo. 147.

[3] Stutz v. Chicago & N. R. Co., 73 Wis. 147; Lake Erie & W. R. Co. v. Fix, 88 Ind. 381; Lawrence v. Latimer, 28 Ill. App. 552; Shepard v. Chicago, etc. Ry. Co., 77 Iowa, 54; Southern K. Ry. Co. v. Hinsdale, 38 Kan. 507; Missouri P. Ry. Co. v. Kaiser, 18 S. W. Rep. 305; 82 Texas, 144.

[4] Bell v. Great Northern Ry. Co., 26 L. R. Ire. 428, quoted from *in extenso*, vol. 1, §§ 21-24.

[5] Stutz v. Chicago & N. Ry. Co., 73 Wis. 147; Curtiss v. Rochester, etc. R. Co., 18 N. Y. 534; Memphis, etc. R. Co. v. Whitfield, 44 Miss. 466; Caldwell v. Murphy, 1 Duer, 233; 11 N. Y. 416; Klein v. Jewett, 26 N. J. Eq. 474; Matteson v. New York, etc. R. Co., 62 Barb. 364; Fink v. Schroyer, 18 Ill. 416; Black v. Carrollton R. Co., 10 La. Ann. 33; Holyoke v. Grand Trunk R., 48 N. H. 541; Filer v. New York C. R. Co., 46 N. Y. 42; Drew v.

party is entitled to recover one compensation for all his injuries, past and prospective; these are presumed to embrace indemnity for actual nursing and medical expenses, also loss of time, or loss from inability to perform ordinary labor, or capacity to earn money; he is to have a reasonable satisfaction for loss of both bodily and mental powers.[1]

§ 945. **Proof of damage.** Evidence of the loss sustained by the plaintiff in his business in consequence of the injury received is proper, not as furnishing the measure of damages, but to aid the jury in estimating them; and for this purpose the nature of such business, its extent, and the importance of his personal oversight and superintendence in conducting it, [262] may be shown.[2] The jury are to consider what, before the injury, was the health and physical and mental ability of the plaintiff to maintain his family or to earn money as compared with his condition in these particulars afterwards and up to the institution of the suit, in consequence of the injury complained of, and how far it is permanent in its results, as well as the physical and mental suffering he has endured and will endure from such injury as a cause, and should allow such damages as in their judgment will fairly compensate therefor.[3]

Sixth Avenue R. Co., 26 N. Y. 49; Aaron v. Second Avenue R. Co., 2 Daly, 127.

[1] Id.; Donaldson v. Mississippi, etc. R. Co., 18 Iowa, 280; Walker v. Erie R. Co., 63 Barb. 260; Pennsylvania R. Co. v. Books, 57 Pa. St. 339.

[2] Central R. v. Senn, 73 Ga. 705; I. & G. N. Ry. Co. v. Irvine, 64 Texas, 529; Lincoln v. Saratoga, etc. R. Co., 23 Wend. 425; Hurt v. Southern R. Co., 40 Miss. 391; The Oriflamme, 3 Sawyer, 397; New Jersey Exp. Co. v. Nichols, 33 N. J. L. 437; Taylor v. Dustin, 43 N. H. 493.

[3] Stockton v. Frey, 4 Gill, 406; Curtiss v. Rochester, etc. R. Co., 20 Barb. 282; Kinney v. Crocker, 18 Wis. 74; Ripon v. Bittel, 30 Wis. 614; Pennsylvania & O. C. Co. v. Graham, 63 Pa. St. 290; McLaughlin v. Corry, 77 Pa. St. 109; Indianapolis v. Gaston, 58 Ind. 224; Shear. & Redf. on Neg., § 606. See Joch v. Dankwardt, 85 Ill. 331.

In Caldwell v. Murphy, 11 N. Y. 416, the plaintiff brought an action against a carrier of passengers for injuries received in consequence of the negligent upsetting of a stage or omnibus. The plaintiff was proved to have been considerably injured, but whether he was permanently disabled or not was a matter earnestly litigated. To show that he continued to suffer from the effects of the injury down to the time of the trial the plaintiff proved that he was a ship carpenter, and that he had not been able to work constantly more than a few weeks after the injury occurred. On cross-examination the defendant raised the question whether his being without work was not occasioned by his not attempting to procure employment.

In a case before the supreme court of the United States [263] the declaration charged that the plaintiff was wounded on the head by a blow from a piece of iron that had been broken off the boat on which he was a passenger, and thrown against him; that in consequence of the wound his brain was injured, so that his understanding was impaired; that for some time he was insensible, and his life despaired of; and before his recovery he suffered much mental and bodily pain; that he was detained in New York at a distance from home, and subjected to much expense about his care, support and maintenance, and had been hindered and prevented for a long period from transacting and attending to his necessary and lawful affairs by him during all that time to be performed and transacted; and lost and was deprived of great gains, profits and advantages which he might and otherwise would have derived and acquired. Under this general declaration the question decided was whether the plaintiff was entitled to prove that before

The witness was made to answer that he was never present when the plaintiff applied for work, and that what he knew about his inability to labor was founded principally on what he had told him. After several other questions, the object of which was to ascertain whether he was voluntarily idle, whether his being without work was on account of his not being able to get employment, or whether it was, as the plaintiff contended, on account of inability to labor by reason of his injuries, the plaintiff's counsel put this question: "Had he the means of support for himself and family except his labor?". It was objected to. The objection being overruled he answered: "He had no means of support except what he got from the charity of his friends." The defendant's view of the matter was still pressed by a further cross-examination of the same witness, and then the judge put some questions to ascertain the number of persons in the plaintiff's family, and in what manner they were supported after the injury, it having been shown that before that he had constant employment. It was held on appeal that this evidence was admissible. Denio, J., said: "I think the evidence was admissible to show that the plaintiff's circumstances were such that he would probably have been engaged in laboring in his calling if he had not been disabled by his injuries, and that he was in a considerable degree unable to labor. Had he been a person of pecuniary means, his being out of employment would have been slight if any evidence of disability; but having a family dependent upon him, and being without means of support except his labor and the charity of his friends, his omission to employ himself, in connection with the other evidence of his injuries, had a bearing upon the extent to which he had been disabled by the occurrence in question."

and up to the time of the alleged injury the particular business in which he was engaged was that of a distiller and manufacturer of turpentine, and that he was largely and extensively engaged therein; and by the physician who attended him in New York that when the plaintiff after his convalescence left there to return to North Carolina he could not safely attend to any business or occupation. The evidence was held admissible.[1]

§ 946. **Same subject.** In a Massachusetts case in which the declaration alleged the plaintiff's business, and impaired capacity after the injury to pursue it, the court held that he might introduce evidence to show the kind and amount of physical and mental labor he was accustomed to do before the injury as compared with that which he was able to do after-

[1] Wade v. Leroy, 20 How. 34. Campbell, J., delivering the opinion, thus cautiously remarks upon the proof so offered: "The precise object for which this evidence was adduced is not stated in the certificate of the judges; but if the evidence tends to support any issue between the parties, or has a direct connection with other evidence competent to maintain the averments of the declaration, either to illustrate its meaning or to ascer- [264] tain its probative effect, it cannot be rejected as impertinent, or as founded upon matter that does not appear in the pleadings in the cause. The evidence objected to conduces to prove that the plaintiff was seriously injured; that he had been confined in New York at a distance from his home and had incurred expense in consequence. That, before that time he had been concerned in conducting a business that required a degree of mental and bodily vigor, and that his time was of some pecuniary value; or, that he had suffered a loss of some profit, and that after some detention in New York he had returned to his home in an infirm condition — so infirm that his medical attendant and adviser deemed him incapable of pursuing any ordinary business or occupation, and had advised him to abstain from personal exertion. This evidence would certainly assist the jury to determine that the plaintiff had sustained an injury of no slight character — an injury to his person, and which was followed by expense, suffering and loss of time which had for him a pecuniary value. These were the direct and necessary consequences of the injury, and sustained strictly and almost exclusively as an effect from it. This evidence may have an application without any inquiry into any remote or contingent consequences which could not have been foreseen or which were peculiar to the circumstances or condition of the plaintiff. The record does not inform us that the evidence was designed to aid in such irrelevant inquiries." It was insisted that damages for the injury to the particular business of the plaintiff were special, and therefore the business and the fact of the loss should be particularly set forth in the declaration. See Laing v. Colder, 8 Pa. St. 497.

wards, for the purpose of aiding the jury to determine the compensation he should receive for his loss of mental and physical capacity.[1] The declaration alleged that by defendant's act he was hurt, and being before able to earn [265] large sums by his business, was rendered unable to labor in and conduct it, and deprived of the earnings which he would otherwise have made. He had been allowed to show on the trial, in order to prove his bodily and mental capacity before the accident, and the extent of his injury, that prior thereto he owned and carried on a large mill for the manufacture of fancy cassimeres; used to select the patterns and colors, which required constant attention and thought; bought part of the stock, hired the workmen and agreed with them for their wages; superintended the putting in of machinery; conducted an extensive correspondence, and twice a year took an account of stock; and that since the accident he had been able to do very little that required mental application or physical labor. It was contended for the defendant that the law makes no distinction between men; that evidence of the plaintiff's wealth in owning and carrying on a large mill afforded no evidence of the amount of damages sustained. Evidence that he was skilled in his occupation, and able to perform a large amount of work therein, does not prove any special damages without evidence that his occupation was profitable; that damages estimated upon the ground of loss of peculiar skill and business capacity must in their nature be conjectural and uncertain; that if different passengers are entitled to different amounts of damages for similar injuries railroad companies must charge a higher rate of fare for those whose occupation or capacity will entitle them to heavy damages. Colt, J., said: "In general the profits of a future business are too remote and uncertain to be relied on as an element in the estimate of damages. It does not follow that superior education, experience or ability in the management of business insures pecuniary success. The uncertainty of the continuance of health and life, with the taste and disposition for such pursuits, and especially the proverbial uncertainty of trade, preclude the making of any estimate which can have weight beyond the

[1] Ballou v. Farnum, 11 Allen, 73.

merest conjecture. If this evidence had been offered by the plaintiff with a view of increasing the damages on account of his wealth, or peculiar skill as a manufacturer, or the large profits he would be able to realize in his future business, and it had been admitted for that purpose, the argument of the [266] defendant would be entitled to further consideration. But it was offered to show the extent of the personal injury by reason of the loss of mental vigor and endurance thereby occasioned. The diminution, whatever it was, could only be shown by evidence of strength before and weakness afterwards, as manifested in the ordinary pursuits of the plaintiff. The presiding judge admitted it only for this restricted purpose, and carefully instructed the jury that it was admissible to enable them to judge of the injury to his capacity, and that the action was for an injury to the man, and not for interfering with his business.[1] In all actions of this description, and particularly in those in which damages for mental suffering or loss of mental capacity are sought to be recovered, the difficulty of furnishing by evidence the means of measuring the extent of the injury so that the jury may be able to award with any certainty a pecuniary equivalent therefor is at once apparent; and in this difficulty the defendants find arguments for the support of their objection. But the answer is that the law does not refuse to take notice of such injury on account of the difficulty of ascertaining its degree. In a variety of actions founded on personal torts, and in many where no positive bodily harm has been inflicted, the plaintiff is permitted to recover for injury to the feelings and affections, for mental anxiety, personal insult, and that wounded sensibility which follows the invasion of a large class of per-

[1] In Kinney v. Crocker, 18 Wis. 74, the plaintiff was allowed to give evidence of the character and extent of his business, and of the effect of his inability to attend to it by reason of the injury; and not only was this held proper, but also this instruction to the jury, that "he would be entitled to recover, in addition to other damages sustained, for all damages to his legitimate business, but not for speculations that he might be engaged in; but that if a man had an ordinary business, yielding ordinary receipts, he would be entitled to recover the diminution of these receipts resulting from his inability to attend to his business, occasioned by the injury." Nebraska City v. Campbell, 2 Black, 590; Indianapolis v. Gaston, 58 Ind. 224.

sonal rights. The impossibility, in all such cases, of precisely appreciating in money mental suffering of this description is certainly as great as is suggested as where the question is what shall be allowed for a permanent injury to mental capacity. The compensation for personal injury occasioned by the [267] negligence or misconduct of others, which the law promises, is indemnity, so far as it may be afforded in money, for the loss and damage which the man has suffered as a man. Some of its elements may be bodily pain, mutilation, loss of time and outlay of money; but of more important consideration oftentimes is the mental suffering and loss of capacity which ensues. Of these several items of injury, if compensation is to be confined to those capable of accurate estimate, it will include but a small part, and must exclude all those injuries commonly regarded as purely physical; for the difficulty in ascertaining a pecuniary equivalent for the last named is precisely the same and quite as great as any that have been suggested. In fact, it will be found impossible to fix a limit to injuries of a physical nature so as to exclude from consideration their effect on the mental organization of the sufferer. The intimate union of the mental and physical, the mutual dependence of each organization,— if, indeed, for any practical purpose, in this regard, they can be considered as distinct,— the direct and mysterious sympathy whenever the sound and healthy condition of either is disturbed, render useless any attempt to separate them for the purpose indicated. It is obvious, upon a moment's reflection, that the powers and usefulness of the limbs and senses in ministering to the necessities and pleasures of the individual are in a great extent to be measured by the knowledge, experience and taste which he possesses, and which are purely qualities of the mind. Take a case of injury to the right arm of a skilful painter or musician, for example. To show the extent of his injury the plaintiff produces evidence of the use he was able to make of the arm before and after the accident. From such evidence alone could the jury judge of the plaintiff's loss. Such proof is constantly resorted to without objection in those cases. And still the chief value of the limb to its possessor consists in its skilful use, as controlled and directed by the cultivated taste and education of the plaintiff; and the chief loss to him

is the loss of the power to make these purely intellectual endowments available for his pleasure or benefit. Or suppose the injury be to one of the five senses. Can any rule be adopted which shall limit the damages to that portion of the injury which may be called only bodily? There is a class of [268] injuries, especially those which affect the brain and nervous system, to which this case seems to have belonged, where, by common observation, the most satisfactory symptom and proof of the physical injury is to be found in the weakness and derangement of the intellectual faculties. Upon the whole, then, upon principle we can see no error in the admission of the evidence, with the accompanying instructions. In the main it must always be left to the discretion of the jury to give such reasonable damages in those cases as in their opinion will afford compensation for the entire injury which the plaintiff proves he has sustained, subject to that power which remains in the court to set aside the verdict in those cases where the damages awarded are so excessive as to warrant the inference that some passion or prejudice or other improper considerations influenced them."[1]

§ 947. Recovery for special loss. If there be a loss of employment, a provable loss in business, or any other special loss resulting from the injury, although it occurs in consequence of the peculiar circumstances in which the injured party is placed at the time, it may be taken into consideration in the estimate of damages, if specially claimed in the declaration.[2]

[1] Ransom v. New York & E. R. Co., 15 N. Y. 415; Collins v. Council Bluffs, 32 Iowa, 324; Russ v. Steamboat War Eagle, 14 Iowa, 363; Laing v. Colder, 8 Pa. St. 497; Pennsylvania R. Co. v. Books, 57 Pa. St. 339; McKinley v. C. & N. W. R. Co., 44 Iowa, 314; Whalen v. St. Louis, etc. R. Co., 60 Mo. 323; Pittsburg, etc. R. Co. v. Andrews, 39 Md. 329.

[2] Laing v. Colder, 8 Pa. St. 497; Walker v. Erie Ry. Co., 63 Barb. 260; Caldwell v. Murphy, 11 N. Y. 416; Chicago v. O'Brennan, 65 Ill. 160; Kinney v. Crocker, 18 Wis. 74; Hunter v. Stewart, 47 Me. 419. In this case there is an implication that an unmarried female might recover damages on account of her prospect of marriage being impaired by the injury, if declared for specially and proved. The charge was that if the jury should be satisfied that the injury sustained would be lasting, they were at liberty to consider whether the prospects for being well married would not thereby be impaired; and if so, they were at liberty to allow such damages in this respect as they were satisfied would arise from this cause, if any. On exception to this instruction the court said: "Now, the

§ 948. Wrongfully placing passenger in second-class car. If a passenger who pays for a first-class ticket is furnished with a second-class one and compelled to ride in a car corresponding therewith, in which car the passengers are permitted to use vulgar and profane language, which the servants of the carrier might have prevented, it must respond in damages based on physical and mental injuries, which, for their measure, especially in the case of a refined and delicate woman, must necessarily largely depend upon the honest exercise of the judgment and discretion of the court or jury trying the cause. In such a case the passenger is not bound to pay the difference between the price of the ticket he holds and

loss of marriage may be of itself a special ground of action. In the present case it was not alleged in the declaration nor sustained by the proof. It does not necessarily arise from a bodily injury, though it might be consequent thereupon. The defendant had no notice that damages would be claimed for any such cause, and, therefore, could not be prepared to prove or disprove its existence. As damages have been given for a special injury having no necessary connection with the wrongful acts of the defendant, and neither set forth in the declaration nor established by the evidence, the exceptions must be sustained."

In The Oriflamme, 3 Sawy. 397, 404, Deady, J., said of the female libelant who had been injured while a passenger on board the vessel: "I find that she is entitled to recover for expenses of her sickness and injury to her clothing, $100; for loss of time and labor on account of the injury, $100; for the expense of employing counsel to maintain this suit to recover the damages to which she is entitled, $300; for the physical and mental pain and suffering caused by the injury, and treatment of the libelant while on board the vessel after the accident, $1,000; and for the permanent disfigurement of the libelant's face from the wound on the forehead, $500. It may be that the sum of $500 is an insufficient compensation for such a blemish upon the personal appearance of the libelant. But it does not appear that the scar will affect her personal appearance so as to make her presence offensive or painful to others. For this reason it is not likely to interfere with or prevent her from obtaining employment in her calling and sphere of life. It will in no way affect her ability to labor and earn her living. In manners and appearance she is a plain girl, moving in an humble walk in life, and not like many others dependent upon her beauty for her dowry or support. Still the scar will be a permanent disfigurement of her person, for which she is entitled to some compensation. Karr v. Parks, 44 Cal. 49. In this country, at least, it is open to every woman, however poor or humble, to obtain a secure and independent position in the community by marriage. In that matter, which is said to be the chief end of her existence, personal appearance — comeliness — is a consideration of comparative importance in the case of every daughter of Eve."

the ticket he is entitled to in order to mitigate the liability of the carrier.[1] The passenger may recover exemplary damages where they are recognized as proper.[2]

[269] § 949. **Mitigation of damages.** The damages recoverable by the injured party cannot be abated or mitigated by showing that he has received money on account of the injury from an insurance company on an accident policy;[3] nor because he has received gratuitous nursing or medical attendance or benefactions in any form from friends.[4] And it has been held that the value of such nursing may be allowed as an item of damage.[5] Where a passenger is injured by the violence of the carrier or his servants his liability is not subject to mitigation by proof that the injured party was suffering from a disease which aggravated his injuries and rendered their cure more difficult.[6] But if the plaintiff's action is for expulsion from the carrier's vehicle any fraudulent conduct on [270] the part of the plaintiff connected with the cause of such expulsion, or the pretext therefor, may be shown as part of the *res gestæ* and in mitigation of damages.[7] So his declarations may be given in evidence, tending to show that his object in taking passage on the cars was to make money by suing the defendant for demanding more than the statutory rate of fare. An article published by the plaintiff subsequently to the injury was held admissible because it tended to show, as the court remarked, his *quo animo*, and that the case was not one in which he should recover damages for supposed injury to his "feelings." It tended to show that he entered the car expecting to be ejected, as he was, and for the purpose of making money out of the transaction. So far as injury to his "feelings" is concerned it tended to show that it was a fair case for the application of the maxim that to the

[1] St. Louis, etc. Ry. Co. v. Mackie, 71 Texas, 491.

[2] Houck v. Southern P. Ry. Co., 38 Fed. Rep. 221.

[3] Pittsburgh, etc. R. Co. v. Thompson, 56 Ill. 138; Bradburn v. Great Western R. Co., L. R. 10 Exch. 1; vol. 1, § 158.

[4] Indianapolis v. Gaston, 58 Ind. 224; Ohio, etc. R. Co. v. Dickerson, 59 Ind. 317; vol. 1, § 158.

[5] The D. S. Gregory, 2 Ben. 226. But see vol. 1, § 158.

[6] Brown v. Hannibal, etc. R. Co., 66 Mo. 588; *ante*, § 938.

[7] N. & W. R. Co. v. Wysor, 82 Va. 250; Terre Haute, etc. R. Co. v. Vanatta, 21 Ill. 188.

willing mind there is no injury.[1] If unnecessary resistance is made to the authority of a conductor in charge of a train by a passenger whom he proposes to eject it will excuse the use of force by the former and mitigate the damages,[2] unless personal injuries were wilfully or maliciously inflicted.[3] It has been laid down by a federal judge that whenever there is a reasonable ground to dispute a passenger's right to ride on the ticket he holds it is his duty to pay the additional fare demanded, if able to do so, and sue for the amount; that the damages cannot be increased by an obstinate resistance to the conductor's demand and by forcing him to resort to expulsion. If the passenger does resist his conduct can be considered in mitigation, and will reduce the damages to a nominal sum or such as were actually sustained by his delay in reaching his destination.[4] This varies from the rule applied in Texas and Wisconsin. There the passenger may pay or leave the train. If he does the latter he may recover full compensation for all damages proximately resulting.[5]

§ 950. Exemplary damages. A carrier's conduct may be so culpable in causing injury or in connection with it as to subject him to exemplary damages as a punishment to him and an example to others.[6] To justify such damages, however, there must usually be fraud, malice, oppression, insult, or other wilful misconduct, or that entire want of care which would raise the presumption of conscious indifference to con-

[1] Cincinnati, etc. R. Co. v. Cole, 29 Ohio St. 126; Holmes v. Carolina C. R. Co., 94 N. C. 318; Murphy v. Western & A. R. Co., 23 Fed. Rep. 637.

[2] Hall v. Memphis & C. R. Co., 15 Fed. Rep. 57; Pennsylvania R. Co. v. Connell, 112 Ill. 295.

A passenger rightfully on a train is justified in reasonably resisting an unlawful attempt to eject him, and may recover for injuries received in consequence of such resistance. Louisville, etc. Ry. Co. v. Wolfe, 128 Ind. 347.

[3] Chicago, etc. R. Co. v. Griffin, 68 Ill. 499; Pennsylvania R. Co. v. Connell, 112 id. 305; S. C., 127 id. 419; Hall v. Memphis & C. R. Co., 15 Fed. Rep. 57.

[4] Gibson v. East Tennessee, etc. R. Co., 30 Fed. Rep. 904; Hall v. Memphis & C. R. Co., 15 id. 57.

[5] Yorton v. Milwaukee, etc. Ry. Co., 62 Wis. 367; St. Louis, etc. Ry. Co. v. Mackie, 71 Texas, 491.

[6] New Orleans, etc. R. Co. v. Hurst, 36 Miss. 660; Same v. Statham, 42 Miss. 607; Caldwell v. New Jersey, etc. Co., 47 N. Y. 282; Graham v. Pacific R. Co., 66 Mo. 536; Pennsylvania R. Co. v. Books, 57 Pa. St. 339; Goddard v. Grand Trunk R. Co., 57 Me. 217; Quigley v. Central P. R. Co., 11 Nev. 350.

sequences.[1] In cases where the wrong done is to the public, as where regulations are made which prevent passengers from stopping and receiving their baggage at the places they desire, exemplary damages may be imposed without any proof of malice or ill-will to the individual whose rights are denied.[2] The same rule has been applied for a refusal to carry where discrimination has been made against individuals in pursuance of the carrier's rules.[3] Private business corporations may be [271] sued in trespass for the authorized acts of their servants; and if a trespass or other wrong is committed by their authority, with circumstances of violence and outrage, such as would authorize exemplary damages against a natural person, it is now settled that the same rule applies to such corporations. If a corporation, like a railroad company, is guilty of an act or default such as in the case of an individual would subject him to exemplary damages, it is equally liable thereto.[4]

[1] Milwaukee, etc. R. Co. v. Arms, 91 U. S. 489; Doss v. Missouri, etc. R. Co., 59 Mo. 27; McKeon v. Citizens' R. Co., 42 Mo. 79; Kentucky, etc. R. Co. v. Dills, 4 Barb. 593; Western Union Tel. Co. v. Eyser, 91 U. S. 495, note; Thompson v. New Orleans, etc. R. Co., 50 Miss. 315; Caldwell v. New Jersey, etc. Co., 47 N. Y. 282; Hamilton v. Third Ave. R. Co., 53 N. Y. 25; Du Laurans v. St. Paul R. Co., 15 Minn. 49; Pullman, etc. Co. v. Reed, 75 Ill. 125; Toledo, etc. R. Co. v. Patterson, 63 Ill. 304; Paine v. Chicago, etc. R. Co., 45 Iowa, 569; Seymour v. Chicago, etc. R. Co., 3 Biss. 43; Pittsburgh, etc. R. Co. v. Slusser, 19 Ohio St. 157; Holmes v. Carolina C. R. Co., 94 N. C. 318, quoting the text; Sullivan v. Oregon Ry. & N. Co., 12 Ore. 392; Philadelphia T. Co. v. Orbann, 119 Pa. St. 37; Louisville, etc. R. Co. v. Guinan, 11 Lea, 98; Hoffman v. Northern P. R. Co., 45 Minn. 53.

[2] Pittsburgh, etc. Ry. Co. v. Lyon, 123 Pa. St. 140.

[3] Brown v. Memphis & C. R. Co., 7 Fed. Rep. 51, 62. Hammond, J., said: The rule in cases where the offense is against the individual is that the want of malice only mitigates the punishment in damages, and may reduce them to zero according to circumstances. But where the offense is not only against a particular individual, but also against the public, as in most if not all the cases of wrongful exclusion of passengers, the question is one solely for the jury to say how much punishment is necessary to enforce the rights of the public against the carrier, as well as to vindicate the individual. Houck v. Southern P. Ry. Co., 38 Fed. Rep. 226.

[4] Hopkins v. Atlantic, etc. R. Co., 36 N. H. 9; Pittsburgh, etc. R. Co. v. Slusser, 19 Ohio St. 157; Atlantic, etc. R. Co. v. Dunn, id. 162; Graham v. Pacific R. Co., 66 Mo. 536; New Orleans, etc. R. Co. v. Bailey, 40 Miss. 395; Same v. Hurst, 36 Miss. 660; Vicksburgh, etc. R. Co. v. Patton, 31 Miss. 156; Illinois, etc. R. Co. v. Hammer, 72 Ill. 353; Hamilton v. Third Ave. R. Co., 53 N. Y. 25; Cleghorn v. New York, etc. R. Co., 56 N. Y. 44;

Where the servants of a corporation engaged in the carriage of passengers are guilty of such acts or conduct in the performance of their duties in the transportation of the injured party as a passenger as would subject them to damages of this nature, the great weight of authority holds the corporation liable to punitive damages, without proof that it directed or ratified such acts or conduct.[1] As the corporation can only act through natural persons, its officers and servants, and as it of necessity commits its trains or vehicles absolutely to the charge of persons of its own appointment, passengers of necessity commit to them their safety and comfort *in transitu*, the whole power and authority of the corporation, *pro hac vice*, is vested in such employees; and as to such passengers they are the corporation.[2]

§ 951. The rule different in some states. It cannot [272] be denied that this view is based upon considerations of great weight, and supported by a preponderance of authority. The old doctrine was that a master was not liable for the wilful or malicious trespass of his servant;[3] if the latter be guilty [273] of anything which was not a mere want of skill or care, the master was held not responsible[4] unless the act was [274]

Western Union Tel. Co. v. Eyser, 2 Colo. 141.

[1] Louisville & N. R. Co. v. Whitman, 79 Ala. 328; Georgia R. v. Olds, 77 Ga. 673; Head v. Georgia P. Ry. Co., 79 id. 358; Curl v. Chicago, etc. Ry. Co., 63 Iowa, 417; Springer T. Co. v. Smith, 16 Lea, 498; Gallena v. Hot Springs R., 13 Fed. Rep. 116; Louisville & N. R. Co. v. Garrett, 8 Lea, 438; Murphy v. Western & A. R., 23 Fed. Rep. 637; Fell v. Northern P. R. Co., 44 id. 248; L. & N. R. Co. v. Ballard, 85 Ky. 307; Wilson v. New Orleans, etc. R. Co., 63 Miss. 352; Louisville & N. R. Co. v. Maybin, 66 id. 83; Evans v. St. Louis, etc. Ry. Co., 11 Mo. App. 463; Lake Shore, etc. Ry. Co. v. Rosenzweig, 113 Pa. St. 519; Hall v. South Carolina Ry. Co., 28 S. C. 261; Denver, etc. Ry. v. Harris, 122 U. S. 597; Atlantic, etc. R. Co. v. Dunn, 19 Ohio St. 162; New Orleans, etc. R. Co. v. Bailey, 40 Miss. 453; Quigley v. Central P. R. Co., 11 Nev. 350; Goddard v. Grand Trunk R. Co., 57 Me. 202; Hopkins v. Atlantic, etc. R. Co., 36 N. H. 9; Sherley v. Billings, 8 Bush, 147; Milwaukee, etc. R. Co. v. Arms, 91 U. S. 489; Baltimore, etc. R. Co. v. Blocher, 27 Md. 277; Higgins v. Louisville, etc. R. Co., 64 Miss. 80.

[2] Randolph v. Hannibal, etc. Ry. Co., 18 Mo. App. 609; Quinn v. South Carolina Ry. Co., 29 S. C. 381, 386, quoting the three preceding propositions in the text; Bass v. Chicago, etc. R. Co., 36 Wis. 450; Goddard v. Grand Trunk R. Co., 57 Me. 202.

[3] Wright v. Wilcox, 19 Wend. 343.

[4] Seymour v. Greenwood, 6 H. & N. 363, 364.

done by his command; that is, unless the particular act or some act which comprised it was ordered to be done by the principal.[1] In some early cases this rule exonerated the master where the tortious act of the servant was very closely connected with his legitimate duties. In an English case[2] where the servant in charge of and driving his master's chaise wilfully collided with another chaise, it was held the act of the servant and not of the master. Lord Kenyon, adopting the words of Holt, C. J., in a previous case, said: "No master is chargeable with the acts of his servant but when he acts in the execution of the authority given him;" and added, that "when a servant quits sight of the object for which he is employed, and, without having in view his master's orders, pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him, and according to the doctrine of Lord Holt his master will not be answerable for the act." The principle is sound, but its application is not in harmony with the rulings in later cases.[3] It has been followed in some cases in New York.[4] In a case decided in 1857[5] on the assumption that the conductor had wrongfully ejected the plaintiff, a passenger, from the defendant's cars on some punctilio relating to his refusing to show a ticket or pay fare, the trial court refused to instruct that the defendant was not liable for the injuries which the plaintiff might have sustained in consequence of the assault in question by their agents and servants, but did charge "that if, in pursuance of the defendant's orders and instructions, the plaintiff was wrongfully ejected from the cars, and was wantonly treated by the conductor or agents of [275] the defendant in so ejecting him, the defendant is liable for the injuries resulting from such ejection," including in their discretion compensation for the "personal ill-treatment

[1] Sharrod v. London, etc. Ry. Co., 4 Exch. 580, 585; Morley v. Gaisford, 2 H. Black. 442.

[2] McManus v. Crickett, 1 East, 106.

[3] Seymour v. Greenwood, 7 H. & N. 355; Huzzey v. Field, 2 Cromp., M. & R. 432, 440; Eastern, etc. Ry. Co. v. Brown, 6 Exch. 314. In Seymour v. Greenwood, 6 H. & N. 364, Pollock, C. B., said: "At the time of the decision of Scott v. Shepherd, 2 W. Black. 892, and McManus v. Crickett, 1 East, 106, the subject had not been so thoroughly considered as it since has been."

[4] Wright v. Wilcox, 19 Wend. 343; Richmond T. Co. v. Vanderbilt, 1 Hill, 480; S. C., 2 N. Y. 479.

[5] Hibbard v. New York & E. Ry. Co., 15 N. Y. 455.

to which the plaintiff had been subjected in ejecting him." This refusal to charge and this instruction were held erroneous.[1]

This strictness has been very much relaxed by later [276] cases. In a case decided by the court of appeals in 1871 it was

[1] Brown, J., said: "The object of the request was that the court should discriminate between those acts of the company's agents done in the execution of its directions and those done in excess of its instructions, and without authority or approbation. This, I think, should have been done. The plaintiff may have been injured by the use of unnecessary force to effect what the company had a right to do. The conductor and those who aided him are not the company. They are its agents and servants, and whatever tortious acts they commit by its direction they are responsible for and no other. This is upon the principle that what one does by another he does by himself. But for the wilful acts of the servant the master is not responsible, because such wilful acts are a departure from the master's business. Wright v. Wilcox, 19 Wend. 343. In removing a passenger from the cars, who refuses to pay his fare or exhibit his ticket, the servants of the company are limited to the use of so much force as may effect that object and no more. They are not to resort to force at all, until it becomes absolutely necessary by refusal of a passenger to depart upon request; and when they do resort to it they are to use no more than becomes sufficient, and they are to do no unnecessary injury to the party. This is the extent of their authority, and if they exceed it, they, and not the company, are responsible for the consequences." In this case Comstock, J., said: "If the plaintiff had forfeited his right to be carried as a passenger by refusing to show his ticket when requested to do so by the conductor, and if the right was not restored by subsequently complying, then his expulsion was lawful and he has nothing to complain of, unless greater force and violence were used than his own resistance rendered necessary. The verdict of the jury was for a wrongful expulsion and not for an excess of force. If, on the other hand, the conductor had no right to eject the plaintiff from the train after he had complied with the request and produced the ticket, then I do not see on what principle the defendant can be made liable for the wrong. The regulation, and instructions to the conductor, as we have said, were lawful, and they did not, in their terms or construction, profess to justify the trespass and eviction. The result is that the wrong was done without any authority, and therefore that those who actually did it are alone answerable. The judge was requested to charge the jury that the plaintiff, if entitled to recover at all, could only recover such damages as he had sustained in consequence of the defendant's not performing its contract to carry him to Scio, to wit, damages to his business. The judge refused so to charge, but did charge that the plaintiff could recover, if at all, for personal ill-treatment; in other words, for the unlawful assault and battery. It seems to me that the request was essentially right, and that the refusal and charge were er-

held that where a conductor on a railroad, under a mistake of facts or of judgment, ejected a person from the car in which he was a passenger, the act not being justified by his misconduct, the company was liable; and so if there was justifiable cause for ejection, but excessive force was used. There was no evidence of wanton violence or malice, and the effect of such elements was not decided. The court say: "It is sufficient to make the master responsible *civiliter* if the wrongful act of the servant was committed in the business of the master, and within the scope of his employment, and this, although the servant in doing it departed from the instructions of his master. This rule is founded upon public policy and convenience. Every person is bound to use due care in the conduct of his business. If the business is committed to an agent or servant the obligation is not changed. The omission of such care by the latter is the omission of the principal, and for injury resulting therefrom to others the principal is justly held liable. If he employs incompetent or untrustworthy agents it is his fault; and whether the injury to third persons is caused by the negligence or positive misfeasance of the [277] agent the maxim *respondeat superior* applies, provided only that the agent was acting at the time for the principal and within the scope of the business intrusted to him."[1] Such is the established doctrine. As a general rule, the master is liable for

roneous. The request was made and the charge given upon the theory that the plaintiff's expulsion was unlawful. But if unlawful, then the company had not authorized it. There was, no doubt, an implied contract to carry the plaintiff to the place for which he had bought his ticket, and that contract was broken. The defendant, being bound to carry him to Scio, might be liable for the breach of the engagement, even if the plaintiff had been expelled by another passenger. The defendant was bound even to prevent an unlawful expulsion and to carry the passenger through. But this is a liability entirely different from the one enforced at the trial. The conductor, according to the plaintiff's own showing, without authority from his principal, assaulted and expelled him from the train; and, under the charge given to them, the jury rendered their verdict for the personal wrong and outrage. This, I think, is contrary to the law of the case." Donivan v. Manhattan Ry. Co., 47 Alb. L. J. 50.

[1] Higgins v. Watervliet F. Co., 46 N. Y. 23. See Sandford v. Eighth Avenue R. Co., 23 N. Y. 343; Weed v. Panama R. Co., 17 id. 362; Hamilton v. Third Avenue R. Co., 53 id. 25; Rounds v. Delaware, etc. R. Co., 64 id. 129; Cohen v. Dry Dock, etc. Co., 69 id. 170.

what his servant does in the course of his employment; but in regard to matters wholly disconnected from the service to be rendered he is under no responsibility for what the servant does or neglects to do. The reason is that in respect to such matters he is not a servant.[1] The fact that the injurious act of the agent or servant in the course of his employment was wanton and malicious will not excuse the master,[2] nor will the master be exonerated though the act was committed in violation of his instructions,[3] but any element of wanton violence or malice will aggravate the damages.[4]

The liability of masters or employers thus recognized and exemplified, for the negligence and misfeasances of their servants, augmented in cases where the injury has been aggravated by malice, insult or excessive violence, and to which such employer was privy only by his relation of employer to the guilty actor, is founded on the legal unity and identity of employer and employee in respect to all that is done by the latter within the sphere of his employment. There are considerations of public policy to support it; the wrongs done by the servant are imputed to the master, and there is an assumption of actual culpability on his part. But in some of the states exemplary damages are not allowed against a carrier of passengers for the act of the servant without some proof of previous direction, of participation, or subsequent ratification. Thus, in Wisconsin it was ruled in a late case that although a principal is liable to full compensatory damages for a [278] malicious injury inflicted by his agent acting within the scope of his employment, yet that he was not liable to punitory damages unless he directed the injurious act or subsequently adopted or confirmed it; but that retention by the principal in his service of the guilty servant, after notice of his wrongful act, was sufficient evidence of ratification.[5] The law is so held

[1] Bryant v. Rich, 106 Mass. 180; Aldrich v. Boston, etc. Co., 100 Mass. 31; Philadelphia, etc. R. Co. v. Quigley, 21 How. (U. S.) 202; Moore v. Fitchburg R. Co., 4 Gray, 465.

[2] Weed v. Panama R. Co., 17 N. Y. 362.

[3] Philadelphia, etc. R. Co. v. Derby, 14 How. (U. S.) 468; Louisville & N. R. Co. v. Whitman, 79 Ala. 328.

[4] Hawes v. Knowles, 114 Mass. 518.

[5] Bass v. Chicago, etc. R. Co., 42 Wis. 654; Milwaukee & M. R. Co. v. Finney, 10 Wis. 388; Craker v. Chicago, etc. R. Co., 36 Wis. 676.

in California,[1] Rhode Island,[2] Georgia,[3] Texas[4] and in some cases in Missouri,[5] though in a later one it appears to be otherwise.[6] West Virginia is also committed to that view.[7]

In New York it has been ruled that "for injuries by the negligence of a servant while engaged in the business of the master within the scope of his employment, the latter is liable for compensatory damages; but for such negligence, however gross or culpable, he is not liable to punitive damages unless he is himself also chargeable with gross misconduct. Such misconduct may be established by showing that the act of the servant was authorized or ratified, or that the master employed or retained the servant knowing that he was incompetent, or from bad habits unfit for the position he occupied. Something more than ordinary negligence is requisite; it must be reckless and of a criminal nature, and clearly established. Corporations may incur this liability as well as private persons. If a railroad company, for instance, knowingly and wantonly employs a drunken engineer or switchman, or retains one after knowledge of his habits is clearly brought home to it, or to a superintending agent authorized to employ and discharge him, and injury occurs by reason of such habits, the company may and ought to be amenable to the severest rule of damages."[8] In New Jersey it has been held that where a railroad company adopts all rules and regulations needful to the safety of its passengers and employs compe-

[1] Turner v. North Beach & M. R. Co., 34 Cal. 594; Wade v. Thayer, 40 Cal. 578; Mendelsohn v. Anaheim L. Co., id. 657.

[2] Hagan v. Providence, etc. R. Co., 3 R. I. 88.

[3] Western & A. R. Co. v. Turner, 72 Ga. 292. But see Georgia R. v. Olds, 77 id. 673; Head v. Georgia P. Ry. Co., 79 id. 358, in which cases the general rule stated in the preceding section was applied.

[4] Railway Co. v. Donahoe, 56 Texas, 162.

[5] Perkins v. Railroad, 55 Mo. 201; Graham v. Pacific R. Co., 66 id. 536; Rouse v. Metropolitan Street Ry. Co., 41 Mo. App 298.

[6] Hicks v. Hannibal, etc. R. Co., 68 id. 329.

[7] Ricketts v. Chesapeake & O. Ry. Co,, 33 W. Va. 433.

[8] Cleghorn v. New York, etc. R. Co., 56 N. Y. 44; Murphy v. Central Park, etc. R. Co., 48 N. Y. Super. Ct. 96; Caldwell v. New Jersey, etc. Co., 47 N. Y. 282. This rule is approved by Thayer, J., in Sullivan v. Oregon Ry. & N. Co., 12 Ore. 392, but the question was not necessarily in the case. It prevails in Texas. Mays v. Railroad Co., 64 Texas, 272; Dillingham v. Russell, 73 id. 47.

tent agents, whose duty it is to see that those rules and regulations are observed, the company, in case of injury to passengers happening by reason of the failure of the agent to perform this duty, cannot be held liable for punitive damages. If, however, the company, as such, is in fault a different [279] rule applies. The company for its own carelessness may be justly held liable for smart money. This rule does not prevail when the carelessness is that of a subordinate agent. The principle is not admitted that the company is guilty of gross negligence whenever its agent is.[1]

§ 952. Injury to wife, child or servant. Where a husband or parent brings an action for injury sustained by his wife or child there can be no recovery for suffering either bodily or mental, but there may be for loss of services or society, and the expenses attending the cure. For these he is entitled to recover.[2] If the injury, in the case of a child, is of such a nature as to make the parent's duty of caring for and nurturing it more expensive, the wrong-doer may be charged with the increased expense; this conclusion may be arrived at by the jury though there is no direct evidence that such will be

[1] Ackerson v. Erie R. Co., 32 N. J. L. 254. See New Orleans, etc. R. Co. v. Allbritton, 38 Miss. 242.

In Great Western R. Co. v. Miller, 19 Mich. 314, Campbell, J., said: "It was urged on the hearing that the railroad company could not be held liable for any wrongful expulsion under this statute, because it would be the personal wrong of the conductor in violation of law, for which he must be held to have exceeded his known agency. And the same exemption was claimed for them from liability for any expulsion, unless under circumstances where they may be supposed to have authorized it by their instructions, general or special. There is, however, so far as we have seen, no authority which would exempt them from some amount of responsibility for any wrongful expulsion of a passenger by a conductor. He represents them in the whole management of his train, and the power to do any serious mischief is chiefly derived from their investing him with the control of this large agency. He occupies the same position as the master of a ship, and his action in the case supposed must be regarded as done in the line of his employment. But it does not follow that the responsibility of his employers is the same as his. For those aggravations which may arise out of his wantonness and malice we have held that the employer is not on the same footing with the agent." Detroit Daily Post Co. v. McArthur, 16 Mich. 447.

[2] Dennis v. Clark, 2 Cush. 347; Klein v. Jewett, 26 N. J. Eq. 474; Cowden v. Wright, 24 Wend. 429; Ransom v. New York & E. R. Co., 15 N. Y. 415, 419; Ford v. Monroe, 20 Wend. 210; Marys' Case, 9 Coke, 111; Hall v. Hollander, 7 Dowl. & R. 133.

the result. The amount may be estimated as the value of a life is determined.[1] A husband can maintain but one action for the same injury to his wife from a particular act or default. All the damage past, present and prospective proceeding therefrom is from one cause and indivisible. The wrong in such a case is entire and complete at once, though the injurious consequences remain for an indefinite period afterwards. The [280] party liable is guilty of but one wrong and can be subjected to but one action for it to the same person. The real extent of the injury received and the amount of the damages do not depend on the time when the action is brought or tried. The husband may commence his suit forthwith or delay it for years; in either case the same question would be tried and the same damages recoverable; though, if the trial be delayed, the delay will be likely to afford more satisfactory means of ascertaining the real extent of the wife's injury, and the actual amount of the husband's damages. If the condition of the wife is such at the time of the trial as to disable her for the future, and require further expenses for medical treatment and nursing, the jury may give damages for prospective expenses and loss of society and services.[2] These are general, not special, damages in the sense of those terms as used in the law of pleading and evidence. They are not caused by any incidental fact, or by the peculiar situation and circumstances of the party, but are the natural and uniform effects of the injury itself. And when the injury to the wife is once shown to be of such a nature, the damages to the husband from the loss of her services and society, and the expenses of her cure, follow uniformly and by legal necessity from the relation of husband and wife which entitles him to her services and society and charges him with her support.[3] Where the injury is permanent, or must continue after the trial, prospective damages may be recovered. The jury will be obliged to estimate as well as they can from the condition in which they found the wife at the time of the trial, the whole ultimate loss and damage to the husband in the same way and on the same principle that they would estimate such damage for a like injury to himself.[4]

[1] Lang v. New York, etc. R. Co., 51 Hun, 603.

[2] Hopkins v. Atlantic, etc. R. Co., 36 N. H. 9.

[3] Id.

[4] Id.

In a California case, where an infant child had been wounded by a vicious animal, and had thereby been disfigured or deformed, it was held that its father could recover from the owner of the animal only for such expenses as he had incurred in healing the original wound, and not for any expense incurred in removing the deformity or disfiguration. The injury arising from the permanent deformity would be an item properly allowable in the daughter's own claim for [281] damages; but the cost of its removal, after the wound was healed, would be a voluntary expenditure by the father.[1] "In the absence of controlling authority," said Andrews, J., "we are of opinion that in an action by a parent, founded on loss of service of the child, only expenses actually incurred by the parent for medicine or medical attendance, or which are immediately necessary to be incurred, are recoverable as incident to the main cause of action, and that future, prospective, contingent expenses of this kind are recoverable only in an action by the child."[2] In New York it has been held in an action of trespass by a father for assaulting and beating his son *per quod servitium amisit*, that a jury in assessing the damages are not authorized to take into account the wounded feelings of the parents. The court remarked on the difference between such cases and those for seduction where the only remedy for the injury is the action by the parent; whereas, in case of an assault and battery the child may also maintain an action against the defendant in which the measure of redress depends very much upon the sound discretion of the jury, because his personal injury and suffering then constitute the *gravamen* of the suit.[3] In an earlier case the same court held in an action on the case for negligence in driving a carriage whereby the son of the plaintiff was run over and killed that the loss of service of the child, and expense occasioned by the sickness of the plaintiff's wife caused by the shock to her maternal feelings were proper items of damage, the same being laid as special damages in the declaration.[4] A husband's right of action for injuries to himself is independent of his right to recover for the loss of the so-

[1] Karr v. Parks, 44 Cal. 46.

[2] Cuming v. Brooklyn City R. Co., 109 N. Y. 95.

[3] Cowden v. Wright, 24 Wend. 429.

[4] Ford v. Monroe, 20 Wend. 210.

ciety and services of his wife, where both are injured by the same act of negligence. Hence a recovery by him for his personal injuries does not bar a separate action to recover on account of his loss by reason of her injury.[1]

[289] § 953. **Excessive verdicts.**[2] It is the exclusive province of a jury to decide facts and causes depending upon controverted facts, applying thereto the law as given to them by

[1] Skoglund v Minneapolis Street Ry. Co., 45 Minn. 330; Newberry v. Connecticut, etc. R. Co., 25 Vt. 377. Compare Cincinnati, etc. R. Co. v. Chester, 57 Ind. 297.

[2] *Damages for being ejected from trains, without physical injury.* In Lake Erie & W. Ry. Co. v. Fix, 88 Ind. 381, a judgment for $600 was sustained for being removed from a train at 11 o'clock P. M., several miles from a station and seven miles from home. The distinguishing fact in the case was the charge of the conductor that the plaintiff was trying to cheat the company. As a result of the walk made necessary the plaintiff suffered physical pain for some time.

In other cases in Indiana verdicts for expulsion have been sustained as follows: $562, St. Louis, etc. R. Co. v. Myrtle, 51 Ind. 566; $1,000, Jeffersonville R. Co. v. Rogers, 38 Ind. 116; $700, Indianapolis, etc. R. Co. v. Milligan, 50 id. 392.

In Chicago, etc. R. Co. v. Holdridge, 118 Ind. 281, a passenger holding a ticket refused to pay fare and left the train to avoid expulsion; but immediately boarded it again, paid his fare (twenty-five cents) and was carried to his destination. A majority of the court held that $200 was not an outrageously excessive sum to compensate for the humiliation and shame suffered.

In I. & G. N. Ry. Co. v. Gilbert, 64 Texas, 536, a lady was put off a train in a dark night, at an unusual place, where few people lived, and those nearly all negroes, and was insulted by the employees of the company. She and her children walked four or five miles through a swamp over the railroad track and a high bridge; a negro who had been engaged to pilot them was rude and insulting. The alleged effects of the walk were fatigue, swollen feet, bodily pain, mental anxiety from fright, etc. A verdict for $6,500 was upheld as compensatory damages.

In International, etc. R. Co. v. Smith, referred to in Same v. Wilkes, 68 Texas, 617, 621, a verdict for $8,000 was sustained under circumstances quite similar.

In Wightman v. Chicago & N. R. Co., 73 Wis. 169, a passenger was obliged to leave the train at the depot where he boarded it, the train having been run back there for the purpose of permitting him to get off. A verdict of $299 for injury to his feelings by being ejected and called a liar by the conductor was sustained.

In Gray v. Cincinnati S. R. Co., 11 Fed. Rep. 683, a colored woman was refused admission to a ladies' car. The case does not disclose any particular grounds for damages. The court instructed thus: "If you find for the plaintiff you will assess her such damages as will make her whole, considering the loss of time and inconvenience she was put to. And you may also take into consideration what the proper amount of expenses might be in the vindication

the court. In actions for personal injuries and in cases generally where there is no fixed legal rule of compensation, [290]

of this right." A verdict for $1,000 was returned.

In Louisville & N. R. Co. v. Garrett, 8 Lea, 438, an old and feeble man was ejected with some rudeness but not with sufficient force to injure him. He was obliged to walk to his home, a distance of two miles. The case was held to be a proper one for exemplary damages, and a verdict for $2,000 was sustained.

In Houston, etc. R. Co. v. Ford, 53 Texas, 364, it is held that $250 is an excessive sum for damages where the ejection occurred not far from the starting place, and the passenger was detained but a few hours and suffered no special damage.

It is held in Railway v. Branch, 45 Ark. 524, that the violation of a statute which provides that a person on a train who refuses to pay his fare shall only be put off at some usual stopping place entitles a person put off elsewhere to nothing more than nominal damages unless actual personal or pecuniary damage has been sustained.

In Illinois C. R. Co. v. Latimer, 28 Ill. App. 552, a girl six years of age was put off a train within seventeen hundred feet of the depot. She was not physically injured, but was frightened. A verdict for $2,000 was sustained. The court admits that under ordinary circumstances the damages would be excessive, but sustained the verdict in these observations: "Had appellee been of sufficient age to justify the belief that she could have returned to the depot without harm or danger to herself, no one, we presume, would insist that she ought to recover any such sum as she did. But the circumstances of this case are so unusual that it is easy to believe that the conductor acted with a wanton disregard of the rights of the appellee. When it is remembered that appellee was a delicate little girl, only six years old, taken off the train — no matter how gently — suddenly left alone upon the track, and the train speeding away, it is a wonder that in her fright and agony she had presence of mind enough to know the way back to the depot. Just how much a railroad company ought to pay for such treatment is difficult to measure by any exact standard."

In Boster v. Chesapeake & O. Ry. Co., 15 S. E. Rep. 158, the West Virginia court held that $500 allowed as compensatory damages for ejecting a passenger from a train at a place where there was no station and from which he had to walk nine miles was not excessive. Compare McLean v. Chicago, etc. Ry. Co., 52 N. W. Rep. (Minn.) 966.

Damages for being ejected from train where physical injury followed. In Ohio, etc. Ry. Co. v. Judy, 120 Ind. 397, $5,500 was held not to be excessive where a passenger ejected from a freight train was injured by falling over a truck at the depot, the ejectment being made in the dark. The evidence showed that the plaintiff was a business man, capable of earning $150 to $200 per month, and that four months after the event he was unable to use one arm, with a probability that the injury would be permanent.

In Louisville, etc. R. Co. v. Mask, 64 Miss. 738, a passenger was carried several hundred yards beyond the station, and in consequence missed the conveyance which was to take him home, and had to walk three-

the theory of the law is that the decision of the jury is conclusive unless they have been misled, or their verdict has been

fourths of a mile over a muddy road at midnight; sickness resulted from the exposure and the walk. He was old and feeble, and thereafter unable to attend to business. Judgment for $1,000 was sustained.

In Lake Shore, etc. Ry. Co. v. Rosenzweig, 113 Pa. St. 519, a verdict for $48,750 for personal injuries of an unusually severe character resulting from being ejected from a train at a dangerous place was sustained.

In Brown v. Memphis, etc. Ry. Co., 7 Fed. Rep. 51, a colored woman was ejected from a train on the ground that her general character for virtue made her unfit to ride in the ladies' car. Her conduct as a passenger was irreproachable. Some force was used in removing her, and perhaps some physical injury was done her. A verdict for $3,000 (the case being one for punitory damages) was sustained. See Houck v. Southern P. Ry. Co., 38 Fed. Rep. 226.

In Texas, etc. R. Co. v. Casey, 52 Texas, 112, the wife of an employee of the carrier was on the train without a pass, and was put off in a "rude, wanton and malicious manner" in the presence of a large number of passengers. In consequence of being obliged to walk with a child in her arms, it was alleged that she suffered a miscarriage, and injured her health. Punitive damages were not allowed; but only "such actual damages" as the jury were satisfied from the evidence were suffered "pecuniarily, and in feelings, injuries and sufferings resulting" from the unlawful act of putting her off at other than a station or other usual stopping place. A verdict for $2,500 was sustained.

A verdict for $600 was sustained, punitive damages being allowed, where a passenger was forced by threats to jump from a rapidly running train in the dark, and was injured so that he suffered pain for three weeks and was unable to work during that time. Fell v. Northern P. R. Co., 44 Fed. Rep. 248.

Damages for carrying passenger beyond station. In Trigg v. St. Louis, etc. Ry. Co., 74 Mo. 147, a judgment for $1,000 was held excessive for carrying a female passenger and two small children to the next station beyond their destination. The case was devoid of any aggravating circumstances whatever.

In Higgins v. Louisville, etc. R. Co., 64 Miss. 80, a judgment for $500 was sustained where a passenger was carried three-fourths of a mile beyond his station, and the conductor refused to run the train back. The actual damage was small.

Damages for physical injury to child. In Hurt v. St. Louis, etc. Ry. Co., 94 Mo. 255, a five-year old boy was injured, through mere negligence, so that one leg had to be amputated just below the knee, and the toes removed from his remaining foot. The testimony was to the effect that his services to his father would be worth $100 per year from his tenth or twelfth year until he became twenty-one. A verdict of $4,500 was set aside.

In Lang v. New York, etc. R. Co., 51 Hun, 603, $1,500 was said not to be extravagant for the loss of part of a leg of a boy eleven years old.

In Schultz v. Third Avenue R. Co., 46 N. Y. Super. Ct. 211, the plaintiff, a boy aged twelve years, was pushed from the platform of a car and partially run over by a car on another track. His injuries consisted of a

influenced by corruption, passion or prejudice.[1] Unless the verdict in a given case finds an amount of damages so out of proportion to the actual injury as to evince such misleading, or the presence of some malign influence, it will be sus- [291] tained, although it may materially differ from the judgment of the court.[2] But if the amount of the verdict so far exceeds or falls short of what to the court appears to be just compensation as to induce the belief that the jury have not given the case a fair and dispassionate consideration the verdict will be set aside.[3] In such actions it is within the discretion of the court, on a motion for new trial, to indicate a sum for

broken collar bone, two broken ribs, right arm broken in four or five pieces near the shoulder, the small bone of the left arm broken near the wrist, a thigh joint broken between the upper and middle third, and contusions and abrasions permanently injuring and deforming him.' A verdict of $15,000 was sustained.

Damages for gross insult to a passenger. In Goddard v. Grand Trunk Ry., 57 Me. 202, the plaintiff, a respectable citizen and a passenger in the defendant's train, surrendered his ticket to the brakeman, who soon after denied that he had received it, and in loud, coarse, profane and grossly insulting language called the plaintiff a liar, charged him with attempting to avoid the payment of his fare, and with having done so before, and also threatened him with personal violence. The plaintiff was in ill-health, and did nothing to invite such conduct. The case was one for exemplary damages, and a verdict for $4,850 was not disturbed.

[1] Singleton v. Southwestern R., 70 Ga. 464; I. & G. N. Ry. Co. v. Gilbert, 64 Texas, 536; Schmidt v. Milwaukee, etc. R. Co., 23 Wis. 186; Duffy v. Chicago, etc. R. Co., 34 Wis. 188; Thomas v. Womack, 13 Tex. 580; Lambert v. Craig, 12 Pick. 199; Wiggin v. Coffin, 3 Story, 1.

[2] Bierbauer v. New York, etc. R. Co., 15 Hun, 559; Collins v. Albany, etc. R. Co., 12 Barb. 492; Bass v. Chicago, etc. R. Co., 42 Wis. 654, 672; Hammond v. Mukwa, 40 Wis. 35; Plath v. Braunsdorff, 40 Wis. 107; Davis v. Central R. Co., 60 Ga. 329; Cummins v. Crawford, 88 Ill. 312; Illinois C. R. Co. v. Parks, 88 Ill. 373; Solen v. Virginia City, etc. R. Co., 13 Nev. 106.

[3] Central R. v. Smith, 76 Ga. 209; Lehman v. Louisiana W. Ry. Co., 37 La. Ann. 705 (verdict for $12,000 for the loss of a child's left arm just above the elbow set aside and judgment given for $5,000); Nashville, etc. R. Co. v. Smith, 6 Heisk. 174; Bass v. Chicago, etc. R. Co., 39 Wis. 636; Goodno v. Oshkosh, 28 Wis. 300; Diblin v. Murphy, 3 Sandf. 19; Nettles v. Harrison, 2 McCord, 230; Spicer v. Chicago, etc. R. Co., 29 Wis. 580; Wiggin v. Coffin, 3 Story, 1; Price v. Severn, 7 Bing. 316; Armytage v. Haley, 4 Q. B. 917; Tinney v. New Jersey S. B. Co., 5 Lans. 507; Gains v. Western R. Co., 59 Ga. 426; Collins v. Albany, etc. R. Co., 12 Barb. 492; Chicago, etc. R. Co. v. Hughes, 87 Ill. 94; Chicago, etc. R. Co. v. Payzant, 87 Ill. 125; Union P. R. Co. v. Hause, 1 Wyo. 27.

which the verdict may be retained on remitting an excess, or adding to the deficient verdict, to make the amount suggested by the court.[1]

§ **954. Loss of baggage.** The responsibility of common carriers of passengers for the safe transportation of their baggage is, in general, the same as that of carriers in respect to merchandise which they receive for carriage.[2] The money paid for passage is a consideration for the carrier's undertaking or duty in respect to baggage.[3]

What is baggage has often been a subject of conflicting dis- [292] cussion and decision. The implied undertaking of safety is not unlimited, but extends only to such kinds of articles and valuables, and to such quantity, as are ordinarily taken by travelers for their personal use and convenience, varying according to the station of the party, the object and length of his journey and many other circumstances.[4] It is safe to say generally that baggage, entitled to protection under the rule stated, embraces anything which travelers usually carry for their personal use, comfort, instruction or amusement, considering the circumstances before mentioned, the occupation of the traveler, the mode of conveyance, and any others which affect his needs, including, according to the weight of authority, a sufficient amount of money for expenses.[5] But property

[1] Collins v. Albany, etc. R. Co., 12 Barb. 492; Clapp v. Hudson R. Co., 19 Barb. 461; Durrell v. Carver, 9 Ohio St. 72; Hegeman v. Western R. Co., 16 Barb. 353; 13 N. Y. 9; Peck v. New York, etc. R. Co., 8 Hun, 286; Whitehead v. Kennedy, 69 N. Y. 462–470; Goodno v. Oshkosh, 28 Wis. 300; Spicer v. Chicago, etc. R. Co., 29 Wis. 580; Patten v. Chicago, etc. R. Co., 32 Wis. 524; Potter v. Chicago, etc. R. Co., 22 Wis. 615; Lombard v. Chicago, etc. R. Co., 47 Iowa, 494; Murray v. Hudson R. Co., 47 Barb. 196; Bierbauer v. New York, etc. R. Co., 15 Hun, 559.

[2] Montgomery & E. Ry. Co. v. Culver, 75 Ala. 587; Merrill v. Grinnell, 30 N. Y. 594; Powell v. Myers, 26 Wend. 591; Chamberlain v. Western T. Co., 45 Barb. 218; Hannibal, etc. R. Co. v. Swift, 12 Wall. 262; Perkins v. Wright, 37 Ind. 27; Baylis v. Lintott, L. R. 8 C. P. 345; Chicago, etc. R. Co. v. Fahey, 52 Ill. 81.

[3] Id.; Orange Co. Bank v. Brown, 9 Wend. 85; Woods v. Devin, 13 Ill. 746; Hutchins v. Western, etc. R. Co., 25 Ga. 51.

[4] Hannibal, etc. R. v. Swift, 12 Wall. 262; New York, etc. R. Co. v. Fraloff, 100 U. S. 24; Angell on Car., § 115; Thompson's Car. Pas., 510; Hutchinson on Carriers (2d ed.), §§ 677–685.

[5] Id.; Duffy v. Thompson, 4 E. D. Smith, 178; Doyle v. Kiser, 6 Ind. 242; Baltimore, etc. Co. v. Smith, 23 Md. 402; Dibble v. Brown, 12 Ga. 217; Woods v. Devin, 13 Ill. 746; Van

of other persons, not members of his family, or intended to be presented to others at the end of the journey, is not baggage;[1] nor are masonic regalia or engravings;[2] nor samples of goods carried by a commercial traveler;[3] nor valuable papers carried by a lawyer on his way to court;[4] nor the manuscript of a work intended for publication.[5] But it has been held that a reasonable quantity of tools is proper baggage for a mechanic,[6] and that a watch and chain and diamond pin worth $1,400 were suitable baggage to be carried in a lady's trunk.[7] "Articles treated as baggage may consist of clothing, money for defraying traveling expenses, a few books for the amusement of reading, a lady's jewelry for dressing, a watch, fishing tackle, a gun and a pair of pistols."[8] Cloth not made into garments, but procured for that purpose, if the quantity is reasonable, may be baggage, and so is jewelry and personal ornaments so far as appropriate to the wardrobe, rank and social position of the passenger; but bedding and bed furnishings, not intended for use on the journey, and other articles of household goods are not.[9]

If a passenger's baggage includes only what he is en- [293]

Horn v. Kennit, 4 E. D. Smith, 454; Hopkins v. Westcott, 6 Blatchf. 64; Toledo, etc. R. Co. v. Hammond, 23 Ind. 379; Porter v. Hildebrand, 14 Pa. St. 129; McCormick v. Pennsylvania, etc. R. Co., 4 E. D. Smith, 181; 49 N. Y. 303; Jones v. Voorhies, 10 Ohio, 145; Bomar v. Maxwell, 9 Humph. 621; Fraloff v. New York, etc. R. Co., 10 Blatchf. 16; American Contract Co. v. Cross, 8 Bush, 472; Orange Co. Bank v. Brown, 9 Wend. 85; Jones v. Priester, W. & W. (Texas), 326.

[1] Dunlap v. International, etc. Co., 98 Mass. 371; Chicago, etc. R. Co. v. Boyce, 73 Ill. 510; Dexter v. Syracuse, etc. R. Co., 42 N. Y. 326; First Nat. Bank v. Marietta, etc. R. Co., 20 Ohio St. 259; Becher v. Great E. Ry. Co., L. R. 5 Q. B. 241; Nevins v. Bay State, etc. Co., 4 Bosw. 225; The Ionic, 5 Blatchf. 538. See Baltimore, etc. Co. v. Smith, 23 Md. 402.

[2] Nevins v. Bay State, etc. Co., 4 Bosw. 225.

[3] Stimson v. Connecticut R. Co., 98 Mass. 83; Alling v. Boston, etc. R. Co., 126 Mass. 121; Hawkins v. Hoffman, 6 Hill, 586; Mississippi C. R. Co. v. Kennedy, 41 Miss. 671.

[4] Phelps v. London, etc. R. Co., 19 C. B. (N. S.) 321; Thomas v. Great Western Ry. Co., 14 Up. Can. Q. B. 389.

[5] Hannibal, etc. R. Co. v. Swift, 12 Wall. 262.

[6] Porter v. Hildebrand, 14 Pa. St. 129; Davis v. Cayuga, etc. R. Co., 10 How. Pr. 330. *Contra*, Mauritz v. New York, etc. R. Co., 23 Fed. Rep. 765, 771.

[7] Coward v. East Tennessee, etc. R. Co., 16 Lea, 225.

[8] Mississippi Central R. Co. v. Kennedy, 41 Miss. 671, 679.

[9] Mauritz v. New York, etc. R. Co., 23 Fed. Rep. 765.

titled to have carried as such, he will not be prevented from recovering its full value in case of loss by having failed to inform the carrier of its nature and value unless inquiry has been made of him, or he has notice of reasonable regulations requiring such disclosure and payment of extra charges, where the value is above the standard of ordinary baggage; or unless the passenger is guilty of some fraud to conceal the true value.[1] Where such inquiries are made, or regulations brought to the passenger's notice, and he makes true disclosure and pays any extra charges demanded, either for baggage or merchandise, the carrier is bound for the safe conveyance of the property.[2] But where the passenger delivers to the carrier as baggage what is not such, there is no implied undertaking in respect to it; the undertaking of the carrier is to carry the passenger and his baggage — no more; and if articles not properly baggage are packed with others that are, in case of loss there can be no recovery, in the absence of negligence or misconduct, except for the latter, unless the carrier is informed of the true value and accepts them for carriage as baggage without objection.[3]

§ 955. Measure of damages. If the property lost has a value that is the measure of recovery[4] including interest.[5] Where the loss was valuable laces which had been made by [294] the plaintiff's ancestors, and had come to her by gift or inheritance, it was held necessary, nevertheless, to prove their

[1] New York, etc. R. Co. v. Fraloff, 100 U. S. 24; Camden, etc. R. Co. v. Baldauf, 16 Pa. St. 67; Kuter v. Michigan C. R. Co., 1 Biss. 35.

[2] Strouss v. Wabash, etc. Ry. Co., 17 Fed. Rep. 209; Sloman v. Western R. Co., 67 N. Y. 208; Stoneman v. Erie R. Co., 52 N. Y. 429.

[3] Ross v. Missouri, etc. R. Co., 4 Mo. App. 582; Doyle v. Kiser, 6 Ind. 242; Nevins v. Bay State, etc. Co., 4 Bosw. 225; Michigan, etc. R. Co. v. Oehm, 56 Ill. 293; Hillman v. Halliday, 1 Woolw. 365; Cahill v. London, etc. Ry. Co., 10 C. B. (N. S.) 154; S. C., 13 id. 818; Hollister v. Nowlen, 19 Wend. 234; Pardee v. Drew, 25 id. 459; Millard v. Missouri, etc. R. Co., 20 Hun, 191; Lee v. Grand Trunk Ry. Co., 36 Up. Can. Q. B. 350; Belfast, etc. Ry. Co. v. Keys, 9 H. L. Cas. 556; Great Northern Ry. Co. v. Shepherd, 8 Exch. 30; Stoneman v. Erie R. Co., 52 N. Y. 429; Minter v. Pacific R. Co. 41 Mo. 503; Strouss v. Wabash, etc. Ry. Co., 17 Fed. Rep. 209.

[4] Illinois C. R. Co. v. Copeland, 24 Ill. 332; New Orleans, etc. R. Co. v. Moore, 40 Miss. 39; Strouss v. Wabash, etc. Ry. Co., 17 Fed. Rep. 209.

[5] Mote v. Chicago, etc. R. Co., 27 Iowa, 22. *Contra*, Texas & P. R. Co. v. Ferguson, W. & W. (Texas), 724.

value by a money standard, otherwise there could be no recovery beyond nominal damages.[1] In a late case in New York,[2] in regard to the mode of fixing the value of lost clothing constituting part of a traveler's baggage, and which had gone into defendants' possession by their own mistake to be carried to New York instead of by boat as the checks on the same indicated, it was said: "The court did not err in charging the jury that the plaintiff was entitled to recover the full value of the clothing for use to him in New York, and not merely what it could be sold for in money. The clothing was made to fit plaintiff, and had been partly worn. It would sell for but little if put into market to be sold for second-hand clothing, and it would be a wholly inadequate and unjust rule of compensation to give plaintiff the value of the clothing thus ascertained. The rule must be the value of the clothing for use by the plaintiff. No other rule would give him a compensation for his damages. This rule must be adopted because such clothing cannot be said to have a market price, and it would not sell for what it really was worth."[3] The owner of lost baggage cannot recover for expense incurred in searching for it.[4]

§ 956. Liability of sleeping-car companies. In a recent case Judge Thompson, of the St. Louis court of appeals, had occasion to pass upon the liability of sleeping-car companies for the loss of valuables through their negligence. It is settled that such companies are not insurers of passengers' baggage; their utmost liability is that of bailees for hire, and there is no liability without negligence. Their duty, so far as the adjudged cases seem to have gone, is to maintain in the car a reasonable watch during the night while the passenger is asleep. "We now go further, and, speaking with reference to the facts of this case, we hold that the duty of keeping watch does not terminate with the period during which the passenger is actually asleep, but that it extends to

[1] Fraloff v. New York, etc. R. Co., 10 Blatchf. 16. See Illinois, etc. R. Co. v. Copeland, 24 Ill. 332.

[2] Fairfax v. New York, etc. R. Co., 73 N. Y. 167. See *ante*, § 919.

[3] Mauritz v. New York, etc. R. Co., 23 Fed. Rep. 765.

[4] Mississippi C. R. Co. v. Kennedy, 41 Miss. 671; Texas & P. R. Co. v. Ferguson, W. & W. (Texas), 724. See § 921, *ante*.

keeping a reasonable watch over such of his necessary baggage and belongings as he cannot conveniently take with him nor watch himself while he is absent from his berth in the washing-room preparing his toilet after arising in the morning. This duty of watchfulness extends so far as to make the sleeping-car company liable for a negligent failure to perform it to the extent of any baggage or personal belongings which the passenger may thereby lose, which are reasonably necessary to be taken by him on his journey, regard being had to his station in life and to the length, purposes and probable duration of his journey; nor does the implied undertaking include a large sum of money; it cannot cover more than a reasonable amount necessary to pay traveling expenses. What is a reasonable amount of baggage or of money for traveling expenses for a traveler thus to take with him is a question of fact for a jury. . . . Beyond the amount of baggage or money which it is thus reasonably necessary for the traveler to take with him the sleeping-car company assumes no duty of watchfulness and is under no liability in case of loss or theft. It is not even a gratuitous bailee in respect of such excess of money or baggage, nor is its position even that of a warehouseman who furnishes house-room merely without assuming any duty of watchfulness."[1] The conclusions arrived at in determining the case in hand were that the company is not responsible for the loss of a sum in excess of what it was reasonable for the passenger to have, though it was stolen by its servants. It is responsible to the extent of such sum where it is stolen by such servants, though the passenger's negligence afforded the opportunity for the theft. But it is not responsible if the loss was the result of the servants' negligence in guarding the property if the passenger's neglect contributed directly thereto.[2] If the passenger does not adduce evidence to show what was a reasonable sum for him to take on his person the recovery cannot exceed nominal damages.[3]

[1] Root v. New York, etc. Co., 28 Mo. App. 199.

[2] Id.; Pullman Palace Car Co. v. Matthews, 74 Tex. 654.

[3] Wilson v. Baltimore & O. R. Co., 32 Mo. App. 682.

CHAPTER XXII.

TELEGRAPH COMPANIES.

§ 957. Nature of their duty.
958. Limitation of liability.
959. Liability for neglect where message in cipher.
960. Same subject; opposing view.
961. Liability where object of sender known.
962–964. Same subject; illustrations.
965. Loss of claim; physical pain.
966. Liability for expenses.
967. Loss of employment.
968. When company charged with knowledge of sender's purpose.
969. Same subject; details need not be disclosed.
970. Same subject; result of the decisions.
971. Same subject; opposing view.
972. Form of action; who may sue.
973. Mitigation of damages by injured party.
974. Exemplary damages.
975. Damages for injured feelings.
976. Reasons upon which liability rested.
977. Same subject; opposing authorities.
978. Grounds upon which liability denied.
979. Summary of the authorities.
980. Author's conclusions.
981. Notice to the company.
982. Measure of damages.

§ 957. Nature of their duty. Telegraph companies, [295] by reason of their public employment, their contracts, and, to some extent, by force of statutes, are bound to receive, transmit and deliver messages with impartiality, care and diligence. They do not undertake this with the same absoluteness as common carriers. Though they have sometimes been regarded as such the decided weight of authority is that their liabilities are not to be measured by that standard, and no late case holds the contrary.[1] They are bound to employ com-

[1] Baldwin v. United States T. Co., 45 N. Y. 744; Leonard v. New York, etc. T. Co., 41 N. Y. 544; Bartlett v. Western U. T. Co., 62 Me. 209; Camp v. Same, 1 Met. (Ky.) 164; De Rutte v. New York, etc. T. Co., 30 How. Pr. 403; S. C., 1 Daly, 547; New York, etc. T. Co. v. Dryburg, 35 Pa. St. 298; Passmore v. Western U. T. Co., 78 Pa. St. 238; Birney v. New York, etc. T. Co., 18 Md. 341; Wann v. Western U. T. Co., 37 Mo. 472;

petent and faithful agents who will perform their duties with a degree of care and diligence proportioned to their delicacy and importance. The omission to send a message or to deliver one which has been transmitted, or the occurrence of an error in its tenor, is *prima facie* evidence of neglect on the part of the company, and the burden of proof is upon them to show that such failure or mistake happened without their fault, as the means of doing so are peculiarly within their power.[1] But this rule does not apply where stipulations limiting the liability of the company for error in an unrepeated message are sustained except where it is the result of wilful misconduct or gross neglect. The sender of such a message cannot recover damages in excess of the stipulated sum unless he shows that the neglect was gross or wilful.[2]

[296] **§ 958. Limitation of liability.** Such companies may make reasonable regulations for the safe and proper conduct of their business, and have power to contract with the sender of a message so as to relieve themselves from liability for inadvertencies, but not for gross negligence, misconduct or bad faith.[3] Regulations and contracts exempting the company

Washington T. Co. v. Hobson, 15 Gratt. 122; Western U. T. Co. v. Carew, 15 Mich. 525; Aiken v. Telegraph Co., 5 S. C. 358; Telegraph Co. v. Griswold, 37 Ohio St. 301; Marr v. Western U. T. Co., 85 Tenn. 529; Western U. T. Co. v. Neill, 87 Texas, 283; Same v. Edsall, 63 id. 668; Pearsall v. Western U. T. Co., 124 N. Y. 256.

[1] Baldwin v. United States T. Co., 45 N. Y. 744; Bartlett v. Western U. T. Co., 62 Me. 209; Rittenhouse v. Independent L. T., 44 N. Y. 263; Western U. T. Co. v. Carew, 15 Mich. 525; Tyler v. Western U. T. Co., 60 Ill. 421; S. C., 74 Ill. 168; Little Rock, etc. T. Co. v. Davis, 41 Ark. 79; Western U. T. Co. v. Short, 53 id. 434; Same v. Crall, 38 Kan. 679; Telegraph Co. v. Griswold, 37 Ohio St. 301; Western U. T. Co. v. Edsall, 61 Texas, 668; Pearsall v. Western U. T. Co., 124 N. Y. 256.

[2] Hart v. Western U. T. Co., 66 Cal. 579; Aiken v. Same, 69 Iowa, 31; Womack v. Same, 58 Texas, 176.

[3] Western U. T. Co. v. Carew, 15 Mich. 525; United States T. Co. v. Gildersleeve, 29 Md. 248; Western U. T. Co. v. Graham, 1 Colo. 230; Same v. Fontaine, 58 Ga. 433; True v. International T. Co., 60 Me. 9; Western U. T. Co. v. Buchanan, 35 Ind. 429; Same v. Meek, 49 Ind. 53; Same v. Fenton, 52 Ind. 1; Candee v. Western U. T. Co., 34 Wis. 471; Sweatland v. Illinois, etc. T. Co., 27 Iowa, 433; Manville v. Western U. T. Co., 37 Iowa, 214; Breese v. United States T. Co., 48 N. Y. 132; S. C., 45 Barb. 274; Grinnell v. Western U. T. Co., 113 Mass. 299; Passmore v. Same, 78 Pa. St. 238; Western U. T. Co. v. Way, 83 Ala. 542; American U. T. Co. v. Daugherty, 89 id. 191; Western U. T. Co. v. Crall, 38 Kan. 679; Mowry v. Western U. T. Co., 51 Hun, 126; Las-

from the payment of damages for errors in the transmission of messages, unless repeated at an extra compensation to be paid by the sender, have been sustained as reasonable. Bigelow, C. J., said: "In view of the risks and uncertainties attendant on the transmission of messages by means of electricity, and the difficulties in the way of guarding against errors and delay in the performance of such service, . . . and also of the very extensive liability to damages which may be incurred by a failure to deliver a message accurately, we think it just and reasonable that the conductor of a telegraph should require that additional precautions should be taken to ascertain the accuracy of the messages as received, at the request and expense of the parties interested, if they intend to hold him responsible in damages for any mistake which may have taken place in the transmission of the messages. There is nothing in this regulation which tends to embarrass or hinder the free use of the telegraph, or to impose on those having occasion to transmit or receive messages any onerous or impracticable duty." [1] There are very respectable authorities which hold the contrary.[2] If the message transmitted is written on paper which does not contain the regulations or stipulations which limit the company's liability, the sender is not bound by them unless it is shown that he had knowledge of them.[3] The reasonableness of a regulation concerning the delivery of messages received after designated hours is for the jury.[4]

siter v. Same, 89 N. C. 334; Telegraph Co. v. Griswold, 37 Ohio St. 301; Marr v. Western U. T. Co., 85 Tenn. 529; Pepper v. Telegraph Co., 87 id. 554; Telegraph Co. v. Munford, id. 190; Western U. T. Co. v. Neill, 57 Texas, 283; Thompson v. Western U. T. Co., 64 Wis. 531.

[1] Ellis v. American T. Co., 13 Allen, 226; Western U. T. Co. v. Carew, 15 Mich. 525; United States T. Co. v. Gildersleeve, 29 Md. 341; Birney v. New York, etc. T. Co., 18 Md. 341; Western U. T. Co. v. Graham, 1 Colo. 230; Wolf v. Western U. T. Co., 62 Pa. St. 83; Wann v. Same, 37 Mo. 472; Sweatland v. Illinois, etc. T. Co., 27 Iowa, 433; Hart v. Western U. T. Co., 66 Cal. 579; Becker v. Same, 11 Neb. 87; Lassiter v. Same, 89 N. C. 334; Cannon v. Same, 100 id. 300; Western U. T. Co. v. Neill, 57 Texas. 283; Womack v. Western U. T. Co., 58 id. 176; Western U. T. Co. v. Hearne, 77 id. 83.

[2] Western U. T. Co. v. Short, 53 Ark. 434; Same v. Fontaine, 58 Ga. 433; Same v. Blanchard, 68 id. 299; Same v. Shotter, 71 id. 760; Same v. Harris, 19 Ill. App. 347; Ayer v. Western U. T. Co., 79 Me. 493.

[3] Pearsall v. Western U. T. Co., 44 Hun, 532; S. C., 124 N. Y. 256; Beasley v. Same, 39 Fed. Rep. 181.

[4] Brown v. Western U. T. Co., 6 Utah, 219.

The practice very generally prevails of requiring messages to be written on blanks furnished by the company, on which [297] are printed the terms and conditions in such form that the message-sender not only assents to an exemption for damages from errors or delays in the transmission of unrepeated messages, but also from delay in the delivery or the non-delivery of any such message. The repetition of a message has no legitimate effect to induce nor to expedite its delivery; but it is true that the repetition will convey a warning that the message is deemed important, and implies that the company has received, or on delivery will receive, additional compensation. It is clear that if such a stipulation, assented to, is sustained as having the force of a condition or contract, the company is under no obligation to deliver any unrepeated message. For this reason such stipulations, exacted and assented to, are generally treated as unreasonable and void.[1]

[1] Gulf, etc. Ry. Co. v. Wilson, 69 Texas, 739; Western U. T. Co. v. Broesche, 72 id. 654; Garrett v. Western U. T. Co., — Iowa, —; 49 N. W. Rep. 88; Wertz v. Same, — Utah, —; 27 Pac. Rep. 172; Tyler v. Same, 60 Ill. 421; 74 id. 168; Western U. T. Co. v. Graham, 1 Colo. 230; Birney v. New York, etc. T. Co., 18 Md. 341; True v. International T. Co., 60 Me. 9; Manville v. Western U. T. Co., 37 Iowa, 214; Baldwin v. United States T. Co., 45 Barb. 505; 1 Lans. 125; Bryant v. American T. Co., 1 Daly, 575; Sprague v. Western U. T. Co., 6 Daly, 200; Western U. T. Co. v. Fenton, 52 Ind. 1; New York, etc. T. Co. v. Dryburg, 35 Pa. St. 298.

In Candee v. Western U. T. Co., 34 Wis. 471, Dixon, C. J., said such "regulations were intended to secure the company against liability for the injurious consequences flowing from its own negligence and omissions, and from those of its agents and operators, in and about the performance of its contract entered into with the sender of the message. The supposed exemption is broad and sweeping, and calculated, no doubt, to relieve the company from all responsibility for the improper or insufficient performance or attempted performance of the contract, or the entire failure to perform it, from whatsoever cause occurring. Aside from the objections resting on grounds of public policy, and which forbid the company from stipulating for immunity from the consequences of its own wrongful acts, it seems very clear to us that there can be no consideration for such stipulation on the part of the sender of the message, and that, so far as he is concerned, it is void for that reason, although exacted by the company and fully assented to by him. Either the company enters into a contract with him, and takes upon itself the burden of some sort of legal obligation to send the message, or it does not. It would be manifestly against reason, and what all must assume to be the intention of the parties, to say that no contract whatever is made between them; and nobody, not even the officers and represent-

They are sustained, however, in Massachusetts.[1] The person to whom a message is sent is not bound by a contract between the sender and the company which provides that no claim against the latter shall be valid unless it is presented within sixty days;[2] nor by a stipulation limiting liability if the message is not repeated.[3] The first condition will be strictly construed against the company.[4]

§ 959. Liability for neglect where message in cipher. The consequences which telegraph companies are usually [298] called upon to make compensation for arise from neglecting

atives of the company, asserts such a doctrine. It would seem utterly absurd to assert it. Holding itself out as ready and willing and able to perform the service for whosoever comes and pays the consideration itself has fixed and declared to be sufficient, and actually receiving such consideration, it cannot be denied, we think, that a legal obligation arises and duty exists on the part of the company to transmit the message with reasonable care and diligence, according to the request of the sender. Such being the attitude of the company, and the obligation which it assumes by accepting the payment, the question arising is, whether it can, at the same time, and as part of the very act of creating the obligation, exact and receive from the other party to the contract a release from it. The regulations under consideration, if looked upon as reasonable and valid, completely nullify the contract by absolving the company from all obligation to perform it, and the party delivering the message gets nothing in return for the price of transmission paid by him." Bartlett v. Western U. T. Co., 62 Me. 219; Passmore v. Same, 78 Pa. St. 238. But see United States T. Co. v. Gildersleeve, 29 Md. 232; Grinnell v. Western U. T. Co., 113 Mass. 299; Schwartz v. Atlantic, etc. T. Co., 18 Hun, 157; Hart v. Western U. T. Co., 66 Cal. 579.

[1] Clement v Western U. T. Co., 137 Mass. 463. The stipulation was: "It is agreed between the sender of the following message and this company that such company shall not be liable for mistakes or delays in the transmission or delivery, or for non-delivery, of any unrepeated message, whether happening by negligence of its servants or otherwise, beyond the amount received for sending the same." The sender of an unrepeated message, the delivery of which was delayed by the gross negligence of the company's messenger, was limited in his recovery to the stipulated sum.

[2] Western U. T. Co. v. McKibben, 114 Ind. 511. In New Mexico it has been held that such a contract is not binding upon the sender. Western U. T. Co. v. Longwill, 25 Pac. Rep. 339. But this is clearly contrary to the weight of authority. Beasley v. Western U. T. Co., 39 Fed. Rep. 181; Western U. T. Co. v. Rains, 63 Texas, 27; Young v. Western U. T. Co., 65 N. Y. 163; Wolf v. Same, 62 Pa. St. 83.

[3] Western U. T. Co. v. Richman, 8 Atl. Rep. (Pa.) 171.

[4] Barrett v. Western U. T. Co., 42 Mo. App. 542; Western U. T. Co. v. Yopst, 118 Ind. 248; Same v. Way, 38 Ala. 542.

altogether to transmit or to deliver, or delaying the transmission or delivery of, messages, or from delivering them changed so as to mean something different from what the sender intended. If not transmitted or not delivered at all the damages may be more serious than where there is mere delay; but if a different message is sent there is at once a failure to deliver the intended message, and also a substituted communication made which may be still more detrimental. And the transmission and delivery of a forged or spurious message may occasion great injury to the receiver. The general rule of compensatory damages stated and defined in the leading cases of Hadley v. Baxendale[1] and Griffin v. Colver[2] applies in these telegraph cases, and affords very striking examples to illustrate its justice and comprehensiveness. In the latter case Judge Selden observed: "The party injured is entitled to recover all his damages, including gains prevented as well as losses sustained; and this rule is subject to but two conditions: the damages must be such as may fairly be supposed to have entered into the contemplation of the parties when they made the contract,— that is, they must be such as might naturally be expected to follow its violation; and they must be certain, both in their nature and in respect to the cause from which they proceed." Under this rule, according to the weight of authority, only nominal damages or the price paid for trans- [299] mitting the message can be recovered for neglecting to transmit or to deliver it, if its purport is not explained to the agent of the company or its operator, or if it is written in cipher, or is wholly unintelligible to him; for no other damages in such a case could be within the contemplation of the parties. The operator who receives, and who represents the company, and may for this purpose be said to be the other party to the contract, cannot be said to look upon such a message as one pertaining to transactions of pecuniary value and importance, and in respect to which pecuniary loss or damage will naturally arise in case of his failure to send it. If ignorant of its real nature and importance it cannot be said to have been in his contemplation at the time of making

[1] 9 Exch. 341.

[2] 16 N. Y. 489. See Bodkin v. Western U. T. Co., 31 Fed. Rep. 134; Western U. T. Co. v. Smith, 76 Texas, 253; Same v. Clifton, 68 Miss. 307; Cahn v. Western U. T. Co., 46 Fed. Rep. 40.

the contract that any particular damage or injury would be the probable result of a breach on his part.[1]

Telegraph agents must take it to be true that when the telegraph is resorted to as a means of communication the message is deemed by the sender to be important enough to justify the increased expense over postage, but that fact implies no more; there is no standard for measuring this importance; there is no known average; no *data* to stimulate to the exercise of special care; none for the assessment of damages as upon supposed contemplation of any particular loss, direct or consequential, beyond that of the cost of telegraphing. Where, therefore, there is a studied concealment of the meaning of a telegram, whether by writing it in cipher or otherwise, there is a manifest intention on the part of the sender not to permit the subject in any of its bearings to come within the contemplation of the company. In the sense of the law of damages he thereby elects to employ the company in a mechanical capacity, and to take the risks of all errors and negligence upon himself.

§ 960. Same subject; opposing view. There are a few cases which hold that the fact that the message is in cipher does not affect the liability of the company for its non-delivery or negligently-delayed delivery, although no information is given concerning its nature or importance. Chief Justice Stone said in an Alabama case,[2] referring to the rule in Hadley v. Baxendale: "Can such a rule, with any propriety, be applied to transactions or dealings in which the

[1] Candee v. Western U. T. Co., 34 Wis. 471; Sanders v. Stuart, 1 C. P. Div. 326; Beaupri v. Pacific, etc. T. Co., 21 Minn. 155; Baldwin v. United States T. Co., 44 N. Y. 744, 748; Shields v. Washington T. Co., 9 West. L. J. 283; Abeles v. Western U. T. Co., 37 Mo. App. 554; Western U. T. Co. v. Martin, 9 Ill. App. 587; Behm v. Western U. T. Co., 8 Biss. 131; Mackay v. Same, 16 Nev. 222; Hart v. Direct United States C. Co., 86 N. Y. 633; Cannon v. Western U. T. Co., 100 N. C. 300; Daniel v. Same, 61 Texas, 452; McAllen v. Same, 70 id. 243.

If the delay in forwarding a cipher dispatch is not so great as to amount to a substantial failure to perform the duty the liability is for nominal damages only; but if it amounts substantially to a failure to deliver, the proper measure of liability is the sum paid for transmission, with interest thereon. Abeles v. Western U. T. Co., 37 Mo. App. 554; Candee v. Same, 34 Wis. 471.

[2] Daugherty v. American U. T. Co., 75 Ala. 168.

same measure of diligence is required in each act or function without regard to the *quantum* of interest to be affected by it? Legal dogmas should rest on some principle which can be appreciated. The telegraph is a modern discovery. Speedy communication is its boasted merit, the object of its use. It is much more expensive than communications by mail, and therefore would not be resorted to if time were not of its very essence. Its tariff of rates is graduated by the number of words employed, not by the pecuniary value of the telegram, nor by the magnitude of the interest it concerns. With few exceptions, imposed by public exigency, it is governed by the law of the mill. Messages must be sent in the order of their handing in, without favor or partiality, without delay, and without reference to the value of the interests to be affected." Quoting the language of early writers on the subject[1] the venerable judge continued: "'Why has the operator any right to know what the message refers to? Or why the necessity of drawing inferences or conjectures in reference thereto? What difference does it make in this respect whether the message conveyed an order to purchase or an account of sales? Would such knowledge aid him in the correct translation of the message?' We fully concur with Messrs. Scott & Jarnigan, and hold that the liability of the telegraph company does not depend upon the knowledge that the operator may have of the contents of the message."[2] On substantially the same line of reasoning similar liability is imposed in Florida where the message is in cipher composed of letters of the English alphabet;[3] and in Georgia, without such an expressed limitation as to the characters in which it is written,[4] and also in Virginia, though some stress is there laid on the statutes.[5] The Texas courts have been divided on the question, the supreme court holding the general rule, and the court of appeals holding with the courts whose views are embodied in this section.[6] The latter court has recently reversed its

[1] Scott & Jarnigan on Tel., § 166.

[2] This view is adhered to in Western U. T. Co. v. Way, 83 Ala. 542; American U. T Co. v. Daugherty, 89 id. 191.

[3] Western U. T. Co. v. Hyer, 22 Fla. 637.

[4] Western U. T. Co. v. Fatman, 73 Ga. 285.

[5] Western U. T. Co. v. Reynolds, 77 Va. 173.

[6] Western U. T. Co. v. Weiting, W. & W., § 801; Same v. Bertram, id. § 1152.

earlier rulings, though without being convinced that they are not proper, so as to conform to the adjudications of the supreme court.[1] The same limitation applies to liability for negligence concerning cipher messages as governs in other cases — there is no responsibility for damage arising from uncommunicated special collateral circumstances.[2]

§ 961. Liability when object of sender known. Where the telegram offered and accepted for transmission expresses the object of the sender, and by actionable negligence in not transmitting or not delivering it, or by unreasonably delaying the transmission, or by change of its tenor so that it [**300**] fails to be the communication intended, then, independently of any contract or valid regulation affecting the measure of damages, the company is liable for such injury as is the direct, natural and necessary consequence of defeating the object which would have been accomplished by the seasonable delivery of the correct message,— or such injury as so results from any negligent change in the purport of the message.[3] Thus if it be a direction from a principal to a broker, factor or correspondent to purchase or sell stocks or property, or is an acceptance of an offer for either, and by negligent non-delivery or delay in delivery such transactions do not take place at all, or not until a later day, the company is liable for the loss which the sender sustains by not having his directions executed or his acceptance delivered. Where a sale is thus prevented and the property declines in price before the injured party, by the use of due diligence after notice of the delinquency in respect to his message, could give new directions, he is entitled to recover damages against the company measured by such decline.[4] So if a purchase is thus defeated or delayed, and the

[1] Western U. T. Co. v. McKinney, 2 Civil Cas., § 644.

[2] American U. T. Co. v. Daugherty, 89 Ala. 191.

[3] Western U. T. Co. v. Hoffman, 80 Texas, 420; Brown v. Western U. T. Co., 6 Utah, 219.

[4] Thompson v. Western U. T. Co., 64 Wis. 531; Strasberger v. Same (N. Y. Sup. Ct. 1867), Allen's Tel. Cas. 661; Manville v. Same, 37 Iowa, 414; Western U. T. Co. v. Brown (Texas), 19 S. W. Rep. 336. See Turner v. Hawkeye T. Co., 41 Iowa, 458.

The same rule is applied in Alabama for negligence concerning cipher messages. Daugherty v. American U. T. Co., 75 Ala. 168; Western U. T. Co. v. Way, 83 id. 542.

If the result of an error in transmitting a dispatch ordering goods is

property advances in value before he is advised of the neglect, he is entitled to recover damages to the extent of such advance.[1] For like reasons, if the sender's purpose in respect to such transactions is defeated by a negligent change in the wording of his message he may hold the company liable for loss of a bargain where it occurs, and also for any other injurious consequence which ensues from such change.[2] The supreme court of the United States has recently by strong implication approved this measure of liability where a message is erroneously transmitted; but it is held that it does not apply in a case of delay where the sender gives an order to purchase in open market, unless it is shown that he did so in the expectation of realizing profits by an immediate resale, or that he would have resold at a profit on any subsequent day if the purchase had been made.[3] If the purpose of the sender of a delayed message was to consummate a contract for the purchase and sale of property, the damages are to be estimated as though the offer would have been accepted as a whole; and if he would have realized profits from one part of it and sustained losses in consequence of the other, the damages are measured by the net profits of the whole transaction.[4]

§ 962. Same subject; illustrations. Plaintiff's agent delivered a message stating that he had bought sheep at $5.60

that they are sent to the wrong place, the damages are not measured by their full value at the place to which they should have been sent; their value at the place where they are should be deducted. Western U. T. Co. v. Reid, 83 Ga. 401.

[1] True v. International T. Co., 60 Me. 9; United States T. Co. v. Wenger, 55 Pa. St. 262; Western U. T. Co. v. Hyer, 22 Fla. 637; Pennington v. Western U. T. Co., 69 Iowa, 631; Alexander v. Same, 66 Miss. 161; S. C., 67 id. 386; Mowry v. Same, 51 Hun, 126; Marr v. Same, 85 Tenn. 529; Pearsall v. Same, 124 N. Y. 256; Gulf, etc. Ry. Co. v. Loonie, 82 Texas, 323; Western U. T. Co. v. Brown (Texas), 19 S. W. Rep. 636.

[2] Sweatland v. Illinois, etc. T. Co., 27 Iowa, 433; Western U. T. Co. v. Virginia Paper Co., 87 Va. 418; 12 S. E. Rep. 755.

[3] Western U. T. Co. v. Hall, 124 U. S. 444; Cahn v. Western U. T. Co., 48 Fed. Rep. 810 (an order to sell without having the stocks, but securities were placed with the brokers who would have sold).

In Georgia contracts for option "futures" are invalid, and the loss or gain resulting from them cannot be invoked to measure the damages sustained by the sender of a message in consequence of a mistake made in transmitting it. Cothran v. Western U. T. Co., 83 Ga. 25.

[4] Western U. T. Co. v. Way, 83 Ala. 542.

per hundred; as delivered it read $5.06. In reliance upon the message the sheep were sold before their arrival at $6 per hundred. Because the selling price was in advance of the purchase price it was contended that no damage had been sustained; but it was ruled that the company was liable for the loss — the difference between the selling price and the actual value of the sheep.[1] In consequence of the non-delivery of a message informing plaintiff of the market price of property at the place where he intended to ship it for sale, he sent it to the next nearest market, where it sold for a less price than it would have brought at the other market. The telegraph company was liable for the difference, and also for the increased freight between the place from and to which the shipment was made and that to which it would have been made but for its default.[2] Where a sale of cattle for future delivery, at the option of the purchaser, had been made and he wrote a message addressed to the owner notifying him that he would take them the next day, and in consequence of negligent delay in its transmission the weighing of the cattle was delayed and their weight decreased, the company was liable for the shrinkage.[3] The price at which the owner of property offered to sell it was negligently altered so that when the message was delivered a lower price was designated, and the offer was accepted at such price. The damages were measured by the difference between that price and the market value of the property at the place to which the message was sent.[4] In the absence of proof that the vendor could have sold for the price he designated in the message he could not recover the difference between that and the price at which the sale was made.[5] But that difference may be taken as the basis of the company's liability if it does not show it to be unreasonable or unjust.[6]

§ 963. Same subject; further illustrations. A plaintiff's message to his broker directed him to sell his stock of a cer-

[1] Western U. T. Co. v. Landis, 12 Atl. Rep. (Pa.) 467. See Same v. Richman, 8 id. 171.

[2] Western U. T. Co. v. Collins, 45 Kan. 88.

[3] Hadley v. Western U. T. Co., 115 Ind. 191.

[4] Western U. T. Co. v. Harris, 19 Ill. App. 347; Same v. Shotter, 71 Ala. 760.

[5] Western U. T. Co. v. Shotter, 71 Ala. 760.

[6] Pepper v. Telegraph Co., 87 Tenn. 554.

tain kind, and to buy a given amount of another named stock. By a change in the message as delivered it directed simply the purchase of an additional amount of the kind of stock directed to be sold, which was made by the broker. As soon as the plaintiff was apprised of the mistake and of this purchase he [**301**] ordered the stock to be sold, which was done at a loss of $475, and repeated his order to purchase, but the price had advanced in the meantime so that it cost $1,875 more to make the purchase than would have been required at the time the erroneous message was received; it was held that the plaintiff was entitled to recover both these sums. It was said by the court that the loss from the advance on stock ordered to be purchased would be recoverable without an actual purchase of the stock at the increased price by showing that immediately or soon after the delivery of the erroneous message the stock rose in market so that the order could not have been filled for less than the advanced price.[1] In a Massachusetts case [2] Bigelow, C. J., after adverting to the rule of damages applicable to a carrier who had negligently delayed to transport and deliver goods intrusted to him,— namely, the difference in their market value at the time when and place where they ought to have been delivered and such value at the same place on the day when they were delivered,— said: "We can see no reason why an analogous rule is not applicable to the case before us. The defendants, as a contracting party, are liable for the injury actually caused by their breach of duty. There is nothing in the nature of the business which they undertake to carry on that should exempt them from making compensation for any neglect or default on their part.[3] The only question then is as to the effect of the application of the general rule of damages, already stated, to the contract between the parties. This necessarily depends on the subject-matter. The defendants undertook to transmit a message which on its face purported to be an accept-

[1] Rittenhouse v. Independent L. T., 44 N. Y. 263; S. C., 1 Daly, 474; New York, etc. T. Co. v. Dryburg, 35 Pa. St. 298; De Rutte v. New York, etc. T. Co., 1 Daly, 547; S. C., 30 How. Pr. 403; Bowen v. Lake Erie T. Co., 1 Am. L. Reg. 685.

[2] Squire v. Western U. T. Co., 98 Mass. 232.

[3] Ellis v. American T. Co., 13 Allen, 226.

ance of an offer for the sale of merchandise. The agreement was to transmit and deliver it with reasonable diligence and dispatch, having reference to the ordinary mode of performing similar services by persons engaged in the same business. The natural consequence of a failure to fulfill the contract was that the party to whom the message was addressed, not receiving a reply to his offer to sell the merchandise in [302] due season, would dispose of it to another person; that the plaintiff might be unable to procure an article of like kind and quality at the same price, and in order to obtain it would be obliged to pay a higher price for it in the market than he would have paid if the prior contract for its purchase had been completed by the seasonable delivery of his message by the defendants. The sum, therefore, which would compensate the plaintiffs for the loss and injury sustained by them would be the difference, if any, in the price which they agreed to pay for the merchandise by the message which the defendants undertook to transmit, if it had been duly and seasonably delivered in fulfillment of their contract, and the sum which the plaintiffs would have been compelled to pay at the same place in order by the use of due diligence to have purchased the like quantity and quality of the same species of merchandise."[1]

An interesting case illustrative of the principles under discussion arose in New York, and after repeated arguments and thorough consideration was finally decided in 1870. The plaintiffs' agent at Chicago telegraphed for five thousand sacks of salt to be sent immediately from Oswego, the plaintiffs' shipping port; the message came over the defendants' line; was delivered by them, and by carelessness of their servants "casks" was written for "sacks." The order was executed accordingly. A sack was a fourteen-pound package of fine salt; a cask contained three hundred and twenty-one pounds of coarse salt. On the arrival of the salt at Chicago there was no market for it; it was stored at the expense of the plaintiffs' agent, and finally sold at less than the market price at Oswego. The plaintiffs were held entitled to recover damages for that mistake; the difference between the market value of the salt

[1] True v. International T. Co., 60 Me. 9, 26; Manville v. Western U. T. Co., 37 Iowa, 214; Tyler v. Same, 60 Ill. 421.

at Oswego, where but for the mistake it would have remained, and what it sold for at Chicago, together with the expense of transportation to the latter place, was not an improper measure. This rule was sustained, although there was no evidence as to what it would have cost to return the salt to Oswego, and the difference in the market price of the two cities was [303] greater than the whole cost of the outward transportation. Earl, C. J., thus vindicated this ruling: "The cardinal rule (of damages) undoubtedly is that the one party shall recover all the damages which has been occasioned by the breach of contract by the other party. But this rule is modified in its application by two others. The damages must flow directly and naturally from the breach of contract, and they must be certain, both in their nature and in respect to the cause from which they proceed. Under this latter rule speculative, contingent and remote damages, which cannot be directly traced to the breach complained of, are excluded. Under the former rule such damages only are allowed as may fairly be supposed to have entered into the contemplation of the parties when they made the contract as might naturally be expected to follow its violation. It is not required that the parties *must* have contemplated the actual damages which are to be allowed. But the damages must be such as the parties may be *supposed* to have contemplated when they made the contract. Parties entering into contracts usually contemplate that they will be performed, and not that they will be violated. They very rarely actually contemplate any damages which would flow from any breach, and very frequently have not sufficient information to know what such damages would be. As both parties are usually equally bound to know and be informed of the facts pertaining to the execution or breach of a contract which they have entered into, I think a more precise statement of this rule is that a party is liable for all the direct damages which both parties to the contract would have contemplated as flowing from the breach, if, at the time they entered into it, they had bestowed proper attention upon the subject and had been fully informed of the facts. In this case, then, in what may properly be called the fiction of law, the defendant must be presumed to have known that this dispatch was an order for salt as an article of merchandise, and

that the plaintiff would fill the order as delivered; and that if the salt was shipped to Chicago it would be shipped there as an article of merchandise to be sold in the open market. And the market price in Chicago being less than the market price in Oswego, that they would lose the cost of transportation, and the difference between the market price at Chicago [304] and the market price at Oswego. . . . The damages allowed were certain, and they were the proximate, direct result of the breach."[1] There was some contention that it was the duty of the plaintiff on being apprised of the mistake to reship the salt to Oswego, and there was some division of judicial opinion on that point. The learned judge from whom we have just quoted remarked in support of the final opinion of the court, from which only one member dissented: "For anything that appears in this case the cost of transportation to Oswego would have been equal to the difference in the market between the two places. Then there was the risk of the lake transportation at that season of the year, and the uncertainty in the Oswego market when the salt should again be landed there. If the plaintiff had shipped, and it had been lost upon the lake, the total loss would not have been chargeable to the defendant. By the wrongful act of the defendant the salt had been placed in Chicago, one of the largest commercial centers of the country, and the plaintiffs had a right to sell it there in good faith and hold the defendant liable for the loss." The rule supported in this case was sanctioned as sufficiently favorable to the defendant. It does not decide that it was so to the plaintiffs. Nothing was allowed by the trial court for profits that might have been made on the fine salt ordered if it had been shipped; nor for the casks of salt at Oswego if it had not been sent.

§ 964. Same subject; other illustrations. In a Virginia case[2] the plaintiff sent over the defendant's line a message to his factor in Mobile, directing him to buy five hundred bales of cotton. It was altered, and as delivered required him to buy two thousand five hundred bales. He proceeded to execute it, and bought two thousand and seventy-eight bales be-

[1] Leonard v. New York, etc. T. Co., 41 N. Y. 544.

[2] Washington, etc. T. Co. v. Hobson, 15 Gratt. 122. And see Smith v. Independent L. T., Scott & J. on Tel., § 412, note.

fore the mistake was discovered. It was ruled that if the defendants were liable for the alteration the measure of damages was what was lost on the sale at Mobile of the excess of the cotton above the amount ordered; or if not sold there, what would have been the loss on the sale there in the condition and circumstances in which it was when the mistake was [305] ascertained, including the proper costs and charges. The factor's commissions upon the purchase were held to be a part of the damages. And it appearing that a part of the cotton was on board a ship to be sent to Liverpool when the mistake was ascertained, it was ruled that in the estimate of damages the whole should still be valued as if sold at Mobile, a part on shipboard and a part under contract of affreightment. The court held further that if the plaintiff intended to hold the company responsible for the excess, he should, as soon as apprised of the purchase, have made a tender of it to the company on the condition of its paying the price and all the charges incident to the purchase; giving it notice, in case of the refusal of such tender, that he would proceed to sell the excess at Mobile, and after crediting the company with the net proceeds would look to it for any difference between the amount of such proceeds and the cost of such excess, including the commissions, costs and charges.

A telegraph company negligently omitted to deliver a message containing the plaintiff's direction from Denver to his agent at Nebraska City: "Ship oil as soon as possible at the best rates you can." The plaintiff alleged that by reason of the consequent delay he was obliged to pay higher rates of freight and lost great profits on the oil. Of what the lost profits consisted is not shown by the case; damages for the increase of freight were allowed; and doubtless, on the same principle, if there had been a fall in the market price of the oil, the amount of such decrease would also have been allowed.[1]

§ 965. Loss of claim; physical pain; injury to credit. A telegraph company negligently delayed for a day or two to forward plaintiff's message to his agent, stating amount of the debt and directing attachment if he could find property. Dur-

[1] Western U. T. Co. v. Graham, 1 Colo. 230. See Manville v. Western U. T. Co., 37 Iowa, 214.

ing the delay the property was seized by other creditors. The court say: "To ascertain the damages sustained by the breach of this contract these inquiries are pertinent: if the message had been sent, was the plaintiff's agent in Stockton at the time, and would he have received it; next, would he have taken out an attachment on the debt; at what time could he have done this; could he have given security; could he [**306**] have procured attorneys to issue the writ; at what hour could and would it have been put in the hands of the sheriff; was property there of the debtor's subject to the writ? If a telegraphic dispatch had reached the agent at 8 o'clock on the 7th the agent would have been bound to act at once; it is to be presumed that he would have done so; at least, he can testify whether he would. If he had the sheriff is to be presumed willing to do his duty; if he did not he would be liable to the plaintiff, and thereby the plaintiff's debt would be secured." It was held that the company was liable for the cost of the dispatch and the amount of the claim, on the assumption that the latter might have been secured by a seasonable attachment, and was prevented by the defendant's default.[1] In an Arizona case a banker made an assignment, and the assignee telegraphed the fact to the cashier of a branch bank. There was negligence in the delivery of the message. After its receipt and before delivery the telegraph company's agent withdrew from the branch bank money deposited therein by himself and the company; other sums were paid to other unpreferred creditors. Some payments were also made after the message reached the cashier. The defendant was liable for the moneys paid during the time intervening between that at which the message should have been and the time it was in fact delivered; but not for what was disbursed after its delivery.[2] The damages resulting from the amputation of a finger in consequence of the delay in delivering a message summoning a physician are sufficiently proximate if the company has full knowledge of all the facts.[3] The principle which holds banks liable when they wrongfully refuse to cash a creditor's check[4]

[1] Parks v. Alta California T. Co., 13 Cal. 422; Bryant v. American T. Co., 1 Daly, 575; Western U. T. Co. v. Sheffield, 71 Texas, 570.

[2] Stiles v. Western U. T. Co., 15 Pac. Rep. 712.

[3] Brown v. Western U. T. Co., 6 Utah, 219.

[4] Vol. 1, § 77.

has been held inapplicable where a telegraph company negligently delayed to transmit money to a bank to meet the note of its customer. In such a case damages for injury to credit were refused, it not appearing that any pecuniary loss resulted from the protest of the note.[1]

[307] § **966. Liability for expenses.** A party having a case in court at a distance gave a telegraph company this message addressed to his attorney: "Hold my case until Tuesday or Thursday. Please reply." Receiving no answer, and inferring, therefore, that there could be no postponement, he went with his counsel to attend the trial; he found that the message had not been sent and that his case had been adjourned to a future day, so that his journey and that of his counsel were wholly useless. In an action for neglect to send the message it was held that he was entitled to recover as damages the expenses of himself and counsel, and the counsel fee found reasonable which he was obliged to pay for making the trip.[2] In a case where there was an error made in transmitting a message concerning the time a case would be called for trial the company was liable for the expenses of going to the place where it was to occur and returning therefrom, and for the loss of time,[3] but not for the damage resulting from a mill remaining idle while the owner was absent, no notice of that consequence having been given.[4]

§ **967. Loss of employment.** Where through the negligent delay of a telegraph company to deliver a message the plaintiff lost a situation, he was allowed to recover substantial damages in view of the salary and the time for which he would have been employed;[5] which, in a case where the telegram, if delivered, would have consummated a contract of employment for one year, were measured by the difference between the salary that would have been received and what was made by working for other persons.[6] The loss of a ship-

[1] Smith v. Western U. T. Co., 24 Atl. Rep. (Penn.) 1049.

[2] Sprague v. Western U. T. Co., 6 Daly, 200.

[3] Western U. T. Co. v. Short, 53 Ark. 434; Bliss v. Baltimore & O. T. Co., 30 Mo. App. 103.

[4] Western U. T. Co. v. Short, 53 Ark. 434.

[5] Western U. T. Co. v. Fenton, 52 Ind. 1; Kemp v. Western U. T. Co., 28 Neb. 661.

[6] Western U. T. Co. v. Valentine, 18 Ill. App. 57; Same v. McKibben, 114 Ind. 511; Same v. Longwill, — New Mex. —; 25 Pac. Rep. 339.

broker's commissions may be recovered.[1] Where the delay deprives the receiver of the benefit of employment at daily wages, no period for its continuance being fixed, only nominal damages can be recovered.[2] In a late Texas case the plaintiff lost a contract for threshing thirty thousand bushels of grain under the following circumstances. His agent wired him: "Have thirty thousand bushels for you, if you can come at once." The answer which was negligently delayed apprised the agent that the threshing machinery would be shipped at once. In consequence of the delay some of the parties who had arranged with the agent for the threshing of their grain made contracts with others for that work. The company was held liable for the loss of these contracts, though there was no delay in getting the machinery to the place where the work was to have been done.[3]

§ 968. When company charged with knowledge of sender's purpose. Independently of all other considerations, to be recoverable damages must be the proximate and natural consequence of the defendant's acts or default. This is the universal requirement; remote and speculative effects [308] are always excluded in the assessment of compensatory damages. What are such requires no special elucidation in this place. Where a telegram was sent by defendant's line to plaintiff asking for $500, and by negligence of its employee it was changed to $5,000, which the plaintiff sent to the party making the request, and he upon receipt of it appropriated it to his own use and absconded, it was held that the defendant's negligence was not the proximate cause of the loss; the embezzlement did not naturally result therefrom, and could not reasonably have been expected.[4] To maintain an action for

[1] Western U. T. Co. v. Fatman, 73 Ga. 285.

[2] Merrill v. Western U. T. Co., 68 Me. 97. It is not easy to understand on what theory the recovery of one day's wages was not allowed in this case.

[3] Western U. T. Co. v. Bowen, 19 S. W. Rep. 554.

[4] Lowery v. Western U. T. Co., 60 N. Y. 198.

It is held in Texas that it is no defense to a telegraph company whose negligence has prevented the person to whom a message was sent from going to the place to which he was summoned on the first train that could have been taken, that a second train on which he went would have taken him there in time but for the fault of the railway company. Loper v. Western U. T. Co., 70 Texas, 689.

special damages it has sometimes been stated that they must appear to be the legal and natural consequences arising from the tort or breach of contract, and not from the wrongful act of a third person induced thereby; in other words, the damage must proceed wholly and exclusively from the injury complained of.[1] The law does not undertake to hold a person who is chargeable with a breach of duty toward another with all the possible consequences of his wrongful act. It in general takes cognizance only of those consequences which are the natural and probable result of the wrong complained of, and may reasonably be expected to follow under ordinary circumstances from the misconduct.[2] This rule, as we have seen, generally excludes all but nominal damages, or the price paid for sending the message, where it is written in cipher or unintel- [309] ligible terms, and is accompanied with no explanation. From this limit the contemplation of damages will expand with the surface of disclosure. This proposition is well illustrated and supported by a New York case,[3] which has often been cited and approved. The plaintiffs at San Francisco, California, contracted with L. of that place to purchase for them in New York on commission three hundred pistols, and to deliver them in San Francisco by the steamer which should leave New York on the 20th of January, 1857; for which the plaintiffs were to receive a commission of seven and a half per

This is clearly wrong; there was an intervening independent cause.

[1] Crain v. Petrie, 6 Hill, 522; First Nat. Bank v. Western U. T. Co., 30 Ohio St. 555; 2 Pars. on Cont. 257. In the syllabus of McColl v. Western U. T. Co., 44 N. Y. Super. Ct. 487, it is stated that, "where the damage claimed is a loss of that which might have been obtained, depending on the contingency of a certain expected action of a third party in the event of the contract being carried out, it is too remote to be regarded as within the contemplation of the party breaking the contract." The case does not warrant so absolute a statement, nor can such a proposition be maintained as law; there may be a legal loss in being deprived of benefits from future dealing pending on the voluntary action of a third person; damages are often estimated and limited by reference to such action. The case of Western U. T. Co. v. Fenton, 52 Ind. 1, is an instance. See Beaupri v. Pacific, etc. T. Co., 21 Minn. 155.

[2] Chapman v. Western U. T. Co., — Ky. —; 13 S. W. Rep. 880; Lowery v. Same, 60 N. Y. 198; Baldwin v. United States T. Co., 45 N. Y. 744; Rigby v. Hewett, 5 Exch. 240, per Pollock, C. B.; Western U. T. Co. v. McKinney, 2 Texas Civil Cas., §§ 644, 646.

[3] Landsberger v. Magnetic T. Co., 32 Barb. 530.

cent. on the cost. They agreed to hold themselves responsible to the sum of $500 to be paid to L. by them if they failed to fulfill the agreement. For the purpose of executing this agreement the plaintiffs remitted from San Francisco by the Pacific Mail Company $10,000, which arrived in New York January 13. The plaintiffs delivered to defendants at New Orleans on the 16th of January a dispatch, addressed to plaintiffs' firm in New York, in these words: "Get $10,000 of the Mail Company." On the following day the telegram was transmitted to and received at the defendants' office in New York; but the address had been so changed that it could not be delivered until the correct address was sent, which was on the morning of the 23d of January. By reason of the non-delivery of the dispatch before the 20th of January the plaintiffs' agreement with L. could not be performed for want of the money mentioned in the dispatch. The plaintiffs paid L. the $500 stipulated damages. It appeared that the sole cause of the non-delivery of the dispatch was the negligent error in the address. The actual loss of the plaintiffs was $970.09; viz., $500 paid L.; $462 loss of commissions they were to receive; $6.50 paid for transmitting the message; and $9.59 interest on the $10,000 for five days while its use was delayed by the erroneous address of the message. But because the defendants had no information whatever in relation to the subject of the dispatch, or the purposes to be accomplished by it except what could be derived from its language, the recovery of damages against the defendants was limited to the last two items. If the message as delivered fully discloses that it is important no other notice need be given the company's agent.[1]

§ 969. Same subject; details need not be disclosed. [310] It does not appear to be necessary that the company should be apprised of details if the purpose of the message is made known; they will be liable for the actual injury which directly results from thwarting that object by a negligent performance of their duties, though there is no mention of facts material to the attainment of that purpose.[2] A party in Portland,

[1] Western U. T. Co. v. Broesche, 72 Texas, 654.

[2] In Turner v. Hawkeye T. Co., 41 Iowa, 458, the company undertook to furnish the plaintiff at a specified place daily dispatches, showing the

Maine, addressed this message to a party in Baltimore: "Ship cargo named at ninety, if you can secure freight at ten. Wire us result." In an action against the company to whom this message was delivered they admitted their liability for failure to deliver it, and in determining the damages therefor the court assumed their knowledge of the object of the sender to be derived from the message itself. The court say: "We assume that the plaintiffs can prove that the firm in Baltimore to whom the telegram was addressed had offered and agreed to sell a cargo of corn at ninety cents per bushel to the plaintiff; that the telegram contained notice of acceptance of the proposition; that the condition named, 'if you can

prices of grain both in Chicago and New York, for the consideration of ten dollars per month. During the engagement defendant's agent delivered to plaintiff a dispatch, showing the market price of wheat in Chicago to be $1.24\frac{1}{4}$ per bushel for a certain day. This report was incorrect; on that day the price was $1.56. Upon that dispatch the plaintiff acted; he bought five thousand bushels. In an action upon the contract he recovered damages measured by that discrepancy. Beck, J., said: "It is claimed that as plaintiff was engaged in buying grain at S. R., and gave defendant no notice that the market report furnished was intended to guide him in purchases of wheat in Chicago, he cannot recover as damages the loss which he sustained by reason of the error in the dispatch in the purchase of five thousand bushels of wheat. Such damages, it is claimed, did not enter into the contemplation of the parties when the contract was made. There is nothing in the evidence upon the subject further than that plaintiff was a purchaser of grain at S. R. and that he sold in Chicago. It also appears that he made contracts for the delivery of grain at that city at a future day. All of his transactions were based upon his information of the Chicago market; and that he might have speedy and accurate information, he entered into the contract sued upon. It is within the ordinary course of business for a dealer to make contracts for future delivery, and to depend upon future purchases to enable him to fulfill his obligation. The purchases are made whenever the grain can be had at a price offering an inducement to the dealer, and such purchases are often made by business men of this state in Chicago to fill their contracts for delivery in that city. These facts, it will be presumed, entered into the contemplation of the parties to the contract in suit. The defendant, then, cannot claim that it is released from liability for the loss sustained by plaintiff on the ground of a want of notice of the transaction in which defendant used the information furnished by the report of the market. It appears to us that as the defendant contracted to furnish reports of the Chicago grain market to plaintiff, it was sufficiently notified that plaintiff's transactions were to be in that market, and there is no evidence raising a presumption that defendant was authorized to regard him as a seller only of grain there."

secure freight at ten' (cents), could have been complied with if the message had been delivered when it should have been; that if it had been thus delivered the bargain would have been closed, and the plaintiffs would at that moment have obtained the cargo at ninety cents per bushel, with freight at ten cents. The pecuniary value, then, of this telegraphic message was in this, that it contained a part of a contract, and that the final and binding and effectual act by which the bargain would become operative and complete. It seems clear that such a message has a distinctive and clear pecuniary value, and demands of the party, who, for a reward, undertakes to convey it, knowing its contents, the same care and diligence, and that he is subject, at least, to like rules and liabilities, as if he (not being a common carrier) had undertaken to transport an article of merchandise. On its face it gives clear intimation that it is of a business character relating to a distinct and specific contract, and that, according to the well known custom of merchants, it must have been understood by the operator or agent as an acceptance of an offer to sell a cargo at the price named, if freight at ten cents could be procured. In this respect it differs from a class of cases to be found in the reports where the message was so brief, or enigmatical, [311] or so obscure, that it gave the operator no notice that it was of any value pecuniarily." The defendant was held liable for the value of the bargain.[1] In another case the company negligently delayed the delivery of this message: "Will take your hogs at your offer," and the same rule of damages was applied. This message did not state the number of hogs nor the price. It was sufficient that on its face it purported to be an acceptance of an offer for the sale of merchandise.[2] The non-delivery of this telegram: "Hold my case until Tuesday or Thursday; please reply," subjected the company to damages for the expense of a journey by the party and his counsel, and a fee for the time to the latter.[3] For delay in delivery of this message: "Ship your hogs at once," the company were

[1] True v. International T. Co., 60 Me. 9.

[2] Squire v. Western U. T. Co., 98 Mass. 232.

[3] Sprague v. Western U. T. Co., 6 Daly, 200; Western U. T. Co. v. Short, 53 Ark. 434.

held liable for decrease in market value of one hundred and eighty fat hogs.[1]

A message from commission merchants reading: "Ten cars new two whites Aug. shipment fifty-six half; prompt reply," is notice that it is important and disclosed the nature of the business as fully as the case demanded.[2] "Cover two hundred September and one hundred August," being shown to be ordinary expressions used in the cotton trade, meaning that the person receiving the message should sell the number of bales specified in each month, was sufficient to make the company liable for an error.[3] Where a dealer telegraphed a broker: "Please buy, in addition to thousand August, one thousand cheapest month," also "Put stop order on five thousand December, seventeen cents," it was held that, read in the light of well-known usage in commercial correspondence, it reasonably informed the operator that the matter was of business importance, and disclosed the transaction as far as necessary to accomplish the purpose for which it was sent.[4] In answer to a message which gave the price of "hams, sixteens," and also the price of shoulders, lard and beef hams, the plaintiff, on the same day and from the same office at which he received it, sent this in reply: "Will take two cars sixteens." Defendant was held to have notice that plaintiff was accepting an offer made by the sender of the first telegram, the addressee of the second, purchasing two car-loads of hams at the price named.[5] In another case the message as written was: "Will give one fifty for twenty-five hundred at London. Answer at once, as I have only till night." This disclosed enough to show that it related to a business transaction involving the purchase and sale of property, and that a pecuniary loss might result from an incorrect transmission.[6] "You had better come and attend to your claim at once," indicated to the telegraph company that the addressee had a claim of a pecuniary nature which should

[1] Manville v. Western U. T. Co., 37 Iowa, 214; Thompson v. Same, 64 Wis. 531.

[2] Western U. T. Co. v. Harris, 19 Ill. App. 347.

[3] Western U. T. Co. v. Blanchard, 68 Ga. 299. See Same v. Fatman, 73 id. 285.

[4] Postal T. Co. v. Lathrop, 131 Ill. 575.

[5] Mowry v. Western U. T. Co., 51 Hun, 126.

[6] Telegraph Co. v. Griswold, 37 Ohio St. 301.

be attended to at the place at which the message was dated, that the matter was urgent, and that loss would probably follow the want of such attention which might be prevented by acting in pursuance of the message.[2] In a Texas case a man who desired to be met at a particular place by his horses and a dog named "Shep" telegraphed an employee to that effect. The operator was told that the man, dog and horses were wanted to assist in driving sheep the sender had bought from the place designated in the message to that where the servant was. The word "Shep" was negligently changed to "sheep," and in consequence the employee drove sheep to the place designated, and because of delay failed to meet his master there, in consequence of which the purchased sheep suffered harm. It was held that the telegraph company, having notice of the place from and the place to which the sheep were to be driven, was chargeable with information of the distance between them, the character of the country, the expense of driving the sheep, the effect of delay upon and the injury resulting to them.[2]

§ 970. Same subject; result of the decisions. It is to be observed that in these instances there was sufficient on the face of the dispatches to show not only that they related to business of pecuniary concern, but they were likewise explicit enough to suggest the nature, though not the extent, of the consequences of any negligence touching their transmission or delivery. They support the conclusion that a telegraph company may be made liable for the actual damages resulting directly and proximately from the non-receipt or the delayed receipt of a telegram through their negligence, where the business to which it relates and the purpose to which it is intended to contribute are stated or disclosed in a general way. It is not essential that the company be informed of the magnitude or of any of the usual incidents of the transaction; or that all the requisite agencies and conditions to accomplish the object indicated have been or will be so arranged as to insure success. It is their duty to inquire for such particulars if they desire them.[3] Telegraphic messages are very generally brief

[1] Western U. T. Co. v. Sheffield, 71 Tex. 570.

[2] Western U. T. Co. v. Edsall, 74 Tex. 329; S. C., 63 id. 668.

[3] Pepper v. Telegraph Co., 87 Tenn. 554; Western U. T. Co. v. Edsall, 74 Texas, 329; Same v. McKinney, 2 Texas Civil Cas. 562; Hadley v.

[312] for purposes of economy, even when there is no thought of concealment. Relating to certain subjects on which there is much traffic by telegraph certain abbreviated or condensed expressions are in general use among those who conduct this traffic, and telegraphic operators ought to know their conventional meaning whether they are intelligible to the general public or not.

§ 971. **Same subject; opposing view.** There are some cases which do not confirm the foregoing observations, and appear to be out of harmony with the decisions that suggested them. Thus, in Maryland, a suit was brought by a broker to recover damages resulting from the failure to transmit a dispatch containing this direction: "Sell fifty gold." It was proved that the dispatch would be understood among brokers to mean $50,000 of gold, but it was not shown that the company's agent so understood it; and it was held that its nature should have been communicated to him at the time it was offered to be sent, in order that the company might have observed the precautions necessary to guard itself against the risk; and that it was error to instruct the jury that plaintiff was entitled to recover to the full extent of his loss by the decline in gold.[1] Where the plaintiff intrusted the defendant, a Canadian company, with this message addressed to a person in Oswego: "Do accept your offer — ship, to-morrow, fifteen or twenty hundred," Robinson, C. J., said: "What would the message . . . have informed the man or boy whose duty it was to take it from the wire, and to send it by another man to the office of the American company? Nothing but that the plaintiff had accepted an offer, he could not tell for what, and would ship fifteen or twenty hundred, whether of staves or shingles, or barrels of flour, or bushels of grain, he could not tell; nor could he guess what might be the occasion for haste or the consequences of delay or neglect. A possible loss or gain to the plaintiff, depending on the time at which the message would arrive, was a consequence which the defendants could not appreciate, and cannot be supposed to have

Western U. T. Co., 115 Ind. 191; Rittenhouse v. Independent L. T., 44 N. Y. 263; Candee v. Western U. T. Co., 34 Wis. 471; Erie T. & T. Co. v. Grimes, 82 Texas, 89; Gulf, etc. Ry. Co. v. Loonie, id. 323.

[1] United States T. Co. v. Gildersleeve, 29 Md. 232. See Shields v. Washington T. Co., 9 West. L. J. 5.

contemplated at the time they received the message."[1] In a Minnesota case[2] an order for merchandise, contained in [313] a message, was negligently delayed for several days, and the price advanced in the meantime; when received, the dealer refused to fill the order at the price current on the day of its date, or at any less than the advanced market price current at the time of its arrival. It was properly held that the sender was only entitled to recover the price paid for the message, because, if sent, it would not have concluded a bargain for the merchandise, and it was not shown as a fact that the plaintiff would have obtained it at the then market price if it had been duly delivered. But the court said that the findings implied that the defendant had only such information as was afforded by the message itself. "The message purports to relate to some business transaction the nature of which is not disclosed. It gives no intimation of the magnitude or importance of the business involved, or of the amount of damage that might result from a delay in transmitting it. The company might have known from the tenor of the message that it related to a purchase of goods, and was presumably of some value; but the message itself, 'will take two hundred extra mess, price named,' would hardly have informed the defendant of the nature, quantity, price or value of the goods which the plaintiff offered to take. The damage the plaintiff might suffer from a rise in the market price of pork, if this message were not seasonably delivered, could hardly have entered into the contemplation of the defendant at the time he received and undertook to transmit this message as a probable consequence of the breach of its contract."[3] The court add, however, that whether the information conveyed to the company by the message was sufficient to render it liable for any consequential damages the plaintiff might have sustained from its delay it was not necessary to decide, and announced the general principle which all the cases affirm, that "considering

[1] Smith v. Western U. T. Co., 83 Ky. 104; Kinghorne v. Montreal T. Co., 18 Up. Can. Q. B. 60.

[2] Beaupri v. Pacific & A. T. Co., 21 Minn. 155.

[3] Citing Stevenson v. Montreal T. Co., 16 Up. Can. Q. B. 530; Allen's Tel. Cases, 71, 98; Kinghorne v. Montreal T. Co., 18 Up. Can. Q. B. 60; United States T. Co. v. Gildersleeve, 29 Md. 232; Baldwin v. United States T. Co., 45 N. Y. 744.

the magnitude of the damages which may result from mistake or delay in transmitting important messages, damages often out of all proportion to the price paid for transmission, it is [314] simple justice to the company that it should not be held liable for such consequential damages unless the character and object of the message appear upon its face, or the nature of the risk assumed by the company is made known to it by the sender."

It has been ruled in Texas, though the later cases are to the contrary, that the personal knowledge of the agent of the telegraph company who receives the message, derived independently of it and without communication with the sender, is not imputable to the company.[1] The Illinois appellate court has gone so far as to hold that notice to the local agent at the office where a message is received of the nature and importance of it, such agent having no authority or control over the agent at the place where the message is to be delivered, does not affect the company so as to bind it for the consequences of the latter agent's negligence in failing to deliver the message.[2] The logical result of this holding is that if a message does not of itself disclose its character, the sender cannot charge the company with knowledge of it unless he notifies every agent whose duty it may be to handle it in any way of the facts connected with it. This, surely, is a doctrine which cannot find support either in law or reason.

§ 972. Form of action; who may sue. In England the only duty of a telegraph company is that arising out of contract, and, therefore, only the sender or party making the contract has a right of action for its breach.[3] There is no liability to the receiver of a telegram even for a misfeasance.[4] In this country, however, a different doctrine prevails. The company's employment is of a public character, and it owes the duty of care and good faith to both sender and receiver. For the gross negligence of a company's agent in sending a dispatch over

[1] Western U. T. Co. v. Kirkpatrick, 76 Texas, 217. See Same v. Moore, id. 66; Gulf, etc. Ry. Co. v. Loonie, 82 id. 323; Western U. T. Co. v. Bowen (Texas), 19 S. W. Rep. 554.

[2] Pope v. Western U. T. Co., 14 Ill. App. 531.

[3] Playford v. United Kingdom T. Co., L. R. 4 Q. B. 706; S. C., 10 B. & S. 769; Dickson v. Reuter T. Co., 2 C. P. Div. 62; 3 id. 1. See Feaver v. Montreal T. Co., 23 Up. Can. C. P. 150; S. C., 24 id. 258.

[4] Dickson v. Reuter T. Co., *supra*.

the wires purporting to be that of the cashier of a bank at the request of one known to the operator not to be such cashier, and without evidence of the latter's authority, to the effect that he would honor the drafts, for a large amount, of the person so procuring the transmission of such message, whereby a banking house to which it was presented was induced to pay money to the person so recommended, the company was held liable to make good the loss.[1] So a company was held liable in damages to the recipient of a message for the misfeasance of their agent in sending a different message from that addressed to him.[2] It was ruled that, though not insurers of the safe delivery of what is intrusted to them, their obligations, like those of common carriers, spring from the public nature of their employment and the contract under which the particular duty is assumed. If they negligently or wilfully violate their duty to send the very message furnished, they are responsible to the party to whom the erroneous message is addressed in an action on the case. Even if the company be considered only as the agent of the sender, they are liable to third persons as wrong-doers for any mis- [315] feasance in the execution of the duties confided to them.[3] Accordingly, where they delivered a message for *two hand bouquets*, changed so as to read *two hundred bouquets*, they were held liable to the receiver for the damages resulting from the expense of a partial execution of the erroneous order before the mistake was discovered and corrected.[4] A company, by changing a telegram sent to plaintiff, informed him that eight thousand bushels of wheat could be furnished him for transportation from Chatham to Oswego, three thousand being the amount written in the message furnished for transmission. In consequence of this information he gave up a contract for a cargo from another place, and sent his vessel to

[1] Elwood v. Western U. T. Co., 45 N. Y. 549; Allen's Tel. Cases, 594.

[2] New York, etc. T. Co. v. Dryburg, 35 Pa. St. 298.

[3] Id.; Western U. T. Co. v. Dubois, 128 Ill. 248; Same v. McKibben, 114 Ind. 511; Hadley v. Western U. T. Co., 115 id. 191; Wolfskehl v. Same, 46 Hun, 542; Wadsworth v. Same, 86 Tenn. 695; Western U. T. Co. v. Longwill, — New Mex. —; 21 Pac. Rep. 339; Chapman v. Western U. T. Co., — Ky. —; 13 S. W. Rep. 880; Young v. Same, 107 N. C. 370; Western U. T. Co. v. Adams, 75 Texas, 531.

[4] New York, etc. T. Co. v. Dryburg, 35 Pa. St. 298.

Chatham, where he obtained only three thousand bushels. It was held that a reasonable compensation for sending his vessel to Chatham and back was all the plaintiff was entitled to recover as damages; that his real damage arose from giving up the contract for the other cargo, but that could not be taken into consideration because the defendant had no notice of it; that he was not entitled to freight on five thousand bushels which his vessel did not carry, as it did not appear that he could have obtained this freight if the message had been correctly transmitted.[1]

§ 973. **Mitigation of damages by injured party.** It is the duty of a party who has ordered a message sent, within a reasonable time after he knows that it has not been transmitted, to take all reasonable steps to prevent further loss.[2] If he has goods to deliver or has arranged to procure them for delivery he must make an effort to sell them, and if he has made arrangements for their purchase for the purpose of meeting his contract of sale, he cannot extend them from month to month on a declining market and hold the company for the loss.[3] Where an order for the purchase of one thousand shares of stock was negligently transmitted to read one hundred, it was held that it was the duty of the sender as soon as he knew of the error to have caused the purchase of the additional nine hundred shares at the price at which the stock was then being sold. He could not wait for a further advance and hold the company for the enhanced price after such knowledge came to him.[4]

There is a difference of view concerning the duty of the sender of a message who offers property for sale where the offer made by him is reduced by negligence in transmission, and as reduced is accepted by the person to whom it is made. In Georgia it is held that the person making the offer is not bound to revoke it after knowledge comes to him that as accepted it names a lower price than he in fact offered. The court said: "Whether the telegraphic operator be the agent

[1] Lane v. Montreal T. Co., 7 Up. Can. C. P. 23.

[2] Western U. T. Co. v. Hoffman, 80 Texas, 420; Gulf, etc. Ry. Co. v. Loonie, 82 id. 323.

[3] Daugherty v. American U. T. Co., 75 Ala. 168; Western U. T. Co. v. Way, 83 id. 542.

[4] Marr v. Western U. T. Co., 85 Tenn. 529.

of the sender of a dispatch, so as to bind him, is a debatable question in the courts, the English authorities being to the effect that he is not, and the American mainly that he is. We agree with the American doctrine, at least to the extent that commercial transactions, being now conducted to so great an extent through the telegraph, a merchant would lose business and credit if he did not settle in accordance with the offer literally made, though by mistake of the agency used to convey it; and when he does so settle in good faith, and is induced to do so by the negligence of the telegraph company, through its servants, whether absolutely bound by his contract or not," the company is liable for the difference between the price at which the sale was made and the market value of the property sold.[1] The rule in Maine is that as between the sender and receiver of a message, any resulting damage by a change of its terms in transmission must fall upon the party who elected that mode of communication for the particular message.[2] The Tennessee court holds that the seller is not bound to make good an offer which has been changed in transmission,[3] and such is the rule in North Carolina.[4] A creditor who has lost the priority he would have had against the property of his debtor but for the negligence of a telegraph company is not bound to invest money to secure himself against loss either by purchasing the property at the sheriff's sale or discharging the prior liens, although its estimated or real value was so much in excess of such liens as to have met his claims, at least in the absence of proof of his ability to do so and that it would be prudent to take that course.[5]

[1] Western U. T. Co. v. Shotter, 71 Ga. 760.

[2] Ayer v. Western U. T. Co., 79 Me. 493.

[3] Pepper v. Telegraph Co., 87 Tenn. 554.

[4] Pegram v. Western U. T. Co., 100 N. C. 28. This case holds that the sender of a message cannot recover of the company damages which he has paid pursuant to a judgment which was rendered against the receiver and which bound him, the foundation of the judgment being the negligent alteration of the dispatch. The relation between the sender and the company is not such as is within the general rule that a suit against an agent upon a personal liability incurred in carrying out his principal's orders, notice of which is given the latter, makes him liable for the amount of the judgment.

[5] Western U. T. Co. v. Sheffield, 71 Texas, 570.

§ 974. Exemplary damages. There appears to be no reason to doubt the liability of telegraph companies for exemplary damages when they are guilty of such gross negligence as amounts to wantonness or malice;[1] at least in jurisdictions where such damages are recoverable. These may well be imposed for the refusal to accept a proper message for transmission, as well as where there is a wanton or malicious refusal to deliver one accepted. In the former case such damages may properly be allowed though there is no element of ill-will entertained against the person who offers the message. The functions and duties of the company are so nearly allied to those which are devolved on common carriers that such refusal may be regarded as a breach of duty owing to the public.[2]

§ 975. Damages for injured feelings. There is a wide divergence of opinions concerning the liability of telegraph companies for injury resulting to the feelings in consequence of the non-delivery or negligently-delayed delivery of a dispatch announcing the death or serious illness of a near relative of the person to whom it is addressed, where such negligence deprives the addressee or sender of the opportunity to see his relative or attend his funeral. A majority of the courts which have passed upon this question maintain the proposition that where a person has a right of action for an injury done to his name, person or property, he may recover as actual damages compensation for all the proximate results thereof, including injury to his feelings, if such injury is caused by and was contemplated in the doing of the wrongful act, whether bodily pain was an incident to it or not. The fact

[1] West v. Western U. T. Co., 39 Kan. 93. See, as to the circumstances under which exemplary damages are allowed in Texas, Western U. T. Co. v. Brown, 58 Texas, 170; *ante*, § 950.

[2] In Davis v. Western U. T. Co., 1 Cin. Super. Ct. 100, the plaintiff, a commercial news agent, engaged in furnishing customers information and reports of the state of the market, brought an action against the defendant for delaying such information sent to him by his agents, and purposely doing it, to injure his business and giving precedence to a rival in the same business. The court said: "It is evident that the mere allowance of the amount of loss the plaintiff proved he actually sustained would not, in justice, remunerate him for the violation by the defendant of its agreement, and the jury might very properly have given an additional sum." The court favored a liberal course in the assessment of damages for a wilful and causeless violation of contract by the defendant.

that a message of the nature indicated is delivered for transmission is held to be notice to the company that mental suffering will probably result to some person if it is not promptly transmitted; hence it is liable for its negligence.[1] Damages for such suffering may be recovered either by the person to whom the message was addressed or by him who caused it to be sent. Thus, it is laid down in Indiana that although there is nothing in a message to indicate the kinship existing between the sender and the addressee or the person who is therein announced to be dangerously sick, and it does not request the presence of the addressee at the bedside of the sick person, yet if it in plain terms announces the serious illness of a person, the company is bound to know that prompt communication with the person to whom it is addressed is much desired, and that mental anguish may, and probably will, come to some person if it is not promptly delivered. The sender of the telegram is entitled to recover for such suffering resulting from negligent delivery.[2] And in Tennessee a majority of the court holds that a sister who is deprived of the opportunity of attending on a brother in his last sickness and making necessary preparations for his burial may recover from a company which has negligently failed to deliver a dispatch which would have informed her of his condition such sum, in addition to what she might recover for such neglect, as will reasonably compensate her for the grief, disappointment or other injury to her feelings resulting from the negligence.[3] Where there was negligent failure to transmit money

[1] So Relle v. Western U. T. Co., 55 Texas, 308; Stuart v. Same, 66 id. 580; Gulf, etc. Ry. Co. v. Levy, 59 id. 563; Loper v. Western U. T. Co., 70 id. 689; Western U. T. Co. v. Broesche, 72 id. 654; Same v. Simpson, 73 id. 422; Beasley v. Western U. T. Co., 39 Fed. Rep. 181 (Texas circuit court); Chapman v. Western U. T. Co., — Ky. —; 13 S. W. Rep. 880; Young v. Same, 107 N. C. 370; Thompson v. Same, id. 449; Reese v. Same, 123 Ind. 294; Wadsworth v. Western U. T. Co., 86 Tenn. 695; Western U. T. Co. v. Henderson, 89 Ala. 510; Gulf, etc. T. Co. v. Richardson, 79 Texas, 649; Western U. T. Co. v. Wilson, 93 Ala. 32.

In Illinois it was held by the majority of the court in 1887 that the sender of a telegram of this nature "was entitled to recover nominal damages at least, including the loss of the price of the telegram." Logan v. Western U. T. Co., 84 Ill. 468.

[2] Reese v. Western U. T. Co., 120 Ind. 294.

[3] Wadsworth v. Western U. T. Co., 86 Tenn. 695. The decision of this case was somewhat influenced by a

to a woman who was about to remove the body of her dead husband, with knowledge that the money was desired for that purpose, damages for mental suffering while she was delayed for two days in making the removal were recoverable.[1] A message sent to a physician read: "Come first train to see my wife, very low." The language suggested the necessity of speedy delivery, and made the sender's anxiety an element of recoverable damages for delay.[2] In a North Carolina case a wife about to be confined sent a message for transmission to her husband. It was not delivered. She alleged that she suffered more physical pain, mental anxiety and alarm and sustained permanent and incurable injury because of his absence. The damages were not too remote.[3] Without giving any other reason for so doing except that to hold otherwise would result in intolerable litigation the Texas court has ruled that the continued anxiety of a person who has knowledge of the illness of a relative resulting from neglect in transmitting a reply as to the condition of the sick person is not of itself an element of damage.[4]

Where there was negligent delay in delivering a message summoning the family physician to attend the plaintiff's wife in her confinement, the following propositions were ruled: 1. That the death of the child before its birth and the grief or sorrow occasioned thereby is not an element of damages. "If it is made to appear from the testimony that Mrs. C. suffered more physical pain, mental anxiety and alarm on account of her own condition than she would have done if Dr. K. had been in attendance upon her, and the failure to secure his services is shown to be due to the want of proper care on the part of the defendant's servants, whose duty it was to deliver the message, a fair and reasonable compensation should be allowed for such increased pain and mental suffering.[5] . . . Injury to the mother aione, her physical

statute which makes telegraph companies liable for damages, without distinction as to the nature of the message.

[1] Western U. T. Co. v. Simpson, 73 Texas, 422.

[2] Western U. T. Co. v. Henderson, 89 Ala. 510.

[3] Thompson v. Western U. T. Co., 107 N. C. 449.

[4] Rowell v. Western U. T. Co., 75 Texas, 26.

[5] The proposition quoted has been approved where the husband of the woman confined was absent from her on account of the negligent non-

pain and mental suffering because of her own condition, would be a proper consideration, and it would be correct to allow proof that the child was still-born, if such fact tended to show that the labor was thereby prolonged and her suffering so increased. 2. The husband could not recover for injury to his feelings. "His suffering could only be from alarm and sympathy for his wife's suffering; his distress is merely a reflection from her distress, and that might be very considerable, but it is too remote and consequential." 3. The pain and suffering for which recovery could be had was limited to that which would not have been endured if the physician had been in attendance.[1]

§ 976. Reasons upon which liability rested. In sustaining the recovery of damages for mental suffering the Texas court has thus answered the objection that they cannot be allowed independently of bodily injury: "In cases of bodily injury the mental suffering is not more directly and naturally the result of the wrongful act than in this case — not more obviously the consequence of the wrong done than in this case. What difference exists to make the claimed distinction? That it is caused by and contemplated in doing the wrongful act is the principle of liability. The wrong-doer knows that he is doing this damage when he afflicts the mind by withholding the message of mortal illness as well as by a wound to the person."[2] The Kentucky court of appeals has recently ruled that for the negligent failure to deliver telegrams announcing the illness, death and date of the funeral of the father of the person to whom they are addressed the telegraph company is liable to him in substantial damages for the injury to his feelings without proof of physical pain or pecuniary loss. Speaking for the court, Holt, J., said: "Many of the text-writers say that a person cannot recover damages for mental anguish alone, and that he can recover such damages only where he is entitled to recover some damages upon some other ground. It will generally be found, however, that they are speaking of cases

delivery of a message. Thompson v. Western U. T. Co., 107 N. C. 449.

[1] Western U. T. Co. v. Cooper, 71 Tex. 507.

[2] Stuart v. Western U. T. Co., 66 Texas, 580; Western U. T. Co. v. Cooper, 71 id. 507.

of personal injury. If a telegraph company undertakes to send a message, and it fails to use ordinary diligence in doing so, it is certainly liable for some damage. It has violated its contract, and, whenever a party does so, it is liable at least to some extent. Every infraction of a legal right causes injury in contemplation of law. The party being entitled, in such a case, to recover something, why should not an injury to the feelings, which is often more injurious than a physical one, enter into the estimate? Why, being entitled to some damage by reason of the other party's wrongful act, should not the complaining party recover all the damage arising from it? It seems to us that no sound reason can be given to the contrary. The business of telegraphing, while yet in its infancy, is already of wonderful extent and importance to the public. It is growing, and the end cannot yet be seen. A telegraph company is a *quasi*-public agent, and as such it should exercise the extraordinary privileges accorded to it with diligence to the public. If, in matters of mere trade, it negligently fails to do its duty, it is responsible for all the natural and proximate damages. Is it to be said or held that, as to matters of far greater interest to a person, it shall not be, because feelings or affections only are involved? If it negligently fails to deliver a message which closes a trade for $100, or even less, it is responsible for the damage. It is said, however, that if it is guilty of like fault as to a message to the husband that the wife is dying, or the father that his son is dead, and will be buried at a certain time, there is no responsibility save that which is nominal. Such a rule, at first blush, merits disapproval. It would sanction the company in wrong-doing. It would hold it responsible in matters of the least importance, and suffer it to violate its contracts with impunity as to the greater. It seems to us that both reason and public policy require that it should answer for all injury resulting from its negligence, whether it be to the feelings or the purse, subject only to the rule that it must be the direct and proximate consequence of the act. The injury to the feelings should be regarded as a part of the actual damages, and the jury be allowed to consider it. If it be said that it does not admit of accurate pecuniary measurement, equally so may it be said of any case where mental anguish enters into the esti-

mate of injury for a wrong, and it furnishes no sufficient reason why an injured party should not be allowed to look to the wrong-doer for reparation. If injury to the feelings be an element of actual damage in slander, libel and breach of promise cases, it seems to us that it should equally be so considered in cases of this character. If not, then the most grievous wrongs may often be inflicted with impunity; legal insult added to outrage by the party, by offering one cent, or the cost of the telegram, as compensation to the injured party. Whether the injury be to the feelings or pecuniary, the act of the violator of a right secured by contract has caused it. The source is the same, and the violator should answer for all the proximate damages."[1]

§ 977. Same subject; opposing authorities. Damages have been held not to be recoverable where they were claimed solely on account of mental suffering, though the message sent, and negligently delayed or not delivered, disclosed that the reason for desiring it sent was the death or serious illness of a person named or referred to therein.[2]

[1] Chapman v. Western U. T. Co., — Ky. —; 13 S. W. Rep. 880; 30 Am. & Eng. Corp. Cas. 626. The quotation above is approved in Young v. Western U. T. Co., 107 N. C. 370. The opinion in Reese v. Same, 123 Ind. 294, is interesting and strong.

[2] Chapman v. Western U. T. Co., 88 Ga. 763; 46 Alb. L. J. 409; Russell v. Western U. T. Co., 3 Dak. 315; West v. Same, 39 Kan. 93; Chase v. Same, 44 Fed. Rep. 554; Western U. T. Co. v. Rogers, 68 Miss. 748; Crawson v. Western U. T. Co., 47 Fed. Rep. (Ark.) 44.

It is wrongly assumed in Chase v. Western U. T. Co., 44 Fed. Rep. 554, that the Texas case which first allowed the recovery of damages for mental suffering (So Relle v. Telegraph Co., 55 Texas, 308) has been overruled by Railway Co. v. Levy, 59 id. 563. The fact is that the former case is overruled only in so far as it holds that the right to recover exists independently of a right of action on other grounds. Besides the cases referred to, the judge who wrote the opinion in the Chase case cited to sustain his view Wyman v. Leavitt, 71 Me. 227; Johnson v. Wells, etc. Co., 6 Nev. 224; Nagel v. Railway Co., 75 Mo. 653; Railway Co. v. Stables, 62 Ill. 313; Freese v. Tripp, 70 Ill. 503; Meidel v. Anthis, 71 Ill. 241; Joch v. Dankwardt, 85 Ill. 333; Porter v. Railway Co., 71 Mo. 83; Fenelon v. Butts, 53 Wis. 344; Ferguson v. Davis Co., 57 Iowa, 601; Stewart v. Ripon, 38 Wis. 584; Masters v. Warren, 27 Conn. 293; Blake v. Railway Co., 10 Eng. L. & Eq. 442; Lynch v. Knight, 9 H. of L. Cas. 577; Burke v. Railway Co., 10 Cent. L. J. 48; Rowell v. Telegraph Co., 12 S. W. Rep. 534; 75 Texas, 26; Thompson v. Same, 11 S. E. Rep. 269; 30 Am. & Eng. Corp. Cas. 634. See Wilcox v. Richmond & D. R. Co., 52 Fed. Rep. 264.

§ 978. Grounds upon which liability denied. The most recent and satisfactory discussion of the subject from the other side comes from the Mississippi court. The facts squarely raised the question whether the person to whom a message was addressed, notifying him of the death of his brother, could recover damages for mental suffering resulting from negligent delay in delivering it. The court took the view that has been taken by courts which hold that damages so occasioned may be recovered, viz., that it was immaterial whether the action be considered as for the breach of the contract or on the case for the tort in failure to perform the duty. The merits are thus discussed: "It is upon the suggestions of the text-writers, supported by authorities which have been given a strained construction, and upon a misapplication of the rule that damages for a breach of contract are commensurate with the injury contemplated by the parties, that some courts in recent years have decided that mental pain and anguish, disconnected from physical injury, furnish a substantial cause of action for which recovery may be had. The principle of limitation applied by the courts in cases involving pecuniary loss, for the necessary protection of defendants against ruin by the infliction of speculative and remote damages, has been perverted and accepted as the standard of measurement of damages in a class of cases in which the sole injury sustained is confessedly incapable of compensation, and in which any damages awarded must from the nature of things be purely speculative and uncertain. In 1881, in the case of So Relle v. Western Union Tel. Co.,[1] the supreme court of Texas, relying upon the authority of two previous decisions in that state,[2] in one of which an assault and battery had been committed on a passenger, and in the other serious and permanent physical injury had been suffered, for which damages for mental pain and anguish had been allowed, and upon a suggestion in the text of Shearman & Redfield on Negligence, unsupported by any authority, decided that the sendee of a message might recover from the company, as compensatory damages, for mental suffering caused by its failure to promptly deliver a message which announced to him the death of his mother, by

[1] 55 Texas, 308.

[2] Hays v. Railroad Co., 46 Texas, 361. 279; Railroad Co. v. Randall, 50 id.

reason of which default he was not informed of her death, and failed to attend her funeral. This decision has been since overruled upon a subordinate point, but the general proposition thereby established, that mental suffering, disconnected from physical injury, may be compensated for in actions for breach of contract, has been since repeatedly affirmed.[1] The courts of Alabama, Tennessee, Indiana and Kentucky[2] have followed the supreme court of Texas, relying upon the decisions above noted as authority. These cases, so far as we have been able to discover, rest upon the authority of each other, finding no support in the decisions of the other states or those of England. In actions for injuries sustained by the negligence of the defendant, where serious bodily harm has resulted, the generally accepted rule is that the jury may, and, since it is impossible to draw the line between physical pain and mental suffering in such instances, must give damages for both. Expressions used by the courts as argument or illustration in those cases . . . have been seized upon as sustaining a right of action for mental suffering alone, or for such suffering coupled with the right in the plaintiff to merely nominal damages." After adverting to the classes of cases in which mental suffering has been considered an element of damages, the opinion continues: "The decisions in Texas, Tennessee, Kentucky, Indiana and Alabama rest upon arguments and illustrations drawn from cases of one or the other of these classes, or upon the general proposition that damages must in all cases be commensurate with the injury sustained to the extent that they were in the contemplation of the parties to a contract, or should have been foreseen as the probable consequences of his conduct by the negligent defendant. These decisions are not, in our opinion, sustained by any of the analogies by which they are sought to be supported. These cases are totally different from those in which damages for mental suffering have been allowed, and it is notable that in

[1] Railroad Co. v. Levy, 59 Texas, 542; S. C., id. 563; Stuart v. Telegraph Co., 66 id. 580; McAllen v. Same, 70 id. 243; Telegraph Co. v. Cooper, 71 id. 507; Loper v. Telegraph Co., 70 id. 689; Telegraph Co. v. Simpson, 73 id. 422; Same v. Adams, 75 id. 531; Same v. Feegles, id. 537; Same v. Moore, 76 id. 67; Same v. Broesche, 72 id. 654.

[2] Also North Carolina. See *ante*, § 975.

no one of them is there a citation of a single case, decided prior to the case of So Relle, in which in an action for breach of contract (except actions for breach of contract of marriage), or in an action on the case for injuries resulting from mere negligence, damages were allowed for mental pain disconnected from physical injury. There is an absence of authority upon the direct question of the right of recovery for mere grief or disappointment, probably for the reason that prior to the So Relle case the bar had not entertained the view that an action therefor could be maintained; but there are several cases in which responsibility for mental disturbance by reason of fright has been considered. It has been held that fright attending an accident resulting from negligence, by which bodily injury was sustained, was properly considered by the jury in awarding damages.[1] But where there is no bodily injury, damages for fright should not be given.[2] . . . We are not disposed to depart from what we consider the old and settled principles of law, nor to follow the few courts in which the new rule has been announced."[3]

[1] Seger v. Barkhamsted, 22 Conn. 290; Masters v. Warren, 27 id. 293; Cooper v. Mullins, 30 Ga. 146; Canning v. Williamstown, 1 Cush. 451.

[2] Canning v. Williamstown, *supra;* Railway Co. v. Coultas, L. R. 13 App. Cas. 222; Wyman v. Leavitt, 71 Me. 227; Lynch v. Knight, 9 H. of L. Cas. 598.

[3] Western U. T. Co. v. Rogers, 68 Miss. 748.

The objections to the recovery of damages for mental suffering, as presented by the Georgia court through Lumpkin, J., are also worthy of consideration. Referring to the cases which hold otherwise than it does, it is said: "These rulings involve various perplexing questions on which they do not all agree. Whether the person to whom the message is sent, as well as the sender, can recover; whether the action is grounded in contract or in tort; whether the violation of a contract involving feeling is a proper basis for awarding substantial damages for injury to feelings alone; to what extent the message must show on its face the family relationship; whether the damages to be given are in their nature punitive or compensatory,— these are the chief problems encountered, and solved in various ways. Some of the cases rest on breach of contract, of which some hold that the sendee also, being the beneficiary of the contract, can maintain the action for its violation. This view grapples with the big question, how can one, in an action for breach of contract, recover for mere disappointment or anguish of mind resulting from the breach? The answer given is that the subject-matter of the contract is feeling, and the damage to feeling by non-compliance was plainly in contemplation of the parties making the contract. The breach of many a contract which the injured party desires per-

§ 979. Summary of the authorities. It elsewhere appears that mental suffering is an element of damages where a passenger is wrongfully removed from a train;[1] that "nervous

formed brings disappointment and blasted hopes. Yet these mental consequences, if unattended with other loss, have not usually been regarded ground of recovery. The stronger view is that the recovery, whether by sender or sendee, is had for the tort, or breach of common-law or statutory duty, the contract serving merely to create the relation of duty between the parties. The difficulty arising here is whether, as there is no tort independently of the contract, the contract can be rightly treated as not precluding recovery in tort, and the telegraph company can be dealt with in this respect like a common carrier. A tendency is observed to escape this difficulty by applying code provisions which abolish the distinction between contract and tort, and allow the plaintiff to recover on a simple statement of the facts of his case. In this state no such abolition has been effected. Regarding the nature of the damages the majority opinion in this class of decisions is that they are strictly compensatory, and take on the vindictive or exemplary feature only in cases where the injury is wilful, wanton or malicious. . . . The law protects the person and the purse. The person includes the reputation. The body, reputation and property of the citizen are not to be invaded without responsibility in damages to the sufferer. But outside these protected spheres the law does not yet attempt to guard the peace of mind, the feelings or the happiness of every one by giving recovery of damages for mental anguish produced by mere negligence. There is no right, capable of enforcement by process of law, to possess or maintain without disturbance any particular condition of feeling. The law leaves feeling to be helped and vindicated by the tremendous force of sympathy. The temperaments of individuals are various and variable, and the imagination exerts a powerful and incalculable influence in injuries of this kind. There are many moral obligations too delicate and subtle to be enforced in the rude way of giving money compensation for their violation. Perhaps the feelings find as full protection as it is possible to give in moral law and a responsive public opinion. The civil law is a practical business system, dealing with what is tangible, and does not undertake to redress psychological injuries. The case of Telegraph Co. v. Rogers, *supra*, suggests that the doctrine it opposes would open up a new field of litigation. This is worthy of remark. Except in Texas, suits like this have not been frequent in the past. If their foundation principle be sanctioned they are likely to multiply indefinitely. Nowhere can be found any satisfactory suggestion of a principle to restrain such suits within reasonable limits. How much mental suffering shall be necessary to constitute a cause of action? Let some of the courts favoring recovery measure out the quantity. If they are unable to do this, then on principle any mental suffering would be actionable, the degree of it merely determining the *quantum* of damages. The cases do suggest as a restriction that the plaintiff must be entitled to damages on some other

[1] § 942, *ante*.

shock" is not distinguishable from physical injury;[1] that mental anguish must be compensated for when it is accompanied by physical suffering.[2] We think that the better reasoning, as well as the weight of authority, justify the award of damages for mental pain when it results from the neglect of a telegraph company to deliver messages of the character we have been considering. It may be proper to summarize in this connection a number of cases somewhat variant from each other and from the subject-matter of this chapter, in which, a right of action existing, damages for mental suffering have been allowed. A verdict of $1,000 was not disturbed where a female passenger was kissed by a railroad conductor, although, according to her testimony, "there was no actual injury to complain of."[3] Where a physician took a non-professional unmarried man to attend with him a case

ground, or to nominal damages at least; in other words, there must be an infraction of some legal right of the plaintiff. Then the damages may be increased for the mental suffering. If the plaintiff must be entitled to substantial damages on other grounds, then mental suffering alone is not a ground for damages, which is the very point contended for. To speak of the right to nominal damages as a condition for giving substantial damages is a palpable contradiction. To give nominal damages necessarily denies any further recovery. It is said there must be an infraction of some legal right, attended with mental suffering, for this kind of damages to be given. If this be true law, why is not the mental distress always an item to be allowed for in the damages? We have seen that although allowed in some, it is in many cases excluded. Every man knows that the violation of any material right is necessarily productive of more or less pain of mind. Then why not compensate it in every instance where a right has been violated? In no case whatever are damages recoverable unless a legal duty has been broken. By the test proposed, it is first granted that mental suffering alone is not actionable; then a case arises in which there is no actual damage, unless mental suffering be such, when it is simply assumed that it is actual damage. Throwing away the lame pretense of basing recovery for mental suffering upon an otherwise harmless transgression, and stripping it of all false form and confusing technicality, it is manifest that to allow such a recovery is, in real substance, an effort to protect feeling by legal remedy. If mental suffering be a self-sufficient element of damage, as in reason it must be to recover when no other damage is claimed, why is not the causing of mental suffering itself an infraction of a legal right? Why should the law of torts lag behind the law of damages? Can it do so in a sound system?" Chapman v. Western U. T. Co., 88 Ga. 763; 46 Alb. L. J. 409.

[1] Vol. 1, § 21.

[2] § 943, *ante*.

[3] Craker v. Chicago & N. Ry. Co., 36 Wis. 657.

of confinement, no necessity for so doing existing, it was held that both were liable for damages.[1] The removal of the body of a child from the lot in which it was rightfully buried to a charity plot gives the parent a right to recover for injury to his feelings.[2] The action was trespass *quare clausum fregit*. The verdict was for $837.50. The court said: "We know of no rule of law which requires the mental suffering of the plaintiff or the misconduct of the defendant to be disregarded. The damages in such cases are enhanced, not because vindictive or exemplary damages are allowable, but because the actual injury is made greater by its wantonness." In a recent action of trespass for beating and injuring an old horse of little or no value, there was a recovery of $40. The court said: "The award, as we construe it, compensates the plaintiff for the damage he has sustained by the injury to his property, and for his mental damage by reason of the defendant's malice."[3] The verdict was sustained. An undertaker who had agreed to keep the body of plaintiff's deceased daughter in a vault until such time as he might be ready to inter it, negligently took or allowed it to be taken therefrom and buried or otherwise disposed of, and refused to give information concerning its whereabouts. Referring to the cases which allow damages for mental suffering the court said: "The cases rest upon the reasonable doctrine that where a person contracts, upon a sufficient consideration, to do a particular thing, the failure to do which may result in anguish or distress of mind on the part of the other party contracting, he is presumed to have contracted with reference to the payment of damages of that character in the event such damages accrue by reason of a breach of the contract on his part."[4] The failure to transport the corpse of a husband gives his widow a right of action in which mental suffering is an element of damage.[5] A widow may recover for such suffering and nervous shock against the person who unlawfully mutilates the dead body of her husband, although no actual pecuniary damage is alleged or proven.[6]

[1] De May v. Roberts, 46 Mich. 160.
[2] Meagher v. Driscoll, 99 Mass. 281.
[3] Kimball v. Holmes, 60 N. H. 163.
[4] Renihan v. Wright, 125 Ind. 536, 546.
[5] Hale v. Bonner, 82 Texas, 33.
[6] Larson v. Chase, 47 Minn. 307; 50 N. W. Rep. 238.

§ 980. **Author's conclusions.** The best reconsideration we have been able to give the subject of damages for mental injury, that reconsideration being had with the result of the cases decided since the original edition of this work was prepared in mind, confirms the conclusion then arrived at — given a cause of action on contract or for a tort, the allowance of damages on that account depends on the same rule by which they are allowed for any other resulting injury, namely, in an action *ex contractu* the injury to the feelings must be such as were presumably contemplated by the parties as likely to occur at the time it was made, if a breach resulted; and in an action of tort it must be the natural and proximate consequence of the wrong. In both cases the act or omission which constitutes the cause of action must in some way result in a deprivation of comfort, produce annoyance, personal inconvenience, wound the sensibilities by indignity or something like it, as distinguished from a sense of disappointment on being denied money due or a commodity for business purposes. The objections to the allowance of compensation for such injury are largely based upon reluctance to opening to juries an inquiry as to an indefinite wrong for which there is no precise measure of reparation. But when injury of this character is contemplated as likely to result from the breach of a contract the parties may, when they make their agreement, liquidate the damages; if they do not the party at fault is not entitled to immunity merely because there is danger that a jury may require him to pay too much. This consideration is still more potent in tort actions.

§ 981. **Notice to the company.** The general rule that the message must disclose or the sender must inform the agent of the company of the facts which make its prompt transmission important in order that the latter may be liable for anything more than nominal damages applies where compensation for mental suffering is sought.[1] But it is not required in a message concerning illness or death, when the subject-matter is apparent on its face, that the company shall be apprised of the relationship of the parties, unless information on that point is desired.[2] Thus a message reading: "Clara, come

[1] McAllen v. Western U. T. Co., 70 Texas, 243; Western U. T. Co. v. Kirkpatrick, 76 id. 217.

[2] Western U. T. Co. v. Adams, 75 Texas, 531; Reese v. Western U. T. Co., 123 Ind. 294.

quick; Rufe is dying," charges the company with notice that the parties are near relatives.[1]

§ 982. Measure of damages. The general rule which induces appellate courts not to interfere with the verdicts of juries unless it appears that they were rendered under the influence of passion, prejudice or other reprehensible motive, applies with especial force to awards made as compensation for mental suffering.[2] It is proper in such cases for the trial court to caution the jury not to confound the corroding grief occasioned by the loss of a near relative with the disappointment and suffering resulting from the negligence of the company.[3] A verdict for $1,168 for delay in delivering a dispatch concerning the arrival of the corpse of plaintiff's wife was sustained.[4] And where a woman was unable for two days to remove the corpse of her husband on account of delay in forwarding money by telegraph a verdict of $1,000 was held not to be excessive.[5] The same amount was ruled not to be exorbitant where a brother was unable to attend his sister's funeral because of the company's negligence;[6] and where a physician was prevented from attending the plaintiff's child for the same reason.[7] But a verdict for $4,500 was excessive in favor of a father who did not receive a message from his wife informing him that a sick child of theirs was worse, and summoning the plaintiff home, when he did not reach there until after the child's death.[8]

[1] Western U. T. Co. v. Adams, *supra;* Same v. Moore, 76 Texas, 66; Same v. Feegles, 75 id. 537; Same v. Rosentreter, 80 id. 406; 16 S. W. Rep. 25.

[2] Western U. T. Co. v. Broesche, 72 Texas, 654.

[3] So Relle v. Western U. T. Co., 55 Texas, 308; Beasley v. Same, 39 Fed. Rep. 181.

[4] Western U. T. Co. v. Broesche, 72 Texas, 654.

[5] Western U. T. Co. v. Simpson, 73 Texas, 222.

[6] Western U. T. Co. v. Rosentreter, 80 Texas, 406; 16 S. W. Rep. 25.

[7] Gulf, etc. T. Co. v. Richardson, 79 Texas, 649.

[8] Western U. T. Co. v. Houghton, 82 Texas, 561. See Erie T. & T. Co. v. Grimes, id. 89; Western U. T. Co. v. Nations, id. 539.

CHAPTER XXIII.

BREACH OF MARRIAGE PROMISE.

§ 983. Nature of the action.
984. Seduction as an aggravation.
985. Consequences of seduction.
986. Injury to feelings and other elements of damage.
987. Same subject; exemplary damages.
988. Damages for loss of marriage.
989. What will excuse a breach of the contract.
990. What may be proved in mitigation.

[316] § **983. Nature of the action.** The action for this cause is peculiar. While it is in form upon contract, and in truth based upon it and its breach, the damages are governed by principles which apply to actions for personal torts.[1] The motive of the breach may be inquired into, and may be very material in respect to the amount of damages. The right of action is so personal in its nature that it will not survive to or against personal representatives. Nor are the damages confined to the mere pecuniary loss. Either party may sue for breach by the other,[2] though in the large majority of instances the female is the plaintiff. The recovery may be for injury to her feelings, affections and wounded pride, as well as for loss of marriage.[3]

§ **984. Seduction is an aggravation.** The result of an ordinary breach of promise is the loss of the alliance and the mortification and pain consequent on the rejection.[4] If the defendant, during the subsistence of the promise, has seduced the plaintiff, this fact may be proved in aggravation of the damages.[5] The common-law practice is substantially uniform

[1] Goddard v. Westcott, 82 Mich. 180, quoting the text.

[2] There are several instances reported of actions by the male party to the contract. Baker v. Cartwright, 100 Eng. C. L. 124; Harrison v. Cage, 1 Ld. Raym. 386; S. C., 1 Salk. 24; Atchinson v. Baker, Peake Add. Cas. 103, 104.

[3] Daggett v. Wallace, 75 Texas, 352; Wilbur v. Johnson, 58 Mo. 600; Holloway v. Griffith, 32 Iowa, 409; Royal v. Smith, 40 id. 615; Wells v. Padgett, 8 Barb. 323; Harrison v. Swift, 13 Allen, 144.

[4] Sheahan v. Barry, 27 Mich. 217.

[5] Jennette v. Sullivan, 63 Hun, 361. The seduction need not be alleged. Id.

in allowing such proof. The seduction which is allowed to be proven is brought about in reliance upon the contract, and is, in itself, in no indirect way, a breach of its implied con- [317] ditions. Such an engagement necessarily brings the parties into very intimate and confidential relations, and the advantage taken of them by the seducer is as plain a breach of trust in all its essential features as any advantage gained by a trustee, guardian or confidential adviser who cheats a confiding ward, beneficiary or client into a losing bargain. It differs from ordinary breaches of trust in being more heinous. A subsequent refusal to marry the person whose confidence has thus been abused cannot fail to be aggravated in fact by the seduction. The contract is twice broken; for to the results of an ordinary breach there are added loss of character and social position, and not only a deeper shame and sorrow but a darkened future. All of these spring directly and naturally from the broken obligation. The contract involves protection and respect as well as affection, and is violated by the seduction as it is by the refusal to marry. A subsequent marriage condones the first wrong, but a refusal to marry makes the seduction a very grievous element of the injury that cannot be lost sight of in any view of justice.[1] But in Wisconsin, Indiana and Maine this matter of aggravation can- [318, 319] not be proved unless specially alleged.[2] In Kentucky, Pennsylvania and Maine the seduction cannot be proven in aggravation of damages. The act is one of mutual imprudence, and

[1] Sheahan v. Barry, 27 Mich. 217; Coil v. Wallace, 24 N. J. L. 291; Whalen v. Layman, 2 Blackf. 194; Green v. Spencer, 3 Mo. 318; Hill v. Maupin, id. 323; Conn v. Wilson, 2 Overt. 233; Goodall v. Thurman, 1 Head, 209; Williams v. Hollingsworth, 6 Baxt. (Tenn.) 12; Mathews v. Cribbett, 11 Ohio St. 330; Fidler v. McKinley, 21 Ill. 308; Tubbs v. Van Kleek, 12 Ill. 446; Kniffen v. McConnell, 30 N. Y. 285; Wells v. Padgett, 8 Barb. 323; Sherman v. Rawson, 102 Mass. 395; Kelly v. Riley, 106 Mass. 339; Sauer v. Schulenberg, 33 Md. 288; Jarvis v. Johnson, 2 West. L. Monthly, 389; Kurtz v. Frank, 76 Ind. 594; Smith v. Braun, 37 La. Ann. 225; Bird v. Thompson, 96 Mo. 424; Musselman v. Barker, 26 Neb. 737; Daggett v. Wallace, 75 Texas, 352; Giese v. Schultz, 53 Wis. 462; Bennett v. Beam, 42 Mich. 346; Dent v. Pickens. 34 W. Va. 240. As to the vindication of the general usefulness of the remedy, see observations of Parker, C. J., in Wightman v. Coates, 15 Mass. 1. A different view is advanced by Mr. Schouler in 7 South. L. Rev. 57.

[2] Leavitt v. Cutler, 37 Wis. 46; Cates v. McKinney, 48 Ind. 562; Tyler v. Salley, 82 Me. 128.

the maxim *volenti non fit injuria* applies.[1] In Maine evidence of the fact that the plaintiff had been seduced and delivered of a child may be proven if the facts are specially pleaded, for the purpose of showing her condition at the time of the breach, and increasing the damages on that account.[2]

§ 985. **Consequences of seduction.** There cannot be added to the damages awarded for mental suffering, injury to reputation and loss of virtue, compensation for the loss of time, or the expense of medical or other attendance resulting from the seduction. In considering a recovery for the last-mentioned items, Lyon, J., said, referring to the liability for the other consequences of seduction, that it is believed that none of the cases go beyond their allowance, and "it would seem that the rule as stated includes all elements of proximate injury resulting from the breach of the promise of marriage, if indeed it does not go beyond the line of proximate injury. Other elements of injury, such as loss of time, expenses of medical and other attendance and the like, might be held proximate, and might therefore increase the damages in an action of *per quod servitium amisit*, in which the seduction of the servant is proved in aggravation of the damages. In that form of action the loss of service caused by the seduction is the primary cause of action, and of course such loss is proximate. And the same may be said of the expenses which are the direct result of the act which caused the loss of service. But in this case the cause of action is further removed from the injuries just mentioned. The breach of promise of marriage is the foundation of the action; the seduction is the result of such promise — perhaps proximate — although, but for the authorities, that might well be doubted; but the loss of service and expenses of sickness which might or might not result from the seduction are certainly not the proximate results of the breach of promise, although they may be of the seduction."[3] On a second appeal of the same case it was ruled, in accordance with the foregoing quotation, that additional damages are not to be allowed because the plaintiff was gotten with child or suffered a miscarriage.[4]

[1] Burks v. Shain, 2 Bibb, 341; Weaver v. Bachert, 2 Pa. St. 80; Gring v. Lerch, 112 id. 244, 250; Tyler v. Salley, 82 Me. 128.

[2] Tyler v. Salley, 82 Me. 128.

[3] Giese v. Schultz, 53 Wis. 462; Tyler v. Salley, 82 Me. 128.

[4] S. C., 56 Wis. 487.

If seduction is, on principle, an element of damages in an action for breach of promise, and the disgrace or injury to reputation which follows it is such an element, it seems illogical to exclude any other result of the seduction from the consideration of the jury. Mental suffering may result from seduction without pregnancy following; but compensation for disgrace or injury to reputation must be based on the theory that seduction has resulted in pregnancy. Hence, the physical suffering and the expense connected with confinement, where pregnancy follows the seduction, are not more remote than injury to the reputation. It might be otherwise where there is a miscarriage. In Minnesota it is held that evidence of the physical condition, the sickness of the plaintiff directly after the intercourse with the defendant, is admissible both for the purpose of corroborating her testimony and as bearing upon the matter of damages.[1]

§ 986. Injury to feelings and other elements of damage. As the plaintiff is entitled to recover damages for injury to her feelings any circumstances may be proved which tend to increase or mitigate this injury.[2] The plaintiff may show that she announced the fact of her engagement to her friends and invited them to her wedding;[3] that the defendant assigned as a reason for discontinuing his attentions to her that she

[1] Schmidt v. Durnham, 46 Minn. 227. See next note.

[2] In Goddard v. Westcott, 82 Mich. 180, 188, the following instruction was approved as not including any special damages: "And first, she is entitled to damages as compensation for loss of time, for any expense she may have been put to in making preparations for marriage, for mental suffering which may have been occasioned by the breaking off of the contract, for injury to her health, if any, for loss of a permanent home, and the worldly advantages which might have been derived therefrom by her — the circumstances as to home, property and pecuniary condition of the defendant being considered from the evidence in the case, and her own lack of independent means, if established. She is entitled [to compensation for damage] to her reputation, if any, either moral or physical, for injury to her future prospects of marriage. She is entitled to damages for any humiliation, contempt or mortification she may have suffered in the circles wherein she has moved, by reason of the breach of the contract upon defendant's part. All these she may recover by way of compensatory damages; and these she would be entitled to even if the jury should find that he broke the contract in a careful, considerate, discreet and kindly manner."

[3] Reed v. Clark, 47 Cal. 194; Vanderpool v. Richardson, 52 Mich. 336.

was a thief, and had submitted her person to his pleasure.[1] Evidence may be given of defamatory words, actionable in themselves, or otherwise as circumstances of contumely and aggravation which attended the defendant's refusal to perform his contract;[2] but it has been held not an indecent and an insulting letter written by the defendant to the plaintiff after the commencement of the action.[3] It is doubtful if a recovery can be had for slanderous words used either before or after the commencement of the suit, because the defendant is liable therefor in a distinct action, and if it is brought cannot set up a recovery in the breach of promise suit.[4] Any misconduct of the defendant in which the plaintiff did not participate at the time of the breach, or before or afterwards, tending to increase the injury therefrom may be shown, as well as loss of time and expense incurred in preparations for marriage.[5] The jury in estimating the damages, therefore, may well take into account, as has been stated, the seduction of the plaintiff by the defendant as tending to increase the mortification and distress suffered by her.[6] In the exercise of their right to draw inferences from facts proved, it is competent for them in estimating the damages to consider the [320] period of time that had elapsed pending the engagement,[7] the intimacy of the parties, the frequency of the defendant's visits, the time, place and circumstances of making them; the imputations, if any, cast upon the plaintiff's character under the circumstances by the defendant's denial on oath, that notwithstanding all these considerations, he never promised or intended to marry her.[8] In such a case, if the jury discredit his testimony in such denial, they have a right to regard it as an attempt on his part in the most public and solemn manner

[1] Chesley v. Chesley, 10 N. H. 327.

[2] Id.

[3] Greenleaf v. McColley, 14 N. H. 303.

[4] Greenup v. Stoker, 7 Ill. 688; Dunlap v. Clark, 25 Ill. App. 573.

[5] Baldy v. Stratton, 11 Pa. St. 316. See Smith v. Sherman, 4 Cush. 408; Thorn v. Knapp, 42 N. Y. 474; Dunlap v. Clark, 25 Ill. App. 573; Goddard v. Westcott, 82 Mich. 180.

[6] Sherman v. Rawson, 102 Mass. 395; Musselman v. Barker, 26 Neb. 737; Berry v. Da Costa, L. R. 1 C. P. 331; Bennett v. Beam, 42 Mich. 463.

[7] Coolidge v. Neat, 129 Mass. 146; Vanderpool v. Richardson, 52 Mich. 336; Grant v. Willey, 101 Mass. 356; Miller v. Rosier, 31 Mich. 475.

[8] Lawrence v. Cooke, 26 Me. 187; Chellis v. Chapman, 125 N. Y. 214.

to excite groundless suspicions against the plaintiff's character.[1] In fixing the amount of damages the jury may take into consideration the nature of the defense set up; if by pleading or evidence the defendant attempts to justify or palliate his abandonment or breach of the contract to marry on the ground of any misconduct or bad character of the plaintiff, and fails to establish the same and had no reasonable grounds for believing any such objections to exist, such defamatory and fraudulent defense may be considered by the jury as increasing the injury and justifying a larger verdict.[2] To justify any increase of damages on account of such defense not established, the jury should be satisfied that it is interposed in bad faith.[3] Where the only evidence offered to sustain the allegation of unchastity was of the defendant's own criminal conduct with the plaintiff, the claim of good faith was pronounced baseless.[4] But in Wisconsin it is held that allegations of plaintiff's unchastity in the answer, though unsupported by any evidence, are not cause for aggravating the damages unless the charges were made dishonestly or in bad faith.[5]

§ 987. Same subject; exemplary damages. It is the policy of the law to encourage matrimony, and society has an interest in contracts of marriage both before and after they are consummated. A man who enters into such a contract with improper motives, and then ruthlessly and unjustifiably breaks it, does a wrong to the woman, and, also, in a more remote sense, to society; and needs to be punished in the interest of society, equally with the man who commits a tort under circumstances showing a bad heart. The rule of damages applicable to ordinary contracts would be wholly inadequate; — so much depends upon the circumstances surrounding the case, upon the conduct, standing and character of the parties. [321] Accordingly, in actions for breach of promise of marriage,

[1] Id.; Duvall v. Fuhrman, 3 Ohio Ct. Ct. 305.

[2] Denslow v. Van Horn, 16 Iowa, 476; Southard v. Rexford, 6 Cow. 254; Reed v. Clark, 47 Cal. 194; White v. Thomas, 12 Ohio St. 312; Kniffen v. McConnell, 30 N. Y. 285; Thorn v. Knapp, 42 N. Y. 474; Kelley v. Highfield, 15 Ore. 277.

[3] Leavitt v. Cutler, 37 Wis. 46; Simpson v. Black, 27 Wis. 206; Powers v. Wheatly, 45 Cal. 113; Clark v. Reese, 35 Cal. 89; Blackburn v. Mann, 85 Ill. 222; Kelley v. Highfield, 15 Ore. 277.

[4] Kelley v. Highfield, 15 Ore. 277.

[5] Alberts v. Albertz, 78 Wis. 72.

where it appears that the contract was made and broken, exemplary damages may be given if the defendant was actuated by such motives and has been guilty of a ruthless and unjustifiable breach.[1] The jury may give such an amount of damages, not flagrantly excessive and disproportionate to the injury, as will mark their disapprobation of, and deter others from, the violation of such sacred promises.[2] For this purpose the jury may take into consideration all the facts and circumstances of the case, and the conduct of both parties towards each other, and particularly the conduct of the defendant in his whole intercourse with and treatment of the plaintiff in connection with the making and breach of the contract, and afterwards up to and including the defense and trial of the action.[3] It is, among other facts, a legitimate subject for the consideration of the jury, if the fact is so, that the defendant not only abandoned the plaintiff and trifled with her affections, but had sought to disgrace her and ruin [322] her character.[4] If the abandonment of the plaintiff by

[1] Johnson v. Travis, 33 Minn. 231; Kelley v. Highfield, 15 Ore. 277; Chellis v. Chapman, 125 N. Y. 214; Duvall v. Fuhrman, 3 Ohio Ct. Ct. 305; Thorn v. Knapp, 42 N. Y. 474; Coryell v. Colbaugh, 1 N. J. L. 77; Johnson v. Jenkins, 24 N. Y. 252.

[2] Coil v. Wallace, 24 N. J. L. 291.

[3] Kelley v. Highfield, 15 Ore. 277, 282, quoting the text.

[4] Thorn v. Knapp, 42 N. Y. 474, per Smith, J. The general principles here stated, it is believed, are sustained by the best authorities, and, considering the exceptional character of the action, are just and reasonable. They are also ably discussed and illustrated by Earl, C. J., in the same case. He says: "In such actions it is not only proper to show the main transaction, but any facts bearing upon or relating to it, showing that it was done wantonly, maliciously and wickedly, with the view of enhancing the damages. It is upon this theory that, in an action of slander, the plaintiff is permitted to prove the repetition of the slanderous words subsequent to the time alleged in the complaint, even down to the trial. This proof is allowed, not to sustain the action, and not for the purpose of recovering damages for the words thus repeated, but solely for the purpose of proving the malice which prompted the utterance of the words counted on, and thus bearing upon the damages to be allowed on account of them. And so, if, instead of repeating the slanderous words orally, they are repeated by being set up as a justification or in mitigation in the answer, and thus placed upon the records of the court, and the defendant fails to prove them, for precisely the same reason, and upon the same theory, the damages may be enhanced. So in an action for breach of promise of marriage, it is always competent, for the purpose of enhancing the damages, to prove the motive that actu-

the defendant was wanton and ruthless, and so accomplished as to manifest an intent unnecessarily to wound her feelings, injure her reputation, and destroy her future prospects, all the circumstances showing the latter to have been influenced by bad motives may be proved, and then the largest measure of damages, not only by way of compensation to the plaintiff, but by way of punishment to the defendant, are proper.[1] On the contrary, if the breach of promise was occasioned by a

ated the defendant; that he entered into the contract and broke it with bad motives and a wicked heart; and it is competent for him to prove, in mitigation of damages, that his motives were not bad, and that his conduct was neither cruel nor malicious. In the case of Johnson v. Jenkins, 24 N. Y. 252, it was held competent, in mitigation of damages, for the defendant to prove, when asked by the plaintiff why he had discontinued his visits to her, that he declared that his affection and regard for her were undiminished, but that he could not marry her, because his parents were so violently opposed to the match. Judge Allen, writing the opinion of the court, says: 'Every circumstance attending the breaking off of the engagement becomes part of the *res gestæ*. The reasons which were operative and influential with the defendant are material, so far as they can be ascertained; and whether they are such as, tending to show a willingness to trifle with the contract and with the rights of the plaintiff, should enhance the damages, or, on the contrary, showing a motive consistent with any just appreciation of and regard for his duties, should confine the damages within the limit of a just compensation, will always be for the jury to determine.' 'Had the defendant, by his declarations, shown a wicked mind in the transaction, it is evident that they very properly would have been submitted to the jury further to enhance the damages.' Suppose he had told the plaintiff, at any time before the trial of the action, that he had discontinued his visits and broken the contract because she was a prostitute; could she not, upon the same principles, have proved this in enhancement of damages? No damages could be allowed for defaming her by the utterance of these words, but they could be proved as showing the *mind* with which the contract was broken, and as thus bearing upon the damages to be allowed for that. So, if this language, instead of being uttered orally, is placed upon the record in the answer, for the same reason and upon precisely the same principle, if the defendant fails to prove it, and it turns out to be untrue, it may be taken into consideration by the jury in aggravation of the damages." On this principle it would seem proper that the jury should consider the letter excluded in Greenleaf v. McColley, 14 N. H. 303, and the affidavit excluded in Leavitt v. Cutler, 37 Wis. 46.

The marriage of the defendant to a third person subsequently to the bringing of the suit cannot be proven to show that he was deceitful or malicious toward the plaintiff. Dent v. Pickens, 34 W. Va. 240.

[1] Johnson v. Jenkins, 24 N. Y. 252.

change of circumstances, which, without legally justifying, took from the abandonment all its character of cruelty and wantonness, and the defendant, in withdrawing from his en- [323] gagement, was tender of the feelings and reputation of the plaintiff, and so accomplished his purpose as to leave no stain upon her reputation, and do the least injury to her feelings and future prospects, it would be a case for compensatory damages merely.[1]

§ 988. **Damages for loss of marriage.** In determining the damages for the loss of marriage, where no special damages are alleged, the jury may take into view the money value or worldly advantages, separate from considerations of sentiment and affection, of the marriage which would have given her a permanent home and an advantageous establishment; and if her affections were in fact implicated, and she had become attached to the defendant, the injury to her affections may be considered as an additional element of damage.[2] It is proper

[1] Id.; Moore v. Hopkins, 83 Cal. 270; Dupont v. McAdow, 6 Mont. 226; Goddard v. Westcott, 82 Mich. 180.

[2] Dupont v. McAdow, 6 Mont. 226, quoting the text; Allen v. Baker, 86 N. C. 91; Harrison v. Swift, 13 Allen, 144.

In Coolidge v. Neat, 129 Mass. 146, 149, the following instruction was approved as being in conformity with repeated decisions of the supreme court: "As elements of damage the jury would have the right to consider: 1. The disappointment of the plaintiff's reasonable expectations, and to inquire what she had lost by reason of such disappointment, and, for that purpose, to consider, among other things, what would be the money value or worldly advantage of a marriage which would have given her a permanent home and an advantageous establishment. 2. The wound and injury to her affections, whatever mortification or distress of mind she suffered, resulting from the refusal of the defendant to fulfill his promise. That, in connection with the question how she had been wounded in her affections or suffered mortification or distress, the jury might consider the length of time during which the engagement had subsisted; that if a female had been wantonly deserted, after an engagement of this kind, public policy as well as justice dictated the propriety of a legal indemnity, and if her affections had been deeply implanted, her wounded spirit, the disgrace, the insult to her feelings, the probable solitude which might result by reason of such desertion after a long courtship, were all matters for their consideration. It cannot be assumed that the defendant, by associating with the plaintiff, prevented her from forming any other marriage alliance or engagement to marry. The plaintiff might have had no other opportunity for marriage, and the defendant cannot be held responsible for merely possible damage."

for the jury to consider the pecuniary as well as the social standing of the defendant, as tending to show the condition in life which the plaintiff would have secured by the marriage.[1] In these cases the jury should take into consideration the rank and condition of the parties, the estate of the defendant, and all the facts proven.[2] And the amount of damages not being capable of measurement by any precise rule is left for decision to the discretion of the jury on the circumstances of each particular case,[3] subject to the power of the court to set aside the verdict when it appears that the jury has been misled or influenced by passion or prejudice.[4]

[1] Richmond v. Roberts, 90 Ill. 472; Crosier v. Craig, 47 Hun, 83; McPherson v. Ryan, 59 Mich. 33; Johnson v. Travis, 33 Minn. 231; Bennett v. Beam, 42 Mich. 346; Olson v. Solveson, 71 Wis. 663; Dent v. Pickens, 34 W. Va. 240; Chellis v. Chapman, 125 N. Y. 214; Holloway v. Griffith, 32 Iowa, 409.

In Harrison v. Cage, Carthew, 467, an action for breach on the part of the woman, the value of her estate when the plaintiff courted her and also its subsequent increase was shown. Evidence of reputation as to wealth is admissible. Chellis v. Chapman, 125 N. Y. 214; Kerfoot v. Marsden, 2 F. & F. 160; Kniffen v. McConnell, 30 N. Y. 289.

[2] Id.; Jarvis v. Johnson, 2 Western L. Monthly, 389; Royal v. Smith, 40 Iowa, 615; Reed v. Clark, 47 Cal. 194.

[3] Southard v. Rexford, 6 Cow. 254; Wilbur v. Johnson, 58 Mo. 600; Holloway v. Griffith, 32 Iowa, 409; Lawrence v. Cooke, 56 Me. 187; Goodall v. Thurman, 1 Head, 209; Denslow v. Van Horn, 16 Iowa, 476; Richmond v. Roberts, 98 Ill. 472; Schreckengast v. Ealy, 16 Neb. 510; Musselman v. Barker, 26 id. 737; Kelley v. Highfield, 15 Ore. 277; Daggett v. Wallace, 75 Tex. 352; Giese v. Schultz, 69 Wis. 521; Olson v. Solveson, 71 id. 663.

[4] Wilbur v. Johnson, 58 Mo. 600; Collins v. Mack, 31 Ark. 684; Douglass v. Gausman, 68 Ill. 170; Gough v. Farr, 1 Younge & J. 477; Goodall v. Thurman, 1 Head, 209.

In Smith v. Woodfine, 1 C. B. (N. S.) 660, Cresswell, J., said: "I am far from denying that there may be cases in which it may be the duty of the court to interfere with the verdict of the jury. If, for instance, it appeared that it had been obtained by means of perjury, that would be ground for setting aside the verdict. So, if it were shown that evidence was given which had taken the defendant by surprise, and which he could have had no opportunity to meet. It is said here that the defendant was surprised at the amount at which his property was estimated by the plaintiff's witnesses. . . . But at all events, it cannot be said that the plaintiff artfully relied on the statements of the defendant and abstained from giving other evidence in her power in order to mislead the jury as to the value of the defendant's property. Was it surprise that the question as to his circumstances was entered into? Certainly not; for that is an inquiry that is invariably gone into in cases of this sort, and therefore it was his duty to be prepared for it. . . . There has

[324] Where the plaintiff introduces no proof as to the defendant's pecuniary condition it has been held that the latter cannot bring in such testimony on his own behalf to reduce the amount of damages.[1] But as damages for loss of marriage are to be ascertained by considering the rank and condition of the parties, and as the pecuniary standing of the defendant is a material element, the offer of proof of that condition by him is not so much to reduce damages as to exhibit the state of facts from which they are primarily to be determined. The true principle is well stated in an Iowa case.[2] While in such action the question whether the defendant will, in view of his pecuniary circumstances, be able to pay the damages awarded should have no influence with the jury in arriving at the amount of their verdict, they may, nevertheless, properly consider the pecuniary as well as social standing of the defendant as tending to show the condition in life which the plaintiff would have secured by a consummation of the marriage contract.[3] In a Maine case the instruction of the trial court to the effect that, if the jury found for the plaintiff, the rule in actions of this sort, as in other cases, is that the plaintiff is entitled to such damages as will place her in as good condi-
[325] tion as she would have been in if the contract had been fulfilled, was approved. It was construed as referring to her pecuniary condition. Her loss of pecuniary support is one of the elements of damage. Evidence of the defendant's pecuniary ability was properly introduced to show the probable

been no perjury and no fraud or misconduct on the part of the plaintiff to deprive the defendant of a fair opportunity of laying his case before the jury, nor is there any suggestion that the jury were acting under any prejudiced view or that they misunderstood any particular piece of evidence. There has been no perjury, no surprise, no prejudice, no mistake. But it is said that the jury have awarded the plaintiff an unreasonable and excessive amount of damages. No legitimate ground being laid for it, it seems to me that we should be guilty of a most inconvenient and unconstitutional exercise of our power if we took upon ourselves to interfere with the discretion which the law has, in a peculiar manner, vested in the jury in cases of this sort." See Berry v. Vreeland, 21 N. J. L. 184.

[1] Wilbur v. Johnson, 58 Mo. 600.

Where the evidence does not show the loss of a permanent home, it is error for the court to instruct that damages may be awarded on that account. Dunlap v. Clark, 25 Ill. App. 573.

[2] Holliday v. Griffith, 32 Iowa, 409.

[3] Royal v. Smith, 40 Iowa, 615.

character of such support. The instruction was treated as calling for the judgment of the jury upon the question of the pecuniary value to the plaintiff of a matrimonial alliance with the defendant, and in that view was held unobjectionable.[1]

The relevancy of the defendant's financial condition to the plaintiff's cause of action is placed on impregnable ground by the reasoning of the Michigan court: "In this state it is a well-settled legal axiom that the just theory of an action for damages, and its primary object, are that the damages recovered shall compensate for the injury sustained. . . . Now the contract for a breach of which this suit was brought was one for a life association of interests, and it is one of the most obvious facts that the pecuniary circumstances of the defendant, as well as his social position, would largely influence any one's estimate of the damages suffered. This would be so even if the woman had in no manner taken the man's property into account in engaging herself to him; but the law always supposes that property considerations are not ignored in these cases. In cases like the present what loss is it that the plaintiff has sustained by a breach of the contract? To determine this we must look at the surroundings, and see what it was to which the defendant invited her. If it was to a home of poverty and a life of probable hardship and misery, the loss would apparently be small, but if it was to a home possessed of and surrounded by all the comforts and even the luxuries of life, and where her social position in the circles in which she would move by right of the marriage would be the very best, the case would be exactly the opposite, because in such case there would be abundant promise of social and domestic happiness. But beyond this the very marriage confers certain rights in the husband's real and personal estate of which she cannot afterwards be deprived, except by her own consent, and she would naturally and justly look to them as her security against becoming dependent through the accidents and misfortunes of life. It is all these that the breach of the marriage contract deprives the woman of, and she is allowed to prove them, not to show that he will be able to satisfy a judgment if she obtains one, but to measure the extent of her loss."[2]

[1] Lawrence v. Cooke, 56 Me. 187.

[2] Bennett v. Beam, 42 Mich. 346. See Miller v. Rosier, 31 id. 475.

The evidence of the defendant's financial ability must be limited to the time the breach occurred, or to such time as he might reasonably be expected to fulfill his contract.[1]

§ 989. What will excuse a breach of the contract. A man is not legally holden on his promise of marriage and may justify his refusal to fulfill it if he made it in ignorance of the fact that the woman had an illegitimate child, or had committed fornication with other men, and on that ground declines entering into the marriage.[2] All promises of this kind are founded upon the presumption of chastity on the part of the woman. This is the consideration of the contract, and [**326**] where that is discovered to have failed, she has herself been guilty of the first breach.[3] And if she be guilty of such immorality after the promise it will be a bar.[4] But if the defendant made his promise with knowledge of such past misconduct with other men, or if such misconduct occurs afterwards with his connivance, it is no bar.[5] In an early Massa-

[1] Dent v. Pickens, 24 W. Va. 240.

[2] Guptill v. Verback, 58 Iowa, 98; Bench v. Merrick, 1 C. & K. 463; Irving v. Greenwood, 1 C. & P. 350; Boynton v. Kellogg, 3 Mass. 189; Berry v. Bakeman, 44 Me. 164.

In Wharton v. Lewis, 1 C. & P. 529, it was held that if it appear that the defendant was induced to make the promise or to continue the connection, either by misrepresentation or willful suppression of the real state of the circumstances of the family and previous life of the plaintiff, this goes in bar, and not to the damages only. And in Baddeley v. Mortlock, Holt's N. P. 151, which was an action against a woman for breach of a promise of marriage, it was held a sufficient justification for non-performance that the person to whom she had given the promise turned out upon inquiry to be a man of bad character. The bad conduct charged against the plaintiff was dishonesty in some pecuniary concerns and perjury.

In Foulkes v. Sellway, 3 Esp. 236, Lord Kenyon ruled that where the defendant relies upon general bad character a witness may be examined as to representations made to him by third persons.

In Berry v. Bakeman, 44 Me. 164, Tenny, C. J., said no case has been found which sustains the principle that a breach of the criminal law by the plaintiff, accruing after the promise or before the promise, of which the party contracting is ignorant, will necessarily be a bar to a suit, but such conduct would be material on the question of damage.

[3] Budd v. Crea, 6 N. J. L. 370.

[4] Boynton v. Kellogg, 3 Mass. 189; Burnett v. Simpkins, 24 Ill. 264; Johnson v. Travis, 33 Minn. 231.

Plaintiff's unchaste and lewd habits cannot be proven unless they are pleaded. Smith v. Braun, 37 La. Ann. 225.

[5] Johnson v. Travis, 33 Minn. 231; Kelley v. Highfield, 15 Ore. 277; Denslow v. Van Horn, 16 Iowa, 476; Burnett v. Simpkins, 24 Ill. 264; Johnson v. Smith, 3 Pittsb. 184.

chusetts case[1] the following distinctions were declared as law, and they appear to be generally recognized by later adjudications: 1. That if the woman was of bad character at the time of the contract and that was unknown to the defendant the verdict ought to be in his favor. 2. If the plaintiff after the promise had prostituted her person to any other than the defendant she thereby discharged the defendant. 3. If her conduct was improperly indelicate, although not criminal, before the promise, and it was unknown to the defendant, it ought to be considered in mitigation of damages. 4. If such was her conduct after the promise it was proper, in the same view, for the consideration of the jury. So, when a man breaks off the engagement after he has seduced the woman, and does so on grounds furnishing no excuse or reason, and on the trial produces evidence of her previous incontinence before or during the engagement, of which he had no knowledge or suspicion before he so broke off the engagement, such evidence, if believed, will go in mitigation only, and not in bar of damages.[2] Lord Ellenborough charged in a case brought by a man that if he had conducted himself in a brutal or violent manner and threatened to use the defendant illy, she had a right to say that she would not commit her happiness to such keeping, and such facts would constitute a legal defense.[3] The marriage engagement is made upon the assumption that the woman is perfect as such; if the fact is otherwise it is a defense to an action for the breach of the contract. If she informs the man of her defective physical condition and promises to have it remedied, but does not do so, he is not bound to marry her. The defect that works this result need not be such as would entitle him to a divorce if he was her husband.[4]

§ 990. What may be proved in mitigation. If a man promises to marry a woman, knowing at the time that she had borne an illegitimate child, or that she is loose and immodest, he is bound by his contract, and if he refuses to perform it must respond in damages.[5] Such actions, however, are brought

[1] Boynton v. Kellogg, 3 Mass. 189. See Goddard v. Westcott, 82 Mich. 180.

[2] Sheahan v. Barry, 27 Mich. 217.

[3] Leeds v. Cook, 4 Esp. 256.

[4] Gring v. Lerch, 112 Pa. St. 244.

[5] Irving v. Greenwood, 1 C. & P. 350; Bench v. Merrick, 1 C. & K. 463;

to recover, among other things, for injury to reputation, and [327] therefore it is involved in them, and must necessarily depend on the general conduct of the party subsequent as well as previous to the injury complained of.[1] It may be the subject of inquiry on the question of damages, for a loose and immodest woman cannot be said to be entitled to so large a compensation as one on whose reputation no imputation has ever rested.[2] Any misconduct showing that the party complaining would be an unfit companion in married life may be given in evidence in mitigation.[3] But the defendant cannot reduce damages by showing his want of affection for the plaintiff, on the assumption that he would not fulfill the duties of a husband.[4] She may, however, show that she is sincerely attached to the defendant.[5] So it has been held that declarations made by the plaintiff after the breach that she would not marry the defendant but for his money may be proved by him in mitigation of damages,[6] but such declarations made after the commencement of the action have been excluded.[7] The defendant may show instances of licentious conduct in the plaintiff, and her general character as to sobriety and virtue.[8] A defendant, however, who was shown to have seduced the plaintiff and gotten her with child was held not entitled to prove her general reputation. Parker, J., said: "It appears from the declaration in this case that the plaintiff

Denslow v. Van Horn, 16 Iowa, 476; Morgan v. Yarborough, 5 La. Ann. 316; Woodard v. Bellamy, 2 Root, 351; Johnson v. Caulkins, 1 Johns. Cas. 116; Johnson v. Smith 3 Pittsb. (Pa.) 184.

[1] Willard v. Stone, 7 Cow. 22; Johnson v. Caulkins, 1 Johns. Cas. 116; S. C., 3 id. 437.

[2] Bench v. Merrick, 1 C. & K. 463; Johnson v. Caulkins, *supra;* Von Storch v. Griffin, 77 Pa. St. 504; Budd v. Crea, 6 N. J. L. 370; Butler v. Eschleman, 18 Ill. 44; Burnett v. Simpkins, 24 Ill. 264; Denslow v. Van Horn, 16 Iowa, 476; Palmer v. Andrews, 7 Wend. 142; Daubet v. Kirkman, 15 Ill. App. 622; Kantzler v. Grant, 2 id. 236; Dupont v. McAdow, 6 Mont. 226.

[3] Leeds v. Cook, 4 Esp. 256; Button v. McCauley, 5 Abb. (N. S.) 29; Alberts v. Albertz, 78 Wis. 72.

[4] Richmond v. Roberts, 98 Ill. 472; Coolidge v. Neat, 129 Mass. 146; Piper v. Kingsbury, 48 Vt. 480. See Hall v. Wright, 96 Eng. C. L. 745, 763.

[5] Sprague v. Craig, 51 Ill. 288.

[6] Miller v. Rosier, 31 Mich. 475.

[7] Miller v. Hayes, 34 Iowa, 496.

[8] Johnson v. Caulkins, 1 Johns. Cas. 116; S. C., 3 id. 437; Foulkes v. Sellway, 3 Esp. 236; Williams v. Hollingsworth (Tenn.), 6 Baxt. 12; Cole v. Holliday, 4 Mo. App. 94; Button v. McCauley, 38 Barb. 413, 417, 418; S. C., 5 Abb. (N. S.) 29; Alberts v. Albertz, 78 Wis. 72.

had been seduced by the defendant, and that pregnancy was the consequence of the seduction. This, of itself, would degrade her in the estimation of the public; and the defendant wishes to avail himself of this degradation, a consequence of his own misconduct, to avoid the plaintiff's action, or to reduce the sum she may recover in damages. No argument can show the absurdity of such a proposal in a stronger light than [328] the bare statement of it. A gentleman, under pretense of courtship, pursues a lady to seduction, leaves her to suffer the pain and ignominy which necessarily follow, and when she appeals to the laws of her country for a pecuniary satisfaction, even that, inadequate as it is, is to be resisted or reduced by arguing her ignominy as a reason why she should not recover. To permit such a defense would be a reproach upon the administration of justice."[1] Nor will a defendant be permitted to show by general reputation that after the promise another had supplanted him in the affections of the plaintiff.[2] He may prove in mitigation of damages that at the time of the breach he was afflicted with an incurable disease.[3] If, however, the disease was contracted subsequently to the promise, or if before, and he knew it was incurable, he must respond in damages; but it is otherwise if it was contracted prior to the engagement and he had reason to believe that it was temporary only.[4] The courts are not agreed concerning the proof of a subsequent offer to perform the contract. The weight of authority is against its reception for the purpose of mitigating damages.[5]

[1] Boynton v. Kellogg, 3 Mass. 187; Espy v. Jones, 37 Ala. 379.

[2] Willard v. Stone, 7 Cow. 22.

[3] Sprague v. Craig, 51 Ill. 288; Mabin v. Webster, 129 Ind. 430; 28 N. E. Rep. 863 (if the plaintiff knew of the affliction). See Hall v. Wright, 96 Eng. C. L. 745.

[4] Allen v. Baker, 86 N. C. 91.

[5] Southard v. Rexford, 6 Cow. 254; Kurtz v. Frank, 76 Ind. 594; Holloway v. Griffith, 32 Iowa, 409.

Where the offer was made after the trial had begun, and not on the theory that the defendant had or supposed he had good reason for committing the breach, the court said: "The contract of marriage is one so dependent upon affection that where this wanting a union would be more likely to add to than lessen the damages; instead of bringing happiness to the parties, it would be more likely to entail life-long misery on one or both. The affection which the plaintiff may have had for the defendant, and under the influence of which she may even eagerly have accepted a matrimonial alliance with him, may by his subsequent conduct have been turned into loathing and contempt, so that a marriage which

It is doubtful if any hard and fast rule can be laid down on this proposition. The facts and circumstances of the whole case will determine whether such evidence is to be received or rejected. The defendant cannot affect his liability by proof of relationship where the degree is not within the prohibition of the statute;[1] nor by the fact that the plaintiff did him bodily harm after the breach was committed.[2] The acts, conduct and declarations of the defendant after the breach and down to the time of trial may be proven in mitigation if they have a tendency to that end.[3] Where seduction is proved by way of aggravation its consideration in that view cannot be excluded on account of the existence or even the prior actual enforcement of the parent's or master's right of action for that wrong, for such action is not for the same injury; although the damages they may recover for loss of service are allowed to be much larger than the value of wages could have been, they

at a certain time would have been to her one of the most desirable of events would at a subsequent period, even in thought, be repulsive. A supposed virtuous man of wealth, refinement and respectability gains the affections of a young lady, and under a promise of marriage accomplishes her ruin, then abandons her and enters upon a life of open and notorious profligacy and debauchery, and when sued he offers to carry out his agreement — offers himself in marriage, when any woman with even a spark of virtue or sensibility would shrink from his polluted touch. To hold that the offer of such a skeleton and refusal to accept could be considered even in mitigation of damages would shock the sense of justice and be simply a legal outrage. Such an offer could in no way atone for the past, or have any tendency to show that the defendant had not and was not acting in a most heartless and outrageous manner; yet the principle which would admit the evidence rejected in this case would admit it also in the one supposed." Bennett v. Beam, 42 Mich. 346.

The Alabama court took a less sentimental view in holding that the offer might be proven: "The foundation of this action is the loss of the benefit which the injured party might have received from the union, if that had taken place, as well as compensation to her wounded feelings and character; and if the other party has honestly offered her all the advantages of his wealth and station in the proposal to make her his wife, we can perceive no reason why the jury should not consider it in mitigation of damages," especially as by the offer he does much to relieve her character, if that was impaired by his conduct, and has salved at least her wounded pride. Kelly v. Renfro, 9 Ala. 325.

[1] Alberts v. Albertz, 78 Wis. 72.

[2] Schmidt v. Durnham, 46 Minn. 227.

[3] Crandall v. Quin, 51 N. Y. Super. Ct. 276.

are nevertheless, in legal contemplation, the damages of the parent or master and not of the woman.[1] The engagement of the plaintiff to another man at the time the defendant promised to marry her, and her fraudulent representation to the contrary, does not mitigate the damages if the engagement for the breach of which she sues was continued after knowledge of the previous one and its discontinuance.[2]

[1] Sheahan v. Barry, 27 Mich. 217; Wells v. Padgett, 8 Barb. 323.

[2] Alberts v. Albertz, 78 Wis. 72.

CHAPTER XXIV.

EJECTMENT.

§ 991. Proceedings regulated by statute.

SECTION 1.

MESNE PROFITS.

§ 992. The remedy for.
993. What may be allowed as damages.
994. Recovery limited to compensation.
995. Proof of rental value.
996. What property withheld.
997. Interest.
998. Compensation on recovery of a term.
999. Claims for improvements, taxes, etc.
1000. Remedy under the code.

SECTION 2.

DOWER.

1001. The right of.
1002. It is assignable on a valuation.
1003. Damages for detention of dower.
1004. Extinguishment of dower right.
1005. Reprisals.
1006. Dower limited to husband's equitable interest.
1007. Dower right subject to incumbrance.

[329] § **991. Proceedings regulated by statute.** The damages for withholding possession of real property are recoverable in this country by proceedings, to a great extent regulated by statute, either in the action for recovery of its possession, [**330–343**] or in a supplementary suit or proceeding. The action for recovery of the land is made in many states a bar to any other action or proceeding to recover *mesne* profits. But in most cases, even though such profits may be recovered in the same action in which the land is recovered, the common-law action for them may be maintained after the action for the recovery of the land has been determined in favor of the plaintiff.[1]

[1] Tyler on Eject. 838.

Section 1.

MESNE PROFITS.

§ 992. The remedy for. The action of trespass for *mesne* profits is consequential to the recovery in ejectment.[1] The plaintiff in the latter, upon the introduction of the fictions by which the proceedings were distinguished, was a nominal party, and the damages assessed became nominal also.[2] As these damages are not given in satisfaction of the *mesne* profits, but only entitle the plaintiff to costs,[3] the recovery [**344**] of the latter will not preclude him from the recovery of such profits by action[4] — that is, in trespass.[5] Where his title expires after the commencement of the ejectment suit and before trial, he cannot recover the land, but he is entitled to damages and costs; and these he is entitled to recover in such suit. This was allowed at common law,[6] and is a right now very generally declared by statute. In this action of trespass for *mesne* profits after recovery in ejectment, the tenant or de-

[1] Lord Mansfield in Aslin v. Parkin, 2 Burr. 668; Mitchell v. Mitchell, 1 Md. 55; Morgan v. Varick, 8 Wend. 587; Benson v. Matsdorf, 2 Johns. 369; Blount v. Garen, 3 Haywood, 88; Van Alen v. Rogers, 1 Johns. Cas. 283, note; S. C., 3 id. 457; Cushwa v. Cushwa, 9 Gill, 242.

[2] It has been held in some cases that it is not error to assess the actual damages in ejectment. Miller v. Melchor, 13 Ired. L. 439; Boyd's Lessee v. Cowan, 4 Dall. 128; Lessee of Battin v. Bigelow, 1 Pet. C. C. 452; Osbourn v. Osbourn, 11 S. & R. 58, per Duncan, J.

[3] Van Alen v. Rogers, 1 Johns. Cas. 283, note; S. C., 3 id. 457; Davis v. Doe, 25 Miss. 445.

[4] Van Alen v. Rogers, *supra*, and note.

[5] Bac. Abr., tit. Ejectment (H.): "The object at this day proposed to be recovered by it (ejectment) is quite changed from what it was in its original state; for as, formerly, damages were only recoverable by it, and not the term, so now the term only is sought for by it, and not damages. For a satisfaction in damages, therefore, a subsequent action is to be brought, which subsequent action is in *form* an action of trespass *vi et armis*, but in *effect* to recover the rents and profits of the estate. It is *in form* an action of trespass because it is consequent, and, as it were, supplemental to the action of ejectment, and therefore must necessarily be of the same species with it. It may be brought by the lessor of the plaintiff in his own name or in the name of the nominal lessee; but in either shape it is equally *his* action; for it is not in any manner affected by the fiction in the ejectment."

[6] Jackson v. Davenport, 18 Johns. 295; Wilkes v. Lion, 2 Cow. 333; Woodhull v. Rosenthal, 61 N. Y. 393.

fendant is estopped from controverting the title from the time of the ouster complained of in the ejectment or date of the demise laid in the declaration;[1] but if the plaintiff proceed for antecedent profits he must prove his title to the premises whence they arose to show his right to recover them.[2] Only [345] the lessor of the plaintiff can proceed for damages anterior to the demise.[3] No party can recover *mesne* profits for any time prior to his obtaining title; an heir or devisee cannot recover those which accrued in his ancestor's time.[4] The right of a purchaser at an execution sale does not cover the period between the time thereof and the execution of the deed.[5] If there has not been an ouster, damages, as between tenants in common, can be recovered only from the time suit was instituted.[6]

§ 993. What may be allowed as damages. The plaintiff must prove the value of the *mesne* profits, for the judgment in ejectment does not establish anything as to that.[7] In estimating them, however, the jury are not confined to the mere rent of the premises; they may give extra damages; and the costs in ejectment are recoverable whether the judgment be by default against the casual ejector, or upon a verdict against the tenant or landlord, and are therefore usually declared for as damages in the action for *mesne* profits.[8] The general principle is that the plaintiff in this action is entitled to recover all damages fairly resulting from his having been wrongfully kept out of possession.[9] They may be computed during the

[1] Id.; Benson v. Matsdorf, 2 Johns. 369; Avent v. Hord, 3 Head, 458; Van Alen v. Rogers, 3 Johns. Cas. 457; Crockett v. Lashbrook, 5 T. B. Mon. 531; Man v. Drexel, 2 Pa. St. 202; Drexel v. Man, id. 271; Myers v. Sanders' Heirs, 8 Dana, 65; Doe ex d. Marshall v. Dupey, 4 J. J. Marsh. 388; Graves v. Joice, 5 Cow. 261; Poston v. Jones, 2 Dev. & Batt. 294; Brewer v. Beckwith, 35 Miss. 467; Chirac v. Reinecker, 11 Wheat. 280; Leland v. Tousey, 6 Hill, 328; Den v. McShane, 13 N. J. L. 35.

[2] Id.; Masterson v. Hagan, 17 B. Mon. 328; Avent v. Hord, 3 Head, 458; Kille v. Ege, 82 Pa. St. 102; Brewer v. Beckwith, *supra;* West v. Hughes, 1 Har. & J. 574; Danziger v. Boyd, 54 N. Y. Super. Ct. 365.

[3] Tyler on Eject. 839; Denn v. Chubb, 1 N. J. L. 466.

[4] King v. Little, 77 N. C. 138; Hotchkiss v. Auburn, etc. R. Co., 36 Barb. 600; Brown v. McCloud, 3 Head, 280. See Cook v. Webb, 21 Minn. 428.

[5] Clark v. Boyreau, 14 Cal. 634.

[6] Miller v. Myers, 46 Cal. 535.

[7] Willis v. Morris, 66 Texas, 628.

[8] Bac. Abr., tit. Ejectment (H.); Goodtitle v. Tombs, 3 Wils. 118.

[9] Symonds v. Page, 1 Cromp. & J. 29; Doe v. Perkins, 8 B. Mon. 198.

whole period the defendant has withheld the premises from him down to the verdict, unless the statute of limitations is pleaded,[1] if the defendant has kept possession, and the time and extent of his possession are open to proof.[2] On this principle he is entitled to recover *the costs of the ejectment suit*, both on the trial and in error. In England if the costs have been taxed the recovery is confined to the taxed costs, and no extra costs will be allowed; but it is not essential to the recovery that they be taxed.[3] And where the costs cannot be taxed it has been held that the jury might reasonably [**346**] consider those between attorney and client as the measure.[4] Costs of the ejectment suit have been held recoverable in this country;[5] nor is the recovery limited, at least not uniformly, to costs taxable between party and party. In a Kentucky case Marshall, C. J., said: "The principle from which the rule on this subject is to be extracted is in our opinion this: that the plaintiff in this action is entitled to be reimbursed in such amount as he has in good faith been compelled to pay in obtaining by legal means the restoration of the property which the defendant has wrongfully taken or withheld from him." "The amount recoverable under this head cannot exceed what he has actually paid, or is in good faith actually bound to pay for obtaining restitution. But as he cannot have been

[1] Dawson v. McGill, 4 Whart. 230; Whissenhunt v. Jones, 78 N. C. 361; Pendergast v. McCaslin, 2 Ind. 87; McCrubb v. Bray, 36 Wis. 341; Field v. Columbet, 4 Sawyer, 523; Jackson v. Wood, 24 Wend. 443; Budd v. Walker, 9 Barb. 493; Morgan v. Varick, 8 Wend. 587; Avent v. Hord, 3 Head, 458; Love v. Shartzer, 31 Cal. 487; Danziger v. Boyd, 120 N. Y. 628; Pearson v. Carr, 97 N. C. 194; Ashmead v. Wilson, 22 Fla. 255; Dean v. Tucker, 58 Miss. 487.

In the absence of statutory direction a judgment against two for profits prior to their joint possession is erroneous. Ashmead v. Wilson, 22 Fla. 255.

[2] Aslin v. Parkin, 2 Burr. 668; Pearse v. Coaker, L. R. 4 Exch. 92; 38 L. J. (Exch.) 32; Vance v. Inhabitants, etc., 7 Blackf. 241; Ryers v. Wheeler, Hill & D. Supp. 389; Ainslie v. Mayor, etc. of N. Y., 1 Barb. 168; Mitchell v. Freedley, 10 Pa. St. 198; Miller v. Henry, 84 id. 33.

[3] Newell v. Roake, 7 B. & C. 404; Symonds v. Page, 1 Cromp. & J. 29; Doe v. Davis, 1 Esp. 358; Doe v. Filliter, 13 M. & W. 47; 11 id. 80; Doe v. Hare, 2 Dowl. P. C. 245; 2 Cromp. & M. 145; Doe v. Huddart, 2 Cromp., M. & R. 316.

[4] Newell v. Roake, 7 B. & C. 404.

[5] Furlong v. Cooney, 72 Cal. 322; Baron v. Abeel, 3 Johns. 481; Doe v. Perkins, 8 B. Mon. 198; Denn v. Chubb, 1 N. J. L. 466. See Tate v. Doe, 24 Miss. 465.

compelled to pay more than the reasonable fees and charges for the services of others necessary for obtaining legal redress, he may not be entitled to recover the full amount which he has bound himself to pay for such services. And on the other hand, as he may have obtained the services for less than their actual or reasonable value, he may not always be entitled to recover to the full amount of that value. The recovery under this head may thus be limited below the amount which the plaintiff has actually paid or bound himself to pay on the ground that that amount is more than the reasonable value of the services necessary in his suit for restitution of his right. But it cannot be carried beyond that amount on the ground that the necessary services were reasonably worth more. Then the criterion in this case is not what would have been reasonable if the plaintiff had paid or undertaken to pay so much, but what the plaintiff had paid, or had undertaken and was bound to pay, if that sum was not unreasonable."[1] In Rhode Island the defendant's liability for counsel fees and expense incurred for the services of an engineer in examining records, making plat, etc., for use in the trial of the ejectment suit are not allowed. Referring to the case last quoted from Durfee, C. J., says: "The court cite no authority for their decision. Such an allowance may be just, but it is anomalous, for there is no reason for the recovery of the counsel fees and expenses of the ejectment suit which would not apply as well to any other suit. If plaintiff is entitled to recover his counsel fees and expenses when he succeeds in the ejectment suit, why should not the defendant have the same measure of justice when he succeeds?"[2] This is doubtless the rule in Pennsylvania[3] and Tennessee.[4]

§ **994. Recovery limited to compensation.** There are old cases in which observations have been made tending to convey the impression that the plaintiff may recover more than the annual income from the land during the time the defendant withheld possession. The general rule is that the damages are to be measured on this basis, though other damages are recoverable if waste has been committed. That measure

[1] Doe v. Perkins, 8 B. Mon. 198.
[2] Herreshoff v. Tripp, 15 R. I. 92.
[3] Alexander v. Herr, 11 Pa. St. 537.
[4] White v. Clack, 2 Swan, 230.

affords compensation.[1] This income is measured by the value of the use of the property, not by what the defendant received from it, nor by what he might have obtained.[2] If, however, the title is in real doubt, and the parties have acted in entire good faith, the actual receipts, and not the rental value, will be taken as the damages.[3] In an English case in which [**347**] there had been an actual ouster, and the defendant kept the plaintiff out until judgment in the ejectment, it was held that recovery was not to be confined to *mesne* profits only, but, as was remarked by Gould, J., the plaintiff might recover for "his trouble, etc.;" that he had known four times the value of such profits to be given.[4] Referring to this language Gibson, C. J., said: "If trouble and expense are subjects of compensation, why are they not also included in the original judgment? But it would have been viewed as a startling novelty. A separate suit could not lie for the trouble and expense of a previous one; and there is no reason why they should be component parts of a cause of action in common with something else. There is no case in which compensation has been specifically recovered for them. There are *dicta* that a jury may give whatever they may think reasonable; but surely no court will subject a party to a blind and an unbridled discretion. A verdict will not be set aside for excess of damages except in an extreme case; and the defendant would often suffer all but extreme injustice."[5] Consequential dam-

[1] Larwell v. Stevens, 12 Fed. Rep. 559; Carman v. Bean, 88 Pa. St. 319; Campbell v. Brown, 2 Woods, 349; Adams on Eject. 337, 391; Kille v. Ege, 82 Pa. St. 102–112; Goodtitle v. Tombs, 3 Wils. 118; Dewey v. Osborn, 4 Cow. 329; Drexel v. Man, 2 Pa. St. 271; Brown's Lessee v. Galloway, Pet. C. C. 291; Lippett v. Kelley, 46 Vt. 516; Congregational Society v. Walker, 18 Vt. 600; Averett v. Brady, 20 Ga. 523; Masterson v. Hagan, 17 B. Mon. 325; New Orleans v. Gaines, 15 Wall. 624; Woodhull v. Rosenthal, 61 N. Y. 394.

[2] Kille v. Ege, 82 Pa. St. 102; McMahan v. Bowe, 114 Mass. 140; Campbell v. Brown, 2 Woods, 349; Ring v. Lerser, 26 Gratt 36.

Where the land was wild and unfenced, and no injury was done it nor profits received from it, a recovery was refused. Griffey v. Kennard, 24 Neb. 174. Where it was part of a highway and was occupied by a railroad, and pending the ejectment action was condemned, only nominal damages were recovered for withholding possession prior to the award made in the condemnation proceedings. Judge v. New York, etc. R. Co., 56 Hun, 60.

[3] Lawrence v. Rector, 137 U. S. 139.

[4] Goodtitle v. Tombs, 3 Wils. 118.

[5] Alexander v. Herr, 11 Pa. St. 539. See Good v. Mylin, 8 id. 51.

ages, however, besides costs of the ejectment, may be recovered — as for shutting up an inn and destroying its custom, if they are specially declared for.[1] The plaintiff may recover the actual damage and injury to the premises as well as the yearly value of the land.[2] Defendants, in an action for *mesne* profits, [348] had demised premises for a term of fifteen years at an annual rent of $2,000, besides the payment of royalty on each ton of iron ore mined; they had received the rent for one year; but the premises were in no way injured, and no ore was taken therefrom. The defendants having been evicted by the plaintiffs became unable to fulfill their covenants in the lease, and the lessors thereby acquired a right of action against them for damages. It was held that the $2,000 received did not establish a correct basis for fixing the rental value of the premises.[3] A defendant being *bona fide* purchaser for value, and having taken possession, under color of title, of mines which were unimproved, and expended large sums in their development, as well as in permanent improvements thereon of great value, it was held he was chargeable for ores removed only their value in place, that is, by deducting from their market value the cost of mining, cleansing and delivering in market.[4] And he may defend against the claim of *mesne* profits by showing that the improvements he has made and left upon the lands are of value sufficient to be a full compensation for their use and occupation.[5] Under a statute which fixes the damages at "the clear annual value of the premises for the time" the defendant was in possession, the jury cannot take into consideration the special value of the land in dispute as a passage-way to adjacent premises.[6]

[1] Dunn v. Large, 3 Doug. 335.

[2] Cooch v. Gerry, 3 Harr. 289; Huston v. Wickersham, 2 Watts & S. 308; Masterson v. Hagan, 17 B. Mon. 325; Lippett v. Kelley, 46 Vt. 516; Ashmead v. Wilson, 22 Fla. 255. It is otherwise under statutes in some states. Pacquette v. Pickness, 19 Wis. 219; Bottorff v. Wise, 53 Ind. 32; Emrich v. Ireland, 55 Miss. 390. Under the California code it is optional with the plaintiff to sue for injury to the premises in the same action. Field v. Columbet, 4 Sawyer, 523. The occupant cannot be held liable for diminution in the value of the land which has occurred without his fault. Willis v. Morris, 66 Texas, 628.

[3] Kille v. Ege, 82 Pa. St. 102.

[4] Ege v. Kille, 84 Pa. St. 333; Maye v. Tappan, 23 Cal. 306; Goller v. Fett, 30 id. 481; Stockbridge Iron Co. v. Cone Iron Works, 102 Mass. 80; vol. 1, § 103.

[5] Id.

[6] McMahan v. Bowe, 114 Mass. 140; Furlong v. Cooney, 72 Cal. 322.

§ 995. Proof of rental value. If the land which has been recovered could not or would not in the usual course of things be held, used or occupied independently of adjoining lands owned by the plaintiff, it is proper to prove the rental value of such lands with and without that in dispute. The difference between the two sums would *prima facie* be the basis for ascertaining the rental value of the latter.[1] Where a wall formed one side of a store room, a narrow strip of which was in dispute, proof of the rental value of the entire room was admitted to aid the jury in assessing *mesne* profits.[2]

§ 996. What property withheld. "Whatever would be rent as between landlord and tenant is *mesne* profits as between the parties in ejectment."[3] Where there was a mill on the premises the court said: "Though the mill and the land may have been separable without injury to either, still, while they were in fact together and used, or capable of being used, in the ordinary way, they were worth so much for rent. It is proper and accords with usage, we think, to speak of the rent of a mill, the rent of a factory, etc., and in so doing the use of the machinery, fixed or unfixed, is not thought of as excluded, but as included. The exact point made by counsel, however, is that the declaration does not mention the mill, but describes the land only. There is plausibility in the objection, but not much positive force. With reference to rent or *mesne* profits, the whole is to be taken as realty, and a suit for the profits of the land applies to the land in its actual condition."[4] In an action to recover *mesne* profits of a ferry landing it was sufficiently liberal to defendant to instruct the jury to consider the proceeds of the ferry, deducting the expense of fitting it up and carrying it on, and making due allowance for all risk and expense.[5] As will appear presently, if a *bona fide* occupant of land makes lasting and valuable improvements thereon in good faith, he is entitled to have them taken into account in the ascertainment of the *mesne* profits. If the improvements made are such as the occupant cannot recover for, as where, without his fault, they are

[1] Danziger v. Boyd, 54 N. Y. Super. Ct. 365.

[2] Jenkins v. Means, 59 Ga. 55.

[3] Morris v. Tinker, 60 Ga. 466.

[4] Id.

[5] Averett v. Brady, 20 Ga. 523; Dunlap v. Yoakum, 18 Texas, 582.

burned before he delivers possession, he should not be charged with the income which has been derived from them.[1] The owner, if liable for the cost of improvements, is entitled to the resulting increased income.[2]

§ 997. **Interest.** Interest has been held recoverable on *mesne* profits.[3] Where the property was situate in New York city, rent being payable quarterly, it was held proper to add interest quarterly.[4] But this is not allowable in Massachusetts.[5] Under the statute of New York, and similar statutes in other states, for recovery of damages upon a suggestion after determination of the ejectment suit, the measure is that applicable in *assumpsit* for use and occupation. The compensation is adjusted as upon contract, and not upon the footing of a tort.[6] The statutes indicate the measure of damages and the defenses which may be made.

§ 998. **Compensation on recovery of a term.** In a case of ejectment brought for the recovery of a term it appeared that

[1] Nixon v. Porter, 38 Miss. 401; Tatum v. McLellan, 56 id. 352; Southern Cotton Oil Co. v. Henshaw, 89 Ala. 448; Davis v. Louk, 30 Wis. 308; Pacquette v. Pickness, 19 id. 219.

The equity of this rule is recognized in Texas, but it is not applied because the court is committed to the contrary doctrine. Evetts v. Tendick, 44 Texas, 570.

[2] Bell v. Barnet, 2 J. J. Marsh. 517.

In Dungan v. Von Puhl, 8 Iowa, 263, 269, it is held that the occupier of unimproved land who puts it in a state suitable for cultivation may be charged for its use and occupation in the state in which he puts it, "without having the right to complain that he is required to pay rent for improvements made by himself." The argument upon which this liability is rested is thus stated, if not demolished, by the court: "He pays rent, not upon such improvements, but upon land, worth more for the purpose for which he uses it, by reason of its being brought into a state fit for cultivation. The owner is entitled to rents and profits according to the value of the land for the purpose for which it is devoted by the occupant. The occupant is to pay what the use of the land is worth to him. In such a rule, we think, there will nothing be found inequitable. It does not require the occupant to pay rent on improvements made by himself. But it does require him to pay rent according to the increased adaptation of the land for the purpose for which it is used, though such adaptation has been brought about by the occupant's own labor." The court also held that no rent was to be charged for the use of buildings or farm fixtures erected by the occupant.

[3] Jackson v. Wood, 24 Wend. 443; Low v. Purdy, 2 Lans. 422; Allen v. Smith, 63 Mo. 103; Furlong v. Cooney, 73 Cal. 322; New Orleans v. Gaines, 15 Wall. 624.

[4] Jackson v. Wood, 24 Wend. 443.

[5] Hodgkins v. Price, 141 Mass. 162.

[6] Holmes v. Davis, 19 N. Y. 488, reversing S. C., 21 Barb. 265; Woodhull v. Rosenthal, 61 N. Y. 394.

the buildings on the leased premises were partially destroyed; neither party expressed an intention to rebuild; they were replaced by the defendant's grantor by a more expensive and larger building, which yielded increased rents and profits. This was done in good faith. The plaintiff's damages were measured by the amount which would place him in as good position as he would have been in if he had not been dispossessed. He was not entitled to the whole amount of the rents and profits of the improved estate. His rights were governed by what would have been the measure of damages if the defendant had wrongfully withheld possession of the premises for the same length of time in substantially the same condition in which they were just prior to the fire. The court suggest that this rule was too favorable to the plaintiff: "If the defendant had objected we might have found it difficult to hold that it was not too favorable." In determining the damages upon this basis it was right to deduct from the gross rents and profits which might have been received a fair compensation for the necessary time and labor involved in the care and management of the premises and in the collection of rents. The plaintiff was entitled to interest on the net profits while he was dispossessed; but notwithstanding the rents were payable quarterly, interest should not be computed by making quarterly rests, compound interest not being allowed under the decisions in Massachusetts.[1]

§ 999. Claims for improvements, taxes, etc. The [349] common-law action of trespass for *mesne* profits is a liberal one, and equitable defenses may be made.[2] Taxes paid by the defendant may be deducted from the damages.[3] Where he had paid ground rent during his occupancy, which otherwise the plaintiff must have paid, it was deducted from the damages in an action for *mesne* profits.[4] And so where necessary repairs had been made.[5] At common law, whoever takes and

[1] Hodgkins v. Price, 141 Mass. 162.

[2] Murray v. Gouverneur, 2 Johns. Cas. 441; Jackson v. Loomis, 4 Cow. 172.

[3] Ringhouse v. Keener, 63 Ill. 230; Stark v. Starr, 1 Sawyer, 15; Semple v. Bank of British Columbia, 5 id. 394.

[4] Doe v. Hare, 2 Cromp. & M. 145.

[5] Semple v. Bank of British Columbia, 5 Sawyer, 394. A deficiency of profits of one year, to meet payments, may be deducted from an excess of profits over the payments of another year. The plaintiff may show that a deficiency of profits in particular

holds possession of land to which another has a better title, whether he be a *bona fide* or *mala fide* possessor, is liable to the true owner for all the rents and profits which he has received; but the disseizor, if he be a *bona fide* occupant, may recoup the value of the meliorations made by him against the claim of damages.[1] The owner is not compelled to pay for improvements as a condition on which he may regain possession of his property. The improvements when annexed to the land become part of the freehold.[2] But a *bona fide* occupant is entitled to have them taken into account in ascertaining whether the owner has sustained damages or not, both in the case where such improvements were made by him and where they were made by one whose title he has purchased.[3] In such case the defendant should be allowed the value of lasting and valuable improvements reasonably necessary for the enjoyment of the premises, made in good faith, that is, in belief of his title and without notice of the real owner's claim, to the extent of the rents and profits due to such owner.[4] The

years within the period of recovery has been compensated by an excess in years without that period because barred by the statute. But the defendant cannot increase his claim for reimbursement by the recovery of expenses for a period during which he has, by pleading the statute of limitations, barred the recovery of profits against him. Ewalt v. Gray, 6 Watts, 427.

[1] Green v. Biddle, 8 Wheat. 1.

[2] Anderson v. Fisk, 36 Cal. 629; Russell v. Blake, 2 Pick. 505. See, as to the rule in equity, Bright v. Boyd, 2 Story, 605; S. C., 1 id. 478; Valle's Heirs v. Fleming's Heirs, 29 Mo. 152; Union Hall Ass'n v. Morrison, 39 Md. 281, 296; Hatcher v. Briggs, 6 Ore. 31.

[3] Willingham v. Long, 47 Ga. 540; Morrison v. Robinson, 31 Pa. St. 456.

[4] Jackson v. Loomis, 4 Cow. 172; Hatcher v. Briggs, 6 Ore. 31; Tongue v. Nutwell, 31 Md. 302; Irick v. Fulton, 3 Gratt. 193; Dowd v. Faucett, 4 Dev. 92; Ewing v. Handley, 4 Litt. 346; Porter v. Hanley, 10 Ark. 187; Doe v. Roe, 2 Houst. 321; Dothage v. Stuart, 35 Mo. 251; Russell v. Blake, 2 Pick. 505; Campbell v. Brown, 2 Woods, 349; Utterbach v. Binns, 1 McLean, 242; Averett v. Brady, 20 Ga. 523; White v. Moses, 21 Cal. 34; McGarrity v. Byington, 12 Cal. 426; Worthington v. Young, 8 Ohio, 401; Bedell v. Shaw, 59 N. Y. 46; Bright v. Boyd, 1 Story, 478; 2 id. 607; Union Hall Ass'n v. Morrison, 39 Md. 281; Morrison v. Robinson, 31 Pa. St. 456.

A defendant in ejectment is not liable for *mesne* profits taken prior to his own entry by those under whom he claims; but if in accounting for the profits chargeable to himself he claims credit for improvements made by his predecessors, such improvements must first answer for the profits taken by those who erected them. Gardner v. Grannis, 57 Ga. 539.

A defendant in such an action

improvements should be estimated in favor of the de- [350] fendant at such amount as they add to the market value of the premises.[1] The claim for them may be co-extensive in time with the allowance of rents and profits which the improvements contributed to produce. In other words, their value is not to be limited to their worth in cash at the time of the trial; but by the benefit they have conferred upon the plaintiff, whether by adding to the worth of the land at the time of its recovery or retrospectively by augmenting the amount he may recover as *mesne* profits.[2] Interest on the gross expense of repairs made has been allowed.[3] The compensation allowed at common law for improvements was a mere equitable defense in mitigation of damages. Now very generally this defense, or the right of a *bona fide* occupant to compensation for improvements, is defined and regulated by statute; and where it is so defined and regulated the party claiming such compensation must bring himself within the statute.[4] It is not the policy of these statutes that the owner of property shall be improved out of his title by volunteers or wrong-doers. Hence, such statutes, being in derogation of the common law, are strictly construed,[5] and allow a recovery for improvements "only in excess of the clear annual value of the premises during the time the occupant was in possession (exclusive of the use by the tenant of the improvements thereon made by himself or those under whom he claims), and only to

who claims under a tax title, also under a conveyance from a third party, and who made improvements before the tax title accrued, cannot recover the value of his improvements from the plaintiff. Jacks v. Dyer, 31 Ark. 334.

Improvements made by the grantee of one who has not purchased for value cannot be charged against the owner though the grantor covenanted to protect the grantee's possession. Schettler v. Southern Oregon Co., 19 Ore. 192.

[1] Thomas v. Thomas, Ex'r, 16 B. Mon. 420; Bell's Heirs v. Barnett, 2 J. J. Marsh. 516; Allison v. Taylor's Heirs, 3 B. Mon. 363; Stark v. Starr, 1 Sawyer, 15; Woodhull v. Rosenthal, 61 N. Y. 396-7; Wythe v. Myers, 3 Sawyer, 598.

In some states the value of the improvements is measured by the benefits which the owner will receive from them. McMurray v. Day, 70 Iowa, 671; Morris v. Tinker, 60 Ga. 466.

[2] Johnson v. Futch, 57 Miss. 73. Compare Morris v. Tinker, 60 Ga. 466.

[3] New Orleans v. Gaines, 15 Wall. 624.

[4] Lanquest v. Ten Eyck, 40 Iowa, 213; Love v. Shartzer, 31 Cal. 487; Huggins v. Clark, 51 Cal. 112; McCrubb v. Bray, 36 Wis. 342.

[5] Sutherland, Statutory Construction, §§ 290, 400.

the extent and upon clear and full proof of the amount to which the value of the premises is actually increased thereby at the time of the assessment."[1]

§ 1000. **Remedy under the code.** The claim for damages for withholding possession is a distinct cause of action from the claim of possession. It was necessarily the subject of a subsequent action at common law. Under the code, however, it is at the option of the plaintiff to join it with the claim of possession or bring a separate action. By the New York statute, prior to the code, the action for *mesne* profits was required, in substance, to be an action for use and occupation.[2] The change in the statutes by the introduction of the code did not disturb or affect this right of action for use and occupation, but the action or procedure for its recovery was changed. [351] When the code came to unite the various classes of actions into one, under which all rights of action were to be enforced, and to abolish all peculiarities in the forms of pleading, the remedy for *mesne* profits naturally fell into the arrangement, and became the subject of a civil action under the new system; and the peculiar method of commencing it by suggestion became inapplicable.[3] Hence a claim for recovery of real property and damages for withholding the possession was held not to embrace the claim for the rents and profits, because the latter is a separate and distinct cause of action.[4] It is otherwise under the present code of New York.[5]

Under the Kentucky statute the plaintiff may unite in the same petition "claims for the recovery of specific real property, and the rents, profits and damages for withholding the same." It was held that if the plaintiff shall elect to sue for the recovery of the land merely, or for that and damages for being kept out of possession in the same action, and seek by another suit to recover damages for trespasses and injuries committed by the destruction of timber or other property upon or appurtenant to the land, a judgment in one case should not bar a recovery in the other.[6] The right to damages for withhold-

[1] Hollingsworth v. Funkhouser, 85 Va. 448.

[2] Holmes v. Davis, 19 N. Y. 488; Woodhull v. Rosenthal, 61 id. 394.

[3] Holmes v. Davis, *supra*.

[4] Larned v. Hudson, 57 N. Y. 151; Livingston v. Tanner, 12 Barb. 481. See Cagger v. Lansing, 64 N. Y. 417.

[5] Clason v. Baldwin, 129 N. Y. 183.

[6] Burr v. Woodrow, 1 Bush, 692.

ing the possession of real property given by the Oregon code is equivalent to the action of trespass for *mesne* profits under the common law, and includes all damages to which the owner is entitled on account of the wrongful occupation of the premises as well as for waste committed or suffered by the occupant as the value of the use and occupation. Such right is a distinct cause of action, and if joined with a claim of possession should be separately stated.[1]

Section 2.

DOWER.

§ 1001. The right of. Dower at common law exists [352] where a man is seized of an estate of inheritance and dies in the life-time of his wife. She is entitled to be endowed for her natural life of the third part of all the lands whereof her husband was seized, either by deed or in law at any time during the coverture, and which any issue which she might have had could by possibility have inherited.[2] Marriage, seizin of the husband, and his death are essential; and where they concur, on the happening of the latter the right of dower becomes perfect, not as an estate or interest in the land but as a chose in action.[3]

§ 1002. It is assignable on a valuation. Whatever the proceeding by which dower is recoverable, the value of the lands must be ascertained, for it is by that standard that the dower right is measured. If the lands were aliened by the husband, and have afterwards increased in value, it has been a question whether such increase should be excluded from the valuation. Where the increase is the result of improvements made on the land by the alienee, it does not enter

[1] Wythe v. Myers, 3 Sawyer, 595; Neff v. Pennoyer, id. 495. See Arnold v. Woodward, 14 Colo. 164.

[2] 4 Kent's Com. 35.

[3] Id.; Sheafe v. O'Neil, 9 Mass. 13; Hildreth v. Thompson, 16 Mass. 191; Croade v. Ingraham, 13 Pick. 33; Shields v. Batts, 5 J. J. Marsh. 13; Stedman v. Fortune, 5 Conn. 462; Jackson v. Aspell, 20 Johns. 412; Cox v. Jagger, 2 Cow. 638; Yates v. Paddock, 10 Wend. 528; Johnson v. Shields, 32 Me. 424; Summers v. Babb, 13 Ill. 483; Moore v. New York, 4 Sandf. 456; Torrey v. Minor, Sm. & M. Ch. 489; Harrison v. Wood, 1 Dev. & Bat. Eq. 437; Potter v. Everitt, 7 Ired. Eq. 152; Webb v. Boyle, 63 N. C. 271; Van Name v. Van Name, 23 How. Pr. 247.

into the estimation for the purpose of dower; in other words, the admeasurement is then to be made according to the value at the date of alienation; the dowress recovers the equivalent of one-third of the value of the land as such value was at that [353] time.[1] But if the value is enhanced by extrinsic or general causes, the weight of authority seems to be in favor of including it. Tilghman, C. J., said: "I have found no adjudged case in the year books confining the widow to the time of the alienation by her husband where the question did not arise on improvements made after the alienation; and having considered all the authorities which bear upon the question, I find myself at liberty to decide according to what appears to me to be the reason and justice of the case, which is that the widow shall take no advantage of the improvements of any kind made by the purchaser, but throwing these out of the estimate she shall be endowed according to the value at the time her dower shall be assigned to her."[2] This view is supported by those great jurists, Story and Kent, and by many adjudications.[3] The rule has frequently been stated,

[1] Davis v. Hutton, 127 Ind. 481; Griffin v. Regan, 79 Mo. 73; Humphrey v. Phinney, 2 Johns. 484; Hale v. James, 6 Johns. Ch. 258; Tod v. Baylor, 4 Leigh, 498; Wilson v. Oatman, 2 Blackf. 223; Thrasher v. Pinckard, 23 Ala. 616; Dunseth v. Bank of U. S., 6 Ohio, 77.

[2] Thompson v. Morrow, 5 S. & R. 289.

[3] Baden v. McKenney, 18 D. C. 268; Powell v. Monson & B. Manuf. Co., 3 Mason, 347, 374; 4 Kent's Com. 68; Smith v. Addleman, 5 Blackf. 406; Dunseth v. Bank of U. S., 6 Ohio, 77; Allen v. McCoy, 8 Ohio, 418; Gore v. Brazier, 3 Mass. 544; Scammon v. Campbell, 75 Ill. 223; Barney v. Frowner, 9 Ala. 901; Summers v. Babb, 13 Ill. 483; Manning v. Laboree, 33 Me. 343, 347; Hobbs v. Harvey, 16 Me. 80; Mosher v. Mosher, 15 Me. 371; Bowie v. Berry, 3 Md. Ch. 359; Fritz v. Tudor, 1 Barb. 28; Westcott v. Campbell, 11 R. I. 378; Carter v. Parker, 28 Me. 509; Wall v. Hill, 7 Dana, 175; Taylor v. Brodrick, 1 id. 348; Lawson v. Morton, 6 id. 471. See Doe v. Gwinnell, 1 Q. B. 682.

In Rannels v. Washington University, 96 Mo. 226, the property, when conveyed by the husband, was unimproved and non-productive. Because of improvements and the increased value, one-fourth of it as improved was set off to the widow. It was contended that she was not entitled to damages for the detention of that part because any profit realized from it was the result of the improvements made by the grantee. This view was pronounced illogical and unjust in view of the fact that the whole property produced $800 or $900 per annum. "It is true that without the improvements the property would have produced no rental income, but it does not follow that plaintiff is entitled to no damages. To so hold is to look to the improvements alone, and

however, to be, that when lands are alienated by the husband during coverture, his widow is to be endowed at their value at the time of alienation, thereby excluding her from the benefit of any subsequent increase in their value from any cause.[1] As to lands of which the husband died seized, she is entitled to dower according to their value at the time of the assignment.[2] She is entitled to have such part of the land set out as [**354**] dower as will produce an income equal to one-third part of that which the whole estate would then produce.[3]

§ 1003. Damages for detention of dower. Originally, damages were not recoverable in an action at law for dower.[4] They were first given by the statute of Merton; but as that statute only applied to actions for dower in lands of which the husband died seized, damages continued to be denied in actions brought against the husband's alienee.[5] At common law the right to damages was limited by the remedy. In this country damages are generally, by statute or otherwise, recoverable against the alienee from the time of demand and refusal, or of the institution of the suit.[6] The heir or devisee

to disregard the land. This we have no right to do, for the land is a substantial part of the capital which produced the income."

[1] Humphrey v. Phinney, 2 Johns. 484; Shaw v. White, 13 id. 179; Dorchester v. Coventry, 11 id. 509; Walker v. Schuyler, 10 Wend. 481; Marble v. Lewis, 53 Barb. 432; Brown v. Brown, 31 How. Pr. 481; Green v. Tennant, 2 Harr. (Del.) 336; Ayer v. Spring, 9 Mass. 8; Catlin v. Ware, id. 217; Wooldridge v. Wilkins, 3 How. (Miss.) 360; Markham v. Merrett, 7 id. 437; Thomas v. Gammel, 6 Leigh, 9; Pollard v. Underwood, 4 Hen. & M. 459; Leggett v. Steele, 4 Wash. C. C. 305.

[2] Catlin v. Ware, 9 Mass. 217; Wright v. Jennings, 1 Bailey, 277; McCreary v. Cloud, 2 id. 343; Larrowe v. Beam, 10 Ohio, 498.

One who purchases after demand made is liable for damages from the time it was made. Rannels v. Washington University, 96 Mo. 223.

[3] Carter v. Parker, 28 Me. 509.

[4] 2 Saund. 45, note 4; Fisher v. Morgan, 1 N. J. L. 125; Wright v. Jennings, 1 Bailey, 277; Layton v. Butler, 4 Harr. (Del.) 507.

[5] Kendall v. Honey, 5 T. B. Mon. 282; Marshall v. Anderson, 1 B. Mon. 198; Waters v. Gooch, 6 J. J. Marsh. 589; Embree v. Ellis, 2 Johns. 119; Fisher v. Morgan, 1 N. J. L. 125; Hopper v. Hopper, 22 id. 715; Gaston v. Bates, 4 B. Mon. 366.

[6] O'Ferrall v. Simplot, 4 Iowa, 381; Beavers v. Smith, 11 Ala. 20; Slatter v. Meek, 35 Ala. 528; Atkin v. Merrell, 39 Ill. 62; Galbreath v. Gray, 20 Ind. 290; Price v. Hobbs, 47 Md. 359; Steiger v. Hillen, 5 Gill & J. 121; McClannahan v. Porter, 10 Mo. 746. But see Benner v. Evans, 3 Pen. & Watts, 474; Barnet v. Barnet, 15 S. & R. 72; McElroy v. Wathen, 3 B. Mon. 135.

in possession is answerable for damages from the death of the husband, and in New York, Maryland, New Jersey, and perhaps other states, even without a demand, unless he plead *tout temps prist;* and even on sustaining that plea he is liable from the commencement of the suit.[1] If that issue be found for the demandant, she is entitled to damages from the death of the husband, and not from the date of the demand only.[2] The statute of Merton seems not to have been adopted in South Carolina, and therefore damages are not recoverable in actions for dower;[3] and in that state interest cannot be recovered in a court of law on a sum of money assessed in lieu of [355] dower where the husband died seized; but by statute interest may be allowed on assessments against the husband's alienee.[4] It has been usual there to assess one-sixth of the value of the entire fee as equivalent to the widow's estate for life in one-third of the land; and as a general rule it is said that that proportion should be adhered to except in extreme cases of youth on the one hand, or of age and infirmity on the other.[5] In Maryland damages against the husband's alienee can be recovered only in equity.[6] The admeasurement and assignment of dower defines it with a view to future enjoyment. If withheld afterwards the loss is of that specific parcel. For withholding dower before assignment, damages when recoverable include, but do not consist exclusively of, the net annual value of the third part of the lands in which the right of dower exists. In a Canadian case,[7] after a judgment of seizin in dower, on a writ of inquiry, it was held that the *mesne* value of the premises between the death of the husband and the judgment should be assessed; also the demandant's taxable costs in obtaining judgment of seizin; her costs of execut-

[1] Darnall v. Hill, 12 Gill & J. 388; Thrasher v. Tyack, 15 Wis. 256; Hitchcock v. Harrington, 6 Johns. 290; Hopper v. Hopper, 22 N. J. L. 715; Rankin v. Oliphant, 9 Mo. 239; Layton v. Butler, 4 Harr. (Del.) 507; Slatter v. Meek, 35 Ala. 528; Turner v. Morris, 27 Miss. 733; Thomas v. Gammel, 6 Leigh, 9.

[2] Watson v. Watson, 20 L. J. (C. P.) 25.

[3] Heyward v. Cuthbert, 1 McCord, 386.

[4] Wright v. Jennings, 1 Bailey, 277; McCreary v. Cloud, 2 id. 343. See Jefferies v. Allen, 34 S. C. 189, for a construction of the statute of 1883.

[5] Wright v. Jennings, *supra.*

[6] Sellman v. Bowen, 8 Gill & J. 55; Kiddall v. Trimble, 1 Md. Ch. 143.

[7] Robinett v. Lewis, Draper, 272.

ing the writ of *habere facias*, and her necessary traveling expenses incurred in prosecuting the suit. It was also held that her residence on the premises, in the family, and at the expense of the heir at law for part of the time between the death of the husband and her obtaining judgment, was not admissible as a set-off to her damages for the detention, though proper to go to the jury in mitigation.[1]

[1] See Bogardus v. Parker, 7 How. Pr. 303.

In Fisher v. Morgan, 1 N. J. L. 125 (1792), Kinsey, C. J., said: "One question which has been debated is whether the word *damages* includes the value or *mesne* profits; or whether there is to be a recovery of the value or third part of the profits, and also damages for the detention, with costs. Upon this subject the books seem irreconcilable. It would appear from Co. Litt. 32*b;* the Statute of Merton, 20 H. III., cap. 1, 1 Ruffhead, 16; 2 Inst. 80; Rastal's Entries, *b;* Spiller v. Adams, 8 Mod. 25; Hetley, 141, as if the value and damages for detention were not distinguishable from each other, but assessed and recovered together under the name of *damages*. But although the word *damna*, properly taken, does include both the *mesne* profits and the extra sum for the illegal detention, yet there are not wanting respectable authorities who appear to regard them as distinct objects of the suit and judgment. In Trials Per Pais, 333, where the duty of the jury is laid down, it is said, if they find the husband died seized, then they are to inquire: 1st. Of the value beyond reprises. 2d. What time has elapsed since the death of the husband. 3d. What damages the demandant has sustained by the detention of the dower. In Dennis v. Dennis, 2 Saund. 328, the jury find, first, that the husband died seized; secondly, the value; thirdly, the damages for the detention beyond the value and costs, by the name of damages; fourth, the costs and charges. The judgment follows, first, to recover seizin of the third part; second, the value of the third part; third, for damages found by the jury, extra, and the costs of increase; and the record concludes, *value* and *damages*, and not, as in Rastal, which *damages* amount to, etc. Clifton, 301–303; Hoxley, 99; Ashton, 262, 265, seem to confirm this form of entry. As to the question before the court, it is this: Whether, as the jury have not found that the husband died seized, the court are empowered to give judgment either for the value — the damages for detention — or costs. In Dyer, 28*a*, it is laid down that 'the common practice is, and the precedents of the common pleas are, that a woman demandant in dower shall not recover any damages unless the husband died seized; and this by the Statute of Merton, c. 1.' The same law is laid down in Doct. and Stud., cap. 13, p. 140; Co. Litt. 32*b;* Yelv. 112. The form of the writ of inquiry strengthens the authority of these books; it always directs the jury to inquire if the husband *died seized*, and *if he did*, then to inquire of the value and damages. A note in Jenk. 45, seems contrary to this, and to give countenance to the idea that, if the husband did not die seized, she shall recover her damages from the time of the *demand* from the tenant. Buller adopts the same

[356] Dower was originally granted for the sustenance of widows, and for this purpose they were relieved of feudal exactions. It was provided by Magna Charta that a widow should give nothing for her dower, and tarry in the chief house of her husband for forty days after his death, within which time it was required that dower be assigned her.[1] Hence she has a right to damages if it be not so assigned; but [357] they cannot properly be given for withholding dower, except for such withholding after the duty attaches to assign it. The alienee of the husband wrongfully withholds it after demand, and the heir and his alienee from the death of the husband. In her action against the heir, however, he may plead *tout temps prist*, and if he succeeds she will not recover damages, because it is said the heir holds by the title and does no wrong till a demand is made.[2] If the tenant comes the first day and acknowledges the action, and avows that he was at all times ready to render dower, the demandant could take judgment; then she would recover only seizin *et nihil de misâ quia venit primo die.* But if the demandant would have damages, she may reply that she requested her dower, and the tenant did not endow her, and then the judgment for damages and value will wait till the issue is tried and depend on the result.[3] She is not called on to prove such demand except upon that issue.[4] If the heir sells, he by that act denies dower, and his grantee cannot plead *tout temps prist* because he had not the land all the time since the death of the husband.[5] That plea is available only to the heir. When he sells, and thus repudiates the dower and in effect refuses it, such plea cannot be made. And the widow is entitled to recover against the feoffee of the heir damages for the whole period from the

doctrine, but in neither of these books is there any other authority cited than 1 Inst. 32*b*, which, as we have seen, establishes the contrary law. The *dicta* of these writers are respectable authorities, but the court are compelled to reject them on the present occasion as not warranted by any judicial opinion, and as insufficient to weigh against the law as it has long been established." See Sheppard v. Wardell, 1 N. J. L. 452; Martin v. Martin, 14 id. 125 (1833); O'Flaherty v. Sutton, 49 Mo. 583; Thomas v. Mallinckrodt, 43 Mo. 58.

[1] Co. Litt. 32*b*, sec. 36.

[2] Co. Litt. 33*a*, sec. 36.

[3] Id., note.

[4] Hitchcock v. Harrington, 6 Johns. 290; Woodruff v. Brown, 17 N. J. L. 246.

[5] Co. Litt. 33; Park on Dower, 303.

death of the husband — although such defendant has occupied and claimed the land for only a portion of that time.[1]

§ 1004. Extinguishment of dower right. At law, where no statutes protect her, the widow's right to damages is extinguished by her death.[2] But it is otherwise in equity.[3] She has a right to ask in equity part of a fund in lieu of dower, where that fund has been produced by a sale of her hus- [358] band's lands which were subject to her dower, and increased by being sold clear of that incumbrance with her consent.[4] In determining the value of dower, when to be paid out of the proceeds of the land sold so as to extinguish the right, its present worth is estimated upon the basis of an annuity of such amount as equals the legal interest on one-third of those proceeds for a period which constitutes the widow's expectancy of life according to the rules generally adopted in calculating the probable time a person will live.[5] And this sum is recoverable though she dies before its recovery and short of the time included in her expectancy. In such case the thing to be appraised, and with which the widow parts, is not the value of her real interest in the land, but the value of her expectancy.[6]

§ 1005. Reprisals. At common law there were certain reprisals which were made from the damages of the widow, and among these sometimes were included a deduction on account of her occupation of some part of the property. The legitimate extent of such deduction appears to have been this: Whatever part of the property the widow has been in the actual enjoyment of was thrown out of the estimation of damages, and on the simple ground that, from such property, she had not been deforced of her dower. But this rule merely

[1] Woodruff v. Brown, *supra;* Seaton v. Jamison, 7 Watts, 533; Hopper v. Hopper, 22 N. J. L. 715.

[2] Rowe v. Johnson, 19 Me. 146; Atkins v. Yeoman, 6 Met. 438; Sandback v. Quigley, 8 Watts, 460; Turney v. Smith, 14 Ill. 242. See Karns v. Tanner, 74 Pa. St. 339.

[3] 1 Story's Eq., § 625; Mulford v. Hiers, 13 N. J. Eq. 13; Curtis v. Curtis, 2 Bro. Ch. 632; Dormer v. Fortesque, 3 Atk. 130; Park on Dower, ch. 15, p. 330. See McLaughlin v. McLaughlin, 22 N. J. Eq. 505.

[4] Maccubbin v. Cromwell, 2 Har. & G. 443; Bonner v. Peterson, 44 Ill. 253.

[5] O'Donnell v. O'Donnell, 3 Bush, 216; Alexander v. Bradley, id. 667. See Shippen's Appeal, 80 Pa. St. 391; How v. How, 48 Me. 428.

[6] McLaughlin v. McLaughlin, 22 N. J. Eq. 505.

excluded the claim to recover the value of her thirds in the land during the time she had so occupied it; and it did not authorize the heir to set up a counter-claim in the suit for dower for the other two-thirds of the value of the premises so having been occupied. If the widow had occupied the land without the assent of the heir she was a mere trespasser, and it would not be competent for him in the action for dower to set off the damages thus sustained; and if, on the other hand, he had consented to such occupation, he had his action to call [359] her to account. But in the action for dower the effect of the enjoyment by the widow was to estop her from saying that in such land she had been deforced of her dower, and on that account to claim damages.[1]

§ 1006. Dower limited to husband's equitable interest. Dower is generally confined to the beneficial interest which the husband acquired during coverture in the land.[2] If the land is subject to a paramount charge or incumbrance, as where the dowress has joined with her husband in making a mortgage; or he, on instantaneous seizin, alone mortgages it for purchase-money; or it was subject to a judgment or mortgage at the time of the marriage, or when the husband acquired it, her dower is confined to the right of redemption; it is subject to the incumbrance and liable to be foreclosed, or to contribute to the payment of the debt.[3]

[1] McLaughlin v. McLaughlin, 22 N. J. Eq. 505; Perrine v. Perrine, 35 Ala. 644; Driskell v. Hanks, 18 B. Mon. 855; Craige v. Morris, 25 N. J. Eq. 467; Strawn v. Strawn, 50 Ill. 256.

[2] Welch v. Buckins, 9 Ohio St. 331; Fontaine v. Boatman's Sav. Inst., 57 Mo. 552; Bullard v. Bowers, 10 N. H. 500; Griggs v. Smith, 12 N. J. L. 22; Edmundson v. Welsh, 27 Ala. 578; Leavitt v. Lamprey, 13 Pick. 382; Holbrook v. Finney, 4 Mass. 566; Nicoll v. Ogden, 29 Ill. 323; Nicoll v. Miller, 37 Ill. 387; Nicoll v. Todd, 70 Ill. 295; Stow v. Steel, 45 Ill. 328; Stow v. Tifft, 15 Johns. 458; Coates v. Cheever, 1 Cow. 460; Gammon v. Freeman, 31 Me. 243; Gilliam v. Moore, 4 Leigh, 30; Winn v. Elliott, Hardin (Ky.), 482; Hale v. Munn, 4 Gray, 132. See Barnes v. Gay, 7 Iowa, 26; Yeo v. Mercereau, 18 N. J. L. 387.

[3] Carll v. Butman, 7 Me. 102; Richardson v. Skolfield, 45 id. 386; Simonton v. Gray, 34 Me. 50; Stribling v. Ross, 16 Ill. 122; Manning v. Laboree, 33 Me. 343; Rawlings v. Lowndes, 34 Md. 639; Stewart v. Beard, 4 Md. Ch. 319; Birnie v. Main, 29 Ark. 591; Opdike v. Bartels, 11 N. J. Eq. 133; Hinchman v. Stiles, 9 id. 361; Walton v. Hargroves, 42 Miss. 18; Culver v. Ex'r of Harper, 27 Ohio St. 464; McMahon v. Kimball, 3 Blackf. 1; Coles v. Coles, 15 Johns. 319; Young v. Tarbell, 37 Me. 509; Mills v. Van

§ 1007. Dower right subject to incumbrance. It has always been the policy of the law to preserve with care the right of dower when it has once attached to the property of the husband; but the right always exists subject to all the equities there may be against his title at the time it [360] attaches.[1] Payment of the incumbrance by him or his personal representative will inure to the relief of dower; but when a widow claims dower from an heir or purchaser who has discharged the lien she will be required to contribute, and must pay proportionately to the value of her dower, which will be the interest for her life on one-third of the debt that was a lien or a gross sum equivalent thereto.[2] If there is a

Voorhees, 20 N. Y. 412; Leavenworth v. Croney, 48 Barb. 570; Clark v. Munroe, 14 Mass. 351; Lewis v. James, 8 Humph. 537; Mantz v. Buchanan, 1 Md. Ch. 202. See King v. Stetson, 11 Allen, 407; Smith v. McCarty, 119 Mass. 519; also Greenbaum v. Austrian, 70 Ill. 591.

[1] Firestone v. Firestone, 2 Ohio St. 415. See Crane v. Palme, 8 Blackf. 120.

[2] Swaine v. Perine, 5 Johns. Ch. 482; Evertson v. Tappen, id. 497; Atkinson v. Stewart, 46 Mo. 510; Rossiter v. Cossitt, 15 N. H. 38; Woods v. Wallace, 30 N. H. 384; Bolton v. Ballard, 13 Mass. 227; McArthur v. Franklin, 16 Ohio St. 193; Bullard v. Bowers, 10 N. H. 500; Peckham v. Hadwen, 8 R. I. 160; Coates v. Cheever, 1 Cow. 460; Creecy v. Pearce, 69 N. C. 67; Hildreth v. Jones, 13 Mass. 525; Jennison v. Hapgood, 14 Pick. 345; Snyder v. Snyder, 6 Mich. 470; Cockrill v. Armstrong, 31 Ark. 580; Danforth v. Smith, 23 Vt. 247; Van Vronker v. Eastman, 7 Met. 157; Bell v. Mayor of N. Y., 10 Paige 49. See Newton v. Sly, 15 Mich. 391; Wilson v. Davisson, 2 Rob. (Va.) 384.

In Campbell v. Campbell, 13 N. J. Eq. 415, a bill was filed by the widow of an intestate for dower in lands of three kinds: 1, that which was subject to a mortgage put thereon by the intestate; 2, that which was purchased by him subject to a mortgage, the amount of which was allowed to him as so much of the purchase-money, and the payment thereof assumed by him; and 3, that which belonged to him as a member of a partnership. The chancellor said: "It is, of course, unnecessary to speak of the real estate owned by him individually, which was not subject to any incumbrance. It is almost equally so with regard to that part of such real estate which is subject to mortgage put thereon by him. His personal estate is bound to exonerate that land from the burden of the mortgage. Keene v. Munn, 1 C. E. Green, 398; McLenahan v. McLenahan, 3 id. 101. As to that which was purchased by him subject to mortgage, the amount of which was allowed to him as so much of the purchase-money, and the payment whereof he assumed, his personal estate is not bound to exoneration. In such case, to make his estate primarily liable, there must be clear evidence of an intention to make the mortgage debt his own. The weight of authority, both in this country

surplus on the foreclosure of a mortgage or other incum- [361] brance to which dower in the land is subject it will attach to such surplus.[1] The widow may redeem from a paramount mortgage; but in that case she must pay the whole debt.[2] But if the mortgage is held by the purchaser of the equity of redemption or, in other words, by the party bound to contribute the residue of the mortgage debt, she may redeem by paying her fair proportion according to her estate.[3] If the defendant in such case has been in possession under the mortgage she is entitled to an account of rents and profits, although the property may be sold pending the action for dower.[4] In computing the sum due on the mortgage it has been held that annual rests should be made; that the sums

and England, is that the personal estate is not primarily liable, unless the grantee has not merely made himself answerable for the payment of the mortgage, but has made the debt directly and absolutely his own, or has in some other way manifested an intention to throw the burden on the personalty. But the point under consideration was directly passed upon and decided in McLenahan v. McLenahan, *ubi supra*. There the amount of the mortgage had been allowed to the intestate as so much of the purchase-money. See, also, Crowell v. Hospital of St. Barnabas, 12 C. E. Gr. 650, and King v. Whiteley, 1 Hoffm. Ch. 477.

"The real estate of a partnership, purchased with partnership funds, or for the use of the firm, is subjected to the doctrine of equitable conversion so far as necessary for the purposes of the partnership, but otherwise it retains its legal character and incidents. It is, in equity, chargeable with the debts of the copartnership, and any balance which may be due from one copartner to another. On the winding up of the affairs of the firm, as between the heirs at law and the personal representatives of a deceased partner, his share of the surplus of that real estate remaining after paying the debts and adjusting all the equitable claims of the different members of the firm, as between themselves, is to be considered and treated as real estate. The widow of such deceased partner will be entitled to dower in his share of any real estate of the firm not required for the payment of such debts and the adjusting of such equitable claims. Uhler v. Semple, 5 C. E. Gr. 288; Buchan v. Sumner, 2 Barb. Ch. 165; Shearer v. Shearer, 98 Mass. 107; 1 Wash. on R. P. (4th ed.) 669; 1 Scribner on Dower, 536; Foster's Appeal, 74 Pa. St. 391." Bopp v. Fox, 63 Ill. 540.

[1] Matthews v. Durgee, 45 Barb. 69; Titus v. Neilson, 5 Johns. Ch. 452; Smith v. Jackson, 2 Edw. Ch. 28; Hawley v. Bradford, 9 Paige. 200; Keith v. Trapier, 1 Bailey Eq. 63; Boyer v. Boyer, 1 Cold. 12; Bank of Commerce v. Owens, 31 Md. 320.

[2] Norris v. Morrison, 45 N. H. 490.

[3] Woods v. Wallace, 30 N. H. 384; Van Vronker v. Eastman, 7 Met. 157; McArthur v. Franklin, 16 Ohio St. 193.

[4] Witthaus v. Shack, 38 Hun, 560.

paid by the defendant the first year for repairs, taxes, etc., should be deducted from the gross rents received by him, and the balance be taken as the net rents; that the interest on the mortgage debt for the first year should be added to the principal, the net rent be deducted from the aggregate, and the balance become a new principal; and so on from year to year to the time of judgment.[1]

Where a mortgage in which the wife joined was foreclosed in the life-time of the husband against him alone, and the purchaser went into possession, it was held that as to the widow applying to redeem her dower interest he was to [362] be regarded as the mortgagor and mortgagee occupying in common according to their respective interests; that regarding the price paid at the judicial sale as representing both interests, the purchaser should account for such a proportion of the net annual rents as the amount due on the mortgage at the time of the sale bore to the price at which the land was sold; that in ascertaining the annual rents the enhanced value of the land from improvements other than ordinary repairs should be excluded. Taxes and such repairs should be deducted to get the net rents. The plaintiff not having been a party to the foreclosure suit is entitled to have the amount taken in the same manner as though no decree had been rendered; therefore in the computation there should be no rest made at the time of the rendition of the decree. In determining the amount to be paid by the widow she should be charged with such part of one-third of the debt remaining unpaid as bore the same proportion to the one-third of such debt as the value of her life estate in one-third of the land bore to the value of an unincumbered fee in one-third of the entirety; in other words, the widow should pay the present worth of an annuity for her life equal to one-third of the interest of the debt found due at the taking of the account.[2]

Where land is sold to satisfy a paramount lien, and there is a surplus, a wife's contingent dower interest in it will be recognized. It has been held in New York that she is entitled, as against judgment creditors, to have one-third of the amount invested for her benefit, and kept invested during the joint

[1] Van Vronker v. Eastman, 7 Met. 157.

[2] McArthur v. Franklin, 16 Ohio St. 193.

lives of herself and her husband, and during her own life in case of her surviving him, as and for her dower in such surplus moneys.[1] In a late case in Ohio[2] the same interest was recognized; but the court disapproved of such an investment as a mode of protecting or preserving it; and it was held that its value, ascertained by reference to the tables of recognized authority on that subject, in connection with the state of health and constitutional vigor of the wife and her husband, be paid to her.[3]

[1] Denton v. Nanny, 8 Barb. 618.
[2] Unger v. Leiter, 32 Ohio St. 210.
[3] See Bonner v. Peterson, 44 Ill. 253.

CHAPTER XXV.

INJURIES TO REAL PROPERTY.

§ 1008. Scope of chapter.

SECTION 1.

TRESPASS TO REAL PROPERTY.

1009. The gist of the action.
1010. Definition of trespass and scope of the remedy.
1011. Damages confined to compensation.
1012. Damages where tenant sues.
1013. Damages where suit by executor, etc.
1014. Damages measured by benefit received.
1015. Damages for destruction of property.
1016. Occupation of land by railroads.
1017. Damages for permanent wrong.
1018. Damages where injury remediable.
1019. Cutting trees; mining ores.
1020. Same subject; when value computed.
1021. Liability for additional injury to land.
1022. Damages to unsecured ice.
1023. Injuries to crops.
1024. Destruction of fences.
1025. Injuries to party-walls.
1026. Interest.
1027. Mitigation of damages.
1028–1030. Aggravations and special damages.
1031. Exemplary damages.
1032. Same subject; mitigations.

SECTION 2.

INJURY TO INHERITANCE.

1033, 1034. Injury to the rights of parties not in possession.

SECTION 3.

NUISANCE.

1035. What is a nuisance.
1036. General principles of the law of nuisance.
1037. Wrong-doer liable for at least nominal damages.
1038. Usually a continuing wrong requiring successive actions.
1039. What recoverable in the first action.
1040. Continuing liability of the erector.
1041. Damages may include future expenditures.
1042–1045. When nuisance not a continuing wrong.
1046. Same subject; result of the cases.

§ 1047. Depreciation in value as damages.
1048. Other elements of damage.
1049. Injuries to crops, trees, etc.
1050, 1051. Liability for remoter consequences.
1052. Exemplary damages.
1053. Removal of lateral support to land.
1054. Interference with business.
1055. Mitigation of damages.
1056. Same subject; deduction for benefits.
1057. Damages affected by interest in estate.
1058. Private remedy for public nuisance.
1059. Joint and several liability.
1060. Pleading.

[363] **§ 1008. Scope of chapter.** The damages recoverable after judgment for the plaintiff in ejectment, for withholding possession, or in the action for recovery of possession of real property, have been discussed in the foregoing chapter. These result from, or are connected with, the loss or suspension of the plaintiff's possession, and cannot be recovered until it is regained. When there has been a re-entry, whether pursuant to a judgment of restitution or otherwise, all the damages from the ouster to the re-entry may be recovered.[1] But all injuries to real estate do not involve a loss of possession; so those to the inheritance may be redressed by action though the owner is not in possession. These will constitute the subject of the present chapter.

Section 1.

TRESPASS TO REAL PROPERTY.

§ 1009. The gist of the action. The gist of this action is the injury to the plaintiff's possession;[2] only the party actually or constructively in possession can sue.[3] Where the land

[1] Cutting v. Cox, 19 Vt. 517; Smith v. Wunderlich, 70 Ill. 426; Stevens v. Hollister, 18 Vt. 294; Holmes v. Seely, 19 Wend. 507; Smith v. Ingram, 8 Ired. 175; Allen v. Thayer, 17 Mass. 299; Illinois, etc. Coal Co. v. Cobb, 82 Ill. 183; Wohler v. Buffalo, etc. Co., 46 N. Y. 686. See Tracy v. Butters, 40 Mich. 406.

[2] Booth v. Sherwood, 12 Minn. 426; Smith v. Wunderlich, 70 Ill. 426; Reed v. Price, 30 Mo. 442; Fore v. Western, etc. R. Co., 101 N. C. 526.

[3] Smith v. Ingram, 8 Ired. 175; Abbott v. Abbott, 51 Me. 575; Little v. Palister, 3 id. 6; Lyford v. Toothaker, 39 id. 28; Holmes v. Seely, 19 Wend. 507; West v. Lanier, 9 Humph. 762; Smith v. Wunderlich, 70 Ill. 426; Campbell v. Arnold, 1 Johns.

on which the trespass is committed is not in the actual [364] occupation of any person the plaintiff may prove constructive possession by showing his title.[1] One person may have possession of the surface and another of the subsoil, or mines and minerals.[2] The possession is presumed to be in the owner of the legal title in the absence of all other evidence; or in other words, no one being shown to be in adverse possession he will be presumed to be in possession;[3] and it will also be presumed that his possession is co-extensive with his grant.[4] Though the possession is by wrong it will sustain the action against a stranger.[5] If an action is against the person in possession the burden of proving title is on the plaintiff.[6] Possession at the time the trespass was committed is all that is necessary to give a right of action; it need not continue until suit is brought.[7]

§ 1010. Definition of trespass and scope of the remedy. Every unauthorized intrusion into the land of another is sufficient trespass to support an action for breaking the close.[8] It is immaterial to the cause of action that no actual injury is done, or that the tortious act of the defendant is even beneficial to the plaintiff.[9] His legal right being invaded by the intrusion, he is entitled at least to nominal damages in order

511; Wickham v. Freeman, 12 id. 183; Van Rensselaer v. Radcliff, 10 Wend. 639; Lienow v. Ritchie, 8 Pick. 235; French v. Fuller, 23 id. 104; Owings v. Gibson, 2 A. K. Marsh. 515; Foster v. Fletcher, 7 T. B. Mon. 534; Miller v. Fulton, 4 Ohio, 433; Zimmerman v. Shreeve, 59 Md. 357.

[1] Booth v. Sherwood, 12 Minn. 426; Yorgensen v. Yorgensen, 6 Neb. 383; Jenkins v. Lykes, 19 Fla. 148, 161.

The owner of a cemetery lot may maintain an action for the removal of the remains of a child interred therein. Meagher v. Driscoll, 99 Mass. 281; Smith v. Thompson, 55 Md. 5.

[2] Cox v. Glue, 5 C. B. 533.

[3] Griffin v. Creppin, 60 Me. 270; Smith v. Wunderlich, 70 Ill. 426.

[4] Melcher v. Merryman, 41 Me. 601.

[5] Rollins v. Clay, 33 Me. 132; Wilder v. House, 48 Ill. 279; Reeder v. Purdy, 41 Ill. 279; Meader v. Stone, 7 Met. 147; Yeates v. Allin, 2 Dana, 134; Ives v. Ives, 13 Johns. 235; Reed v. Price, 30 Mo. 442; Jenkins v. McCoy, 50 Mo. 348; Doty v. Burdick, 83 Ill. 473.

[6] Miller v. Wellman, 75 Mich. 353.

[7] Carner v. St. Paul, etc. Ry. Co., 43 Minn. 375; Natchez, etc. R. Co. v. Currie, 62 Miss. 506.

[8] Triscony v. Brandenstein, 66 Cal. 514; Dougherty v. Stepp, 1 Dev. & Batt. 371.

[9] Murphy v. Fond du Lac, 23 Wis. 365; Parker v. Griswold, 17 Conn. 288; Blaen Avon Coal Co. v. McCulloch, 59 Md. 403; Fisher v. Dowling, 66 Mich. 370.

to vindicate that right and recover his costs.[1] When the plaintiff's land is illegally entered a cause of action at once arises; whatever is done after the breaking and entry is but aggravation of damages.[2] The action of trespass *quare clausum fregit*, therefore, may embrace, for the purpose of compensation to the owner as well as punitory damages, all the things done and said by the defendant in the course and forming part of the *res gestæ* of such breaking and entry, and all the natural and proximate effects which ensue.[3]

§ **1011. Damages confined to compensation.** If the nature of the wrong done and the circumstances connected with it are such as do not authorize the imposition of exemplary damages, the recovery must be for such sum as will compensate the plaintiff for the injury done. This cannot be increased in the discretion of the jury;[4] nor will less than that be awarded by a court of equity merely because the wrong was unwittingly done.[5]

[365] § **1012. Damages where tenant sues.** Damages in this action may be such as are appropriate to the tenure by which the plaintiff holds, and such as result from the injury he has suffered. Possession alone will entitle him to recover damages for any injury solely affecting it. If he seeks to recover for the future he must show that his title gives him an interest in the damages claimed, and he can recover none except such as affect his own right,[6] unless he holds in such relation to the other parties interested that his recovery will bar their claim.[7] The same act may be injurious to several

[1] Vol. 1, §§ 9–11; Empire Gold M. Co. v. Bonanza Gold M. Co., 67 Cal. 406; Baltimore & O. R. Co. v. Boyd, 67 Md. 32.

[2] Cook v. Redman, 45 Mo. App. 397; Adams v. Blodgett, 47 N. H. 219; Brown v. Manter, 22 id. 468; Ferrin v. Symonds, 11 id. 365; Kolb v. Bankhead, 18 Tex. 229.

[3] Damron v. Roach, 4 Humph. 134; Tissot v. Great Southern T. & T. Co., 39 La. Ann. 996.

[4] Steele v. Davis, 75 Ind. 191; Flynt v. Chicago, etc. Ry. Co., 38 Mo. App. 98.

[5] Atlantic, etc. Coal Co. v. Maryland Coal Co., 62 Md. 135.

[6] Zimmerman v. Shreeve, 59 Md. 357; Salisbury v. Western, etc. R. Co., 98 N. C. 465; I. & G. N. Ry. Co. v. Benitos, 59 Texas, 326; International, etc. Ry. Co. v. Ragsdale, 67 id. 24; Stratton v. Lyons, 53 Vt. 641; Gilbert v. Kennedy, 22 Mich. 117.

[7] Woods v. Banks, 14 N. H. 101; Hibbard v. Foster, 24 Vt. 542; Bigelow v. Rising, 42 Vt. 678; Nims v. Troy, 59 N. Y. 500; Jackson v. Todd, 25 N. J. L. 121; Harker v. Dement, 9 Gill, 7.

persons having different interests: to a tenant, or one having a limited estate in possession, by the interruption of his enjoyment and the diminution of his profits; to a landlord, or one having an expectant estate in reversion or remainder, by the more permanent injury to his property. Both may have separate actions for their several damages.[1] Where a stranger cuts down trees a tenant can recover only in respect of shade, shelter and fruit; for he is entitled to no more.[2] A tenant may recover for an injury which impairs the value of his possession; also for one which imposes an additional burden in the performance of his covenant to repair.[3] If an injury is done to a building which he must keep in repair that liability entitles him to recover damages therefor.[4] A tenant for years has a right to be compensated for all injury done to his possession and to his rights as lessee; and in ascertaining this the expense necessary to restore the building to such a state as would make the possession as beneficial for his purposes as it was before the trespass was committed should be allowed.[5] The allowance of damages in favor of a tenant on ac- [366] count of injury to the estate, however, should not exceed the value of his term, including the rent he is bound to pay.[6] Where T. demised land to the plaintiff at an annual rent for twenty-one years, with liberty to dig half an acre of brick earth annually, the lessee covenanting that he would not dig more, or, if he did, to pay an increased rent of 375*l.* per half-acre, being after the same rate that the whole brick earth was sold for, and a stranger dug and took away brick earth, it was held the lessee was entitled to recover against him and retain the full value of it.[7] Where it appears that the plaintiff entered as tenant he must prove his lease in order to recover more than nominal damages for other than past injury to his

[1] George v. Fisk, 22 N. H. 32–45; Lane v. Thompson, 43 id. 320; Rolle's Abr., tit. Trespass, notes 3, 4, 5; Jesser v. Gifford, 4 Burr. 2141; Hamden v. Rice, 24 Conn. 350; Reeder v. Purdy, 41 Ill. 279; Starr v. Jackson, 11 Mass. 519; Jackson v. Todd, 25 N. J. L. 121; Bennett v. Thompson, 13 Ired. 146; Zimmerman v. Shreeve, 59 Md. 357.

[2] Bedingfield v. Onslow, 3 Lev. 209.

[3] Hardrop v. Gallagher, 2 E. D. Smith, 523; Buddin v. Fortunato, 10 N. Y. Supp. 115; Weston v. Gravlin, 49 Vt. 507.

[4] Gourdier v. Cormack, 2 E. D. Smith, 200.

[5] Willis v. Branch, 94 N. C. 142.

[6] Walter v. Post, 4 Abb. Pr. 382.

[7] Attersoll v. Stevens, 1 Taunt. 183.

possession.[1] Where the defendant, sued for pulling down a wall on the premises, received a lease five days after the trespass, the plaintiff was only allowed nominal damages, it appearing that he entered under the same lessor and did not think proper to show his lease.[2] A plaintiff in possession under color of title to the fee can recover against a stranger as owner. If the defendant be a mere intruder he cannot set up title in a third person, either to affect the cause of action or in mitigation.[3] One in possession under a contract of purchase and entitled to a conveyance is virtually the owner.[4]

§ **1013. Damages where suit by executor, etc.** An executor may sue for a trespass committed on his testator's lands during the latter's life-time; and where such lands are devised to him in trust for defined purposes he may sue for a trespass committed on them after the testator's death. Both causes of action may be united.[5] A personal representative who has not asserted his statutory right to the possession of the decedent's realty cannot maintain an action for injuries thereto committed *post mortem decedentis;* his right to do so is limited to the property in his control or possession. But if he has asserted his rights by taking possession his possession relates back to the decedent's death, although the wrong complained of was committed intermediate these events and before administration was granted. If the land is vacant bringing an action for the trespass is equivalent to taking possession.[6] In such a case the personal representative may recover the full amount of damage done the premises, regardless of the amount of claims against the estate or any rights the defendant may have acquired through the decedent's heirs.[7] In a suit brought by heirs it is proper to make their father, the owner of a life estate in a portion of the injured property, a party. If they are minors and he alleges ownership in them, he thereby estops himself from afterwards recovering for the injury done to his interest, and damages may be recovered

[1] Gilbert v. Kennedy, 22 Mich. 117.

[2] Twyman v. Knowles, 13 C. B. 222.

[3] Reed v. Price, 30 Mo. 442–447; Illinois, etc. R. Co. v. Cobb, 94 Ill. 55; First Parish of Shrewsbury v. Smith, 14 Pick. 297; Ganter v. Atkinson, 35 Wis. 48; Todd v. Jackson, 26 N. J. L. 525; Hebert v. Lege, 29 La. Ann. 511.

[4] Honsee v. Hammond, 39 Barb. 89.

[5] Pittsburgh, etc. Ry. Co. v. Swinney, 97 Ind. 586.

[6] Noon v. Finnegan, 29 Minn. 418.

[7] S. C., 32 Minn. 81.

for the injury done to the whole estate.[1] One who has conveyed land to a trustee cannot, on the annulment of his conveyance, subsequent to the committal of a trespass on the premises, recover damages on the theory that the cancellation operated retrospectively to restore his rights as owner.[2]

§ **1014. Damages measured by benefit received.** The damages will be such as result from the injury the plaintiff has suffered. If the defendant derives a benefit from the tortious use of the plaintiff's premises the latter will be entitled to damages measured thereby. Where the defendant tortiously used a canal the court said trespass could be brought for entering and breaking the plaintiff's close, and he could allege and prove the use of the canal as special damages.[3] He will be entitled to recover the value of the use.[4] Where land [**367**] was let, but the right to the minerals remained in the landlord, who, however, could not get them without the tenant's consent, but who had, nevertheless, got them without it, it was held that as the tenant had an absolute veto, it was equal in value to that of the minerals, less so much money as would induce a third person to get them; in other words, the measure of damages against the landlord would be the net returns from the sales, less such a sum by way of profit as would induce a third person to undertake the enterprise.[5]

§ **1015. Damages for destruction of property.** All the facts and circumstances constituting or proximately connected with the trespass tending to show its character and immediate consequences may be proved, both to show the amount necessary to a just compensation for the injury, and the motive of the defendant, to enable the jury to determine whether the wrong is such that punitory damages should be given, and, if so, how much.[6] In the absence of facts warranting such damages the principle of compensation governs, and to ascertain the amount the mode of proof must be adapted to the facts of each case. If the wrong consists in destroying some improve-

[1] Fort Worth, etc. Ry. Co. v. Pearce, 75 Tex. 281.

[2] Salisbury v. Western, etc. R. Co., 98 N. C. 465.

[3] Ward v. Warner, 8 Mich. 508–525.

[4] McWilliams v. Morgan, 75 Ill. 473; Weaver v. Mississippi, etc. Boom Co., 28 Minn. 534; Houston, etc. Ry. Co. v. Adams, 63 Texas, 200; Baltimore & O. R. Co. v. Boyd, 67 Md. 32.

[5] Attorney-General v. Tomline, 5 Ch. Div. 750; Mayne on Dam. 387.

[6] Day v. Holland, 15 Ore. 464.

ment on the property not essential to its enjoyment, and not appreciably affecting its value as a whole, or any special interest of the plaintiff therein, the damages may be estimated on the value of the thing destroyed or removed. Thus the removal by the village authorities of a sidewalk which had been laid by the village at its own expense in front of the plaintiff's lot, and used there for two years, and kept in repair by the plaintiff, is a trespass, for which he was allowed to recover the value of the walk, down, at the time it was removed.[1] But where the trespass suspends or impairs the enjoyment of the premises compensation may be given on the basis of the rental value in the absence of any ground for special damages, or in addition to such damages; and if the premises are put out of repair, the cost of repair will be an additional item, including interest on the amount paid. Where the trespass was the re-
[368] moval of a fence it was held that the plaintiff was entitled to recover such damages as would, properly expended, restore the premises to the condition they were in before the interference of the defendant.[2] Where the gas fixtures in a hall used for theatrical purposes were removed and the furniture damaged the tenant was entitled to the same measure of compensation, and also to damages for consequential injuries, such as his inability to use the hall for entertainments already arranged for.[3]

Where the unfinished house of the plaintiff, being built under contract, was injured and its completion delayed by the defendant's tortious act, the plaintiff was not only entitled to recover for the injury to the building but also its rental value during the delay thus occasioned. The court say: "There was no valid objection to a recovery by the plaintiff for the injuries to the dwelling-house. It was part of the realty and the property of the plaintiff. The fact that it was built by contract and was not completed did not detract from his right to the house as it was, or to recover for its destruction. A recovery by him would bar an action by the contractors, even if it be conceded they would have a remedy against the defendant. . . But no legal objection exists to a recovery

[1] Rogers v. Randall, 29 Mich. 41. See Clark v. St. Clair, etc. Co., 24 Mich. 508.

[2] Marvin v. Pardee, 64 Barb. 353; Colton v. Onderdonk, 69 Cal. 155.

[3] Willis v. Branch, 94 N. C. 142.

by the plaintiff for that which was clearly his, although he might have an action against a third person, who in turn would have a remedy over against the city."[1] If the thing destroyed, although it is part of the realty, has a value which can be accurately ascertained without reference to the soil on which it stands or out of which it grows, the recovery may be of the value of the thing thus destroyed, and not for the difference in the value of the land before and after such destruction.[2] The defendant who destroyed the sluiceway to a mill was held liable for the sluiceway and the consequential damages of the plaintiff for having his mill stopped.[3] If for the purpose of staying a conflagration a building has been blown up without right the jury in estimating the dam- [369] ages should consider the circumstances under which it and its contents were situated, and their chance of being saved, even though they were not actually on fire; and should determine their value with reference to the peril to which they were exposed.[4]

§ 1016. Occupation of land by railroads. A railroad company which lays its track upon land without acquiring the right to do so is liable, in the absence of all claim for other damages, for the difference between the annual rental value of the premises with the track down, and the road operated as it is, and what the rental value would have been if the road had not been there.[5] The damages cannot be increased because property on land adjacent to that so occupied has been exposed to extra hazard from fire.[6] If consequential damage has been sustained as the result of the trespass compensation therefor is recoverable. If a mill-race is so obstructed as to destroy the use of the mill the damages are measured by the difference between the value of the mill site and machinery

[1] Nims v. Troy, 59 N. Y. 508.

[2] Southern Oil Works v. Bickford, 14 Lea, 651; Houston, etc. Ry. Co. v. Adams, 63 Texas, 200; Marks v. Culmer, 6 Utah, 419; 24 Pac. Rep. 528; Whitbeck v. New York, etc. R. Co., 36 Barb. 647; Clark v. St. Clair, etc. Co., 24 Mich. 508.

[3] Hammat v. Russ, 16 Me. 171.

[4] Parsons v. Pettingill, 11 Allen, 507.

[5] Blesch v. Chicago, etc. R. Co., 43 Wis. 183; Brakken v. Minneapolis, etc. Ry. Co., 29 Minn. 41; S. C., 31 id. 45; Carli v. Union Depot, etc. Co., 32 id. 101; Larsen v. Oregon Ry. & N. Co., 19 Ore. 240; Rumsey v. New York, etc. R. Co., 133 N. Y. 79.

[6] Fore v. Western, etc. R. Co., 101 N. C. 526.

before and after the obstruction was made.[1] In Mississippi the increased value of adjacent lands resulting from the construction of a railroad cannot affect the amount recoverable for the trespass.[2] In Texas the statutory rule for awarding damages in condemnation proceedings is applied in actions to recover compensation for an unlawful entry, if neither special nor vindictive damages are claimed. The recovery is fixed by the value of the land appropriated on the day it was taken, to be increased or diminished as the value of the part not taken has been affected by the appropriation. No separate account should be taken of the value of trees cut; their worth should be assessed with the land.[3] A trespassing railway company cannot lessen its liability for the depreciation in the market value of the property by proof that the ties and rails placed upon it became part of the realty and the property of the plaintiff.[4] If a single trespass is committed upon two contiguous lots owned by the plaintiff the damages to both may be assessed together, although they have not been so used as to be considered as one tract within the rule which governs in condemnation proceedings.[5] The rental or usable value of the property is to be determined with reference to the purpose it was used for before the wrong was done; not what such value would have been if the land had been devoted to some other use or if the improvements upon it were different.[6] There is a marked diversity of opinion concerning the nature of such a trespass. Some courts hold that the wrong is a continuing one, and that successive actions may be brought in which prospective damages cannot be recovered. This is the rule in Wisconsin,[7] Minnesota,[8] New York,[9] Pennsylvania,[10] Georgia[11]

[1] Hot Springs R. Co. v. Tyler, 36 Ark. 205.

[2] Natchez, etc. R. Co. v. Currie, 62 Miss. 506.

[3] Texas, etc. R. Co. v. Matthews, 60 Texas, 215.

[4] Schroeder v. De Graff, 28 Minn. 299.

[5] Lamm v. Chicago, etc. Ry. Co., 45 Minn. 71.

[6] Rumsey v. New York, etc. R. Co., 133 N. Y. 79.

[7] Carl v. Sheboygan, etc. R. Co., 46 Wis. 625.

[8] Brakken v. Minneapolis, etc. Ry. Co., 29 Minn. 41; Adams v. Hastings, etc. R. Co., 18 id. 260; Lamm v. Chicago, etc. Ry. Co., 45 id. 71.

[9] Uline v. New York, etc. R. Co., 101 N. Y. 98.

[10] Bare v. Hoffman, 79 Pa. St. 71.

[11] Savannah, etc. R. Co. v. Bourquin, 51 Ga. 378.

and Tennessee.[1] In Iowa,[2] Illinois,[3] Kentucky,[4] Massachusetts,[5] Kansas,[6] Indiana,[7] Texas,[8] New Hampshire[9] and Alabama,[10] successive actions will not lie.

§ 1017. Damages for permanent wrong. Wherever [372] by one act a permanent injury is done the damages are assessed once for all,[11] even though separate parcels of land are affected,[12] and any depreciation in the value of the property will be an element of damages according to the extent and duration of the plaintiff's estate. An estimate of damages on this basis presupposes that the premises are subject to the same lasting detriment; and that it is not to be averted or removed by any expenditure; for otherwise the injury would be measured upon different elements. Thus, where by the wrongful act of the defendant a bar of gravel was deposited upon the plaintiff's land by a flood, and was so extensive that the cost of its removal would equal or exceed the value thereby restored to the premises, that expense was held not to measure the damages; but rather the depreciation in the value of the land in consequence of the deposit remaining.[13] So where the plaintiff's land is caused to fall away in [373] consequence of the defendant's removing its lateral support, he is entitled to damages to the extent of the injury sustained; this is not, however, the cost of restoring the lot to

[1] Harmon v. Railroad, 87 Tenn. 614.

[2] Stodghill v. Chicago, etc. R. Co., 53 Iowa, 341.

[3] Chicago, etc. R. Co. v. Loeb, 118 Ill. 203.

[4] Jeffersonville, etc. R. Co. v. Esterle, 13 Bush, 667.

[5] Fowle v. New Haven & N. Co., 112 Mass. 334.

[6] Kansas R. Co. v. Milman, 17 Kan. 224.

[7] Indiana, etc. R. Co. v. Eberle, 110 Ind. 542; Same v. Allen, 113 id. 308.

[8] Rosenthal v. Taylor, etc. Ry. Co., 79 Texas, 325.

[9] Troy v. Cheshire R. Co., 23 N. H. 83.

[10] Highland Avenue, etc. R. Co. v. Matthews, — Ala. —; 34 Cent. L. J. 158; 10 South. Rep. 267.

[11] Ziebarth v. Nye, 42 Minn. 541; Lamb v. Walker, 3 Q. B. Div. 389. See Mitchell v. Darley Main Colliery Co., 14 id. 125; Darley Main Colliery Co. v. Mitchell, 11 App. Cas. 127, considered in vol. 1, §§ 114–116.

[12] Beronio v. Southern P. R. Co., 86 Cal. 415.

[13] Easterbrook v. Erie Ry. Co., 51 Barb. 94; Chase v. New York, etc. R. Co., 24 id. 273; Hanover Water Co. v. Ashland Iron Co., 84 Pa. St. 279; Jones v. Gooday, 8 M. & W. 146; Honsee v. Hammond, 39 Barb. 89; De Coster v. Mass. Min. Co., 17 Cal. 613; Holt v. Sargent, 15 Gray, 97; Chicago, etc. R. Co. v. Willits, 45 Kan. 110.

its former condition, or of building a wall to support it, but it is the diminution in the value of the land in consequence of the defendant's act.[1] It is a damage from loss of soil; and where by any tortious act such a loss occurs the owner is entitled to be compensated according to the value of the land or soil to him.[2] If its removal reduces the value of the lot he is entitled to recover for such depreciation.[3] This measure of damages was applied where property suitable for the site of large buildings was undermined, and the proof tended to show that by the construction of foundation walls of unusual depth, which would cost less than the amount of the diminution in the market value of the property, the surface might be retained in its natural condition and safe support for such buildings afforded. The court thought that the land-owner was not bound to resort to that means to avert loss; he had the right to hold the property for sale and realize its market value. If that value had been diminished to a greater extent than the cost of building such walls the application of that cost as the measure of recovery would not afford full compensation unless the plaintiff should resort to the erection of such buildings as the property was suitable for.[4] The doctrine of lateral support and the measure of damages for injury thereto does not apply to deep mining claims in California which are worked by the hydraulic process. Hence where the parties owned adjoining claims and the defendant in working its own washed away the gravel so that a portion of plaintiff's land fell upon the other's claim and was washed away, the value of the gold in the portion which fell being less than the necessary cost of securing it, there was no liability.[5] If the depreciation in market value measures the liabil-

[1] McGuire v. Grant, 25 N. J. L. 356; Gilmore v. Driscoll, 122 Mass. 199; Nicklin v. Williams, 10 Exch. 259; Moellering v. Evans, 121 Ind. 195; Kopp v. Northern P. R. Co., 41 Minn. 310. The last case holds that evidence of the cost of retaining walls is proper to show whether or not the damage could have been repaired and the lot preserved at reasonable cost.

[2] Jones v. Gooday, 8 M. & W. 146; Mueller v. St. Louis, etc. R. Co., 31 Mo. 262.

[3] Karst v. St. Paul, etc. R. Co., 22 Minn. 118.

[4] Barnett v. St. Anthony Falls Water Power Co., 33 Minn. 265.

[5] Hendricks v. Spring Valley Mining & S. Co., 58 Cal. 190.

ity of the wrong-doer the entire tract of land upon which the injury was done is to be considered, although but a small portion of it has been directly and physically affected.[1] According to the Kansas court the market value of the tract may be shown for any purpose for which it could be most advantageously used and for which it would command the highest price.[2] But this view is not held in New York. Where an action was brought for injury to the life estate of the plaintiff as tenant by the curtesy initiate, it was held erroneous to assess the value of the estate by the present value of the rents and profits, without deduction for annual charges or rebate of interest.[3] If a large quantity of earth is placed upon the land the benefits resulting to the latter may be considered under a general denial. An allowance therefor is not in the nature of recoupment or set-off, but a method of determining the damage sustained.[4] Where the injury complained of consists in the erection of a telephone pole in a footway in front of the plaintiff's premises, no land of his being actually taken nor none of his soil being invaded, the damage is measured either by the extent of the depreciation in the usable or rental value of the property, or by the difference in its value before and after such erection so far as the value has been affected by that act.[5]

§ **1018. Damages where injury remediable.** If the wrong consists in the destruction or removal of some addition, fixture, or part of the premises the loss may be estimated upon the diminution of their value if any results,[6] or upon the value of the part severed considered either as a part of the premises or detached; and that valuation should be adopted which will be most beneficial to the injured party; for he is entitled to the benefit of the premises intact, and to the value of any part separated.[7] The damages for injury done to a house are meas-

[1] Chicago, etc. R. Co. v. Willits, 45 Kan. 110.

[2] Id.

[3] Greer v. Mayor, etc., 1 Abb. (N. S.) 206. See Tallman v. Metropolitan E. R. Co., 121 N. Y. 119, and other cases cited in note to § —, *infra*.

[4] Mayo v. Springfield, 138 Mass. 70.

[5] Chesapeake & P. T. Co. v. Mackenzie, 74 Md. 36.

[6] Rhoda v. Almeda Co., 58 Cal. 357; Oregon & C. R. Co. v. Jackson, 28 Pac. Rep. 74; 21 Ore. 360.

[7] Hoyt v. Southern, etc. T. Co., 60 Conn. 385, 390, quoting and approving the text, and holding that an estimate of the damages resulting from the probable injury to the sale of a lot by cutting a shade tree in front of it was not speculative or remote.

ured by the cost of restoring it to its previous condition;[1] for encroaching upon land the value of its use for past time.[2] Where a pipe supplying plaintiff with water was cut on the defendant's premises the cost of obtaining water and compensation for the inconvenience endured measured the defendant's liability.[3] If trees are cut so as to fall across a line fence and cover a portion of the land with brush the damages are not necessarily measured either by the expense of removing them or the value of the land they cover, because the injury may have extended to other land than that covered.[4] In a recent Iowa case the defendant entered upon and dug trenches and laid pipes through plaintiff's lot, thereby injuring his fences, walks, trees, shrubbery and house. It was assumed that these injuries could be repaired, and held that the damages were measured by such sum as would put the property in as good condition as it was in before the injury, with the additional sum that would compensate for the deprivation of its use and enjoyment and the value of such of the property as could not be restored to its previous condition.[5] The cost of filling a drain and the damage resulting from the loss of the use of the land measured the liability of the person who dug the drain.[6] Liability for loss of the use does not extend over the period occupied in the determination of a suit against a party who is not liable for the wrong.[7] The Pennsylvania court has recently found it necessary to hold that a comparison of the value of the property injured cannot antedate the period which bars the right to bring an action for the wrong done.[8]

§ 1019. Cutting trees; mining ores. For cutting and carrying away trees or timber by a continuous act the action must be trespass *quare clausum fregit*.[9] Under that form of action the severance of the property from the freehold is the essential fact; and so far as it diminishes the value of the land the owner is entitled to compensation. The value of

[1] Harrison v. Kiser, 79 Ga. 588, 595.

[2] McGann v. Hamilton, 58 Conn. 69.

[3] Reynolds v. Braithwaite, 131 Pa. St. 416.

[4] Hutchinson v. Parker, 64 N. H. 89.

[5] Graessle v. Carpenter, 70 Iowa, 166; Lentz v. Carnegie, 145 Pa. St. 612.

[6] Walters v. Chamberlin, 65 Mich. 333; Cavanagh v. Durgin (Mass.), 31 N. E. Rep. 643. See Ziebarth v. Nye, 42 Minn. 541.

[7] Cavanagh v. Durgin (Mass.), 31 N. E. Rep. 643.

[8] Lentz v. Carnegie, 145 Pa. St. 612.

[9] Sturgis v. Warren, 11 Vt. 433.

the timber need not be averred, but may be proved to show the amount of damages.[1] The plaintiff may adopt its value as the measure of his damages, but is not obliged to do so;[2] if the injury to the land exceeds the value of the tim- [374] ber, or in other words, if the trees were worth more standing, he may recover their value as part of the land.[3] Hogeboom, J., forcibly said: "Surely the damage would not be in all cases accurately measured by the market value of the wood or timber when cut. The trees might be a highly valuable appendage to the farm for purposes of shade or ornament; there might be a very scanty supply for a farm of that size; or for other reasons they might have a special value as connected with the farm, altogether independent of, and superior to, their intrinsic value for purposes of building or fuel. As well might you remove the columns which supported the roof or some part of the superstructure of a splendid mansion, and limit the owner in damages to the value of these columns as timber or cord wood as to adopt the parallel rule in this case."[4] A plaintiff in an action for trespass on land in cutting and carrying away timber is entitled, first, to recover damages for the injury to the land in severing the growing timber, considering merely the act of severing it; and secondly, for the taking and carrying away the timber so severed.[5] Though the whole is but one continuous act it includes this twofold injury.[6] In some instances, however, the cutting of the trees would be the whole injury, as where ornamental

[1] Kolb v. Bankhead, 18 Tex. 229.

[2] Id.

[3] Foote v. Merrill, 54 N. H. 490; Wallace v. Goodall, 18 N. H. 439; Ensley v. Nashville, 2 Baxt. (Tenn.) 144; Harder v. Harder, 26 Barb. 409; Van Deusen v. Young, 29 Barb. 9; Templemore v. Moore, 15 Irish C. L. (N. S.) 14; Argotsinger v. Vines, 82 N. Y. 308; Nixon v. Stillwell, 52 Hun, 353; Chipman v. Hibberd, 6 Cal. 162; White v. Stoner, 18 Mo. App. 540; Knisely v. Hire, 2 Ind. App. 86; 28 N. E. Rep. 195; Carner v. St. Paul, etc. Ry. Co., 43 Minn. 375; Hayes v. Chicago, etc. Ry. Co., 45 id. 17. Compare Fremont, etc. R. Co. v. Crum, 30 Neb. 70.

[4] Van Deusen v. Young, 29 Barb. 9.

[5] Id.; Longfellow v. Quimby, 33 Mo. 457; Thompson v. Moiles, 46 Mich. 42; Miller v. Wellman, 75 id. 353; Dwight v. Elmira, etc. R. Co. 132 N. Y. 199.

[6] In Smith v. Smith, 50 N. H. 218, the court say: The common mode of declaring in actions for breaking the plaintiff's close and taking and carrying away property "virtually includes two causes of action in one count — an action for the disturbance of plaintiff's possession of his

trees or fruit trees are cut.[1] In the case of the latter their value, according to some authorities, is to be estimated at their worth in their growing state;[2] but it is settled in New York that where fruit trees are destroyed or injured and their owner asserts his right to go beyond their value after severance from the land, so as to obtain compensation for the damage done the latter, his recovery is measured by the difference between the value of the land before and after the injury.[3] The damages for injury to nursery trees are measured by the depreciation in their market value.[4] The tortious act in these cases is one of destruction merely. On the other hand, if timber trees are cut after they have reached maturity, and the plaintiff, by getting their present market value, will realize all that he could ever obtain from them, the conversion of the timber is the principal injury. If ores are mined and removed a like injury is done; and the same considerations apply in the [375] determination of damages. The value of timber cut may be recovered, although the plaintiff by mistake led the defendant to believe that he was cutting it on his own land.[5]

§ 1020. Same subject; when value computed. On the strict theory of trespass *quare clausum* the breaking of the close is the cause of action, and the removal of timber or other property merely enhances the damages. This is especially so if the severance from the land and the carrying away are by a continuous act. In any case where the severance is not the principal injury, where the conversion into a chattel and the carrying away are together complained of as the cause or causes of action, and the damages are ascertained on the value of the timber or ore, the actual injury is that the

real estate, and an action to recover the value of his chattels unlawfully taken and converted." Woolley v. Carter, 7 N. J. L. 85; Thayer v. Sherlock, 4 Mich. 173.

The damages for cutting and carrying away timber may be recovered without being specially alleged. Argotsinger v. Vines, 82 N. Y. 308.

[1] Whitbeck v. New York, etc. R. Co., 36 Barb. 644; Tissot v. Great Southern T. & T. Co., 39 La. Ann. 996; Ross v. Scott, 15 Lea, 479; N. & W. R. Co. v. Bohannon, 85 Va. 293; United States v. Taylor, 35 Fed. Rep. 484.

[2] Montgomery v. Locke, 72 Cal. 75; Mitchell v. Billingsley, 17 Ala. 391.

[3] Dwight v. Elmira, etc. R. Co., 132 N. Y. 199.

[4] Birket v. Williams, 30 Ill. App. 451; Dwight v. Elmira, etc. R. Co., 132 N. Y. 199.

[5] Pearson v. Inlow, 20 Mo. 322. But see Kramer v. Goodlander, 98 Pa. St. 353.

defendant has taken the plaintiff's property in the condition in which it existed prior to the trespass. How should compensation be computed for this injury? The law is not settled on this point; a great diversity of decision exists. We exclude now the consideration of any special acts detrimental to the land not necessarily involved in taking the timber or ore, and also all elements of bad faith or wilfulness.

In this particular action this conflict is confined to narrower limits than in trover and trespass *de bonis;* the conflict, when the wrong is not wilful, is between charging the defendant with the value of the trees standing, or stumpage, and ore in place, on one hand, and on the other its value immediately after severance from the land. The tendency of decision is toward the former rule; but as the trespasser cannot divest the owner of his title to the property when it becomes a chattel it is recognized as belonging to the owner of the land so that he may retake it, replevy it, or recover for it in actions for taking or conversion of personal property. It has been deemed the right of the owner to recover the value at the time it becomes a chattel; otherwise it is said the trespasser receives remuneration for services not requested by the owner, and for which he is not bound to make compensation. It is supposed that the right to retake the property and recover its value are correlative rights. Ruggles, J., said: "It would be absurd to say that the original owner may retake the thing by an action of replevin in its improved state, and yet that he may not, if put to his action of trespass or trover, recover its improved value in damages."[1] The right of the owner to retake his property is maintainable on the principle that [376] he cannot be divested of it without his consent by the tortious act of a wrong-doer; but his rate of damages or the measure of his compensation is governed by another principle, which is that he is entitled to compensation commensurate, and only commensurate, with the injury suffered. When he sues to recover damages for the taking or conversion he sues for a wrong which precedes and does not include the defendant's acts which enhance the value. The cases which support the rule of damages confined to the value of the property before the trespass was committed are given in a note, with some

[1] Silsbury v. McCoon, 3 N. Y. 384.

[380] of the reasons advanced in their support.[1] As has been observed this measure of damages is only applied where the

[1] Foote v. Merrill, 54 N. H. 490, was trespass *quare clausum fregit* for cutting down and carrying away trees. It was held that the measure of damages is the amount of injury which the plaintiff suffered from the whole trespass, taken as a continuous act; the increased value of the trees occasioned by the labor of the defendant in converting them into timber is not to be included. Hibbard, J., says: "The defendant having wrongfully cut and trimmed the plaintiff's trees, and it being impossible to separate the original property in them from the value subsequently added, it is unnecessary to cite authorities to show that the plaintiff, after they were cut and trimmed, remained the owner of the timber made from them, free from any lien or claim of the defendant for his labor, and that he might, therefore, have lawfully taken it peaceably into his possession. It is only where the identity of the original material has been destroyed, or where its value is insignificant compared with the value of the article manufactured from it or to which it has been annexed, that the law is otherwise. Weatherbee v. Green, 22 Mich. 311. The plaintiff might also have maintained replevin for the timber. Davis v. Easley, 13 Ill. 192; Wingate v. Smith, 20 Me. 287. Or he might, according to numerous authorities, have recovered its full value at the time it was carried away by bringing trover. Brown v. Sax, 7 Cow. 95; Baker v. Wheeler, 8 Wend. 505; Rice v. Hollenbeck, 19 Barb. 664; Grant v. Smith, 26 Mich. 201; Ellis v. Wire, 33 Ind. 127. According to the doctrine of Adams v. Blodgett, 47 N. H. 219, he might have elected any day prior to the date of his writ as the time of the conversion; perhaps the same result might as well have been reached in trespass *de bonis asportatis*, but the difficulty of allowing the original taking to be abandoned, and a later one adopted, has probably been thought greater in that form of action than in trover, although judges have sometimes taken a different view. . . . If the owner of timber cut upon his land by a trespasser gets possession of it increased in value, he has the benefit of the increased value; the law neither divests him of his property, nor requires him to pay for improvements made without his authority; perhaps in trover, and possibly in trespass *de bonis asportatis*, he may be entitled to the same benefit; but we see no occasion for giving it to him where he brings his suit for the whole trespass of breaking [377] and entering his close and cutting down and carrying away his trees as a continuous act. The plaintiff is entitled to be compensated according to the magnitude of his loss, and the defendant ought only to be liable to compensate him according to the magnitude of his loss. The inquiry should be, how much was the plaintiff injured by the breaking and entering of his close and the cutting down and carrying away of his trees. The true measure of damages is the amount of injury which the plaintiff has actually suffered from the whole trespass. If the trees were worth no more to the plaintiff to stand than to the defendant to be cut into timber at that time, their value as timber, with the reasonable expense of cutting deducted, was the measure of the injury which was

trespass is the result of inadvertence or mistake. The quality of the good faith which warrants its application is satis-

done to the plaintiff by cutting them. . . . His trees may have been prematurely cut; they may have been ornamental trees or fruit trees; their value after they were separated from the soil may have been but a small part of the real injury from cutting and removing them. 'The trees considered as timber may, from their youth, be valueless, and so the injury done to the plaintiff by the trespass would be but imperfectly compensated unless he could receive a sum that would be equal to their value to him while standing upon the soil.' Gilchrist, J., in Wallace v. Goodall, 18 N. H. 456. A rule of damages, which is manifestly unsound when applied to the cutting of trees which are more valuable while standing than after they are cut, cannot be usefully employed in other cases."

In Longfellow v. Quimby, 33 Me. 457, a like action, Shepley, C. J., said: "The plaintiff will be entitled to recover compensation for the injuries occasioned by the acts of the defendants upon his lands, to be ascertained by an estimate of the value of the trees cut and carried away, and of the injury, if any, occasioned by cutting them prematurely, and of the injury, if any, done to the land; and on the amount thus ascertained for being deprived of the use of his property may be added an amount equal to six per cent. per annum from the time of taking the property to the time of judgment." Stanton v. Prichard, 4 Hun, 266.

Whitbeck v. New York, etc. R. Co., 36 Barb. 644, was a similar action for damages done by burning the plaintiff's clover field and destroying his apple trees. The court held that the plaintiff should recover the value of the trees standing, and approved the refusal of the trial court to charge the jury that he could recover no more than the diminished value of the orchard lot by reason of the destruction of the trees. Johnson, J., said: "It is true that the trees in question were real estate, and in one sense part and parcel of the land itself. But so are buildings and fences, and grass, and trees of all kinds while growing upon the land. The true rule I conceive to be this: that if the thing destroyed, although it is part of the realty, has a value which can be accurately measured and ascertained without reference to the value of the soil on which it stands or out of which it grows, the recovery must be for the value of the thing thus destroyed, and not for the difference in the value of the land before and after such destruction. And it can make no difference, in this respect, whether the action is brought to recover for the destruction of a single tree, or all the trees in [378] the orchard. There is no intrinsic difficulty, as I conceive, in estimating the value of a fruit tree growing upon land, although it has strictly no market or commercial value, as a tree, independent of the land which sustains it. In this respect, however, it does not differ materially from buildings and other fixtures. But it does differ from trees which are usually converted into timber or firewood, and which are frequently sold as they stand, for that purpose, or nursery trees which are grown for market. The difference is this: in the one case the value consists chiefly in the thing itself, as a convertible and marketable commodity, while in

fied if the wrong was done without culpable negligence or wilful disregard of the rights of others, in the honest and rea-

the other the value consists chiefly in the quality and quantity of its average annual products; and it is capable of being leased as much as a field or a dwelling. The calculation by which the value would be determined in the two cases would be somewhat different, but, for aught I can see, it could be determined by the opinion of competent witnesses in the one case as well as the other."

Stockbridge Iron Co. v. Cone Iron Works, 102 Mass. 80, was an action of tort for mining and carrying away coal, iron and other ores from the plaintiff's land. The court held that the plaintiff was entitled to recover on the ground that the taking of the ore and the injury done to the property were tortious; that the value of the ore was to be estimated as it lay in the bed, not as it was after the defendants had increased its value by removing it, and that to this was to be added the damage done to the real estate.

In re United Merthyr Collieries Company, L. R. 15 Eq. 46, was a case like the preceding. Sir James Bacon, V. C., said: "I have not the slightest intention of interfering with or departing from the decisions which have been mentioned to me (Powell v. Aiken, 4 K. & J. 343; Wood v. Morewood, 3 Q. B. 440, note; Morgan v. Powell, 3 Q. B. 278; Jegon v. Vivian, L. R. 6 Ch. 742; Phillips v. Homfray, id. 770; Llynvi Co. v. Brogden, L. R. 11 Eq. 188; Martin v. Porter, 5 M. & W. 351), especially the more recent cases, because, as I recollect, there was a want of exact agreement between some of the common-law cases and some of those which had formerly been decided in this court. I take the difference now to be entirely removed, and the rule to be clearly and plainly established, and so understanding, I made the order in this case. The words which are supposed to have been used are 'actual cost and expenses,' — the word that has been read from the short-hand notes is 'disbursements.' In my opinion there is not the slightest doubt about the meaning of either of those expressions. It is said that the trespasser must be treated as if he had been the purchaser. Now, that must be taken with a certain qualification. It is a useful illustration of what the court meant to decide in the particular case where that expression is to be found; but the principle of the decision is, that the plaintiff, although he has suffered a wrong, shall not have any more than he would have had if that wrong had not been committed. That I take to be the clear and plain principle. If he had himself severed the coal, he could only have done so by means of disbursements. If he had brought it to the pit's mouth when severed, he could only have done so by means of disbursements. If he himself had severed and brought the coal to the pit's mouth, whatever the value of it might then be would have to be deducted, because he would have borne the expenses on both these heads, which would have been actual disbursements, not profit; nor do 'just allowances' mean profit; but if I were to change the words of the order, I might leave it doubtful, or might open up some ground for argument, as to what was meant by just allowances. . . . The trespasser is not to charge as if somebody else had employed him to sever. If he had paid a certain sum to his

sonable belief that the act was rightful. Notice of the existence of an adverse claim is an important element to be

workmen, and by the custom of the trade was entitled to charge a certain other sum, he is not to have the larger sum. The plaintiff is to be put in the same situation as he would have been in, neither better nor worse, if he himself had severed the coal and brought it to the pit's mouth. That must have been done, and could only have been done, by means of disbursements, not by any profit, not by any allowance in the trade, not by any artificial mode of guessing at it; but the books he must have kept would show how much money he spent in severing the coal, and how much money he spent in bringing it to the pit's mouth."

In Forsyth v. Wells, 41 Pa. St. 291, the parties were owners of adjoining tracts of coal land, and the defendant had opened a mine upon his own land and worked it for years. The dividing line was not exactly known, and the plaintiff claimed the defendant had dug coal over the line and out of her land, which was denied. Lowrie, C. J., in delivering the opinion of the court, said: "The plaintiff insists that because the action is allowed for the coal as personal property, that is, after it had been mined or severed from the realty, therefore, by necessary logical sequence, she is entitled to the value of the coal as it lay in the pit after it had been mined; and so it was decided below. It is apparent that this view would transfer to the plaintiff all the defendant's labor in mining the coal, and thus give her more than compensation for the injury done. Yet we admit the accuracy of this conclusion, if we may properly base our reasoning on the form rather than on the principle or purpose of the remedy. But this we may not do; and especially we may not sacrifice the principle to the very form by which we are endeavoring to enforce it. Principles can never be realized without forms, and they are often inevitably embarrassed by unfitting ones; but still the fact that the form is for the sake of the principle, and not the principle for the form, requires that the form shall serve, not rule, the principle, and must be adapted to its office. Just compensation in a special class of cases is the principle of the action of trover, and a little study will show us that it is no unyielding form, but adapts itself to a great variety of circumstances. In its original purpose, and in its strict form, it is an action for the value of personal property lost by one and found by another and converted to his own use. But it is not thus restricted in practice; for it is continually applied to every form of wrongful conversion and of wrongful taking and conversion, and it affords compensation, not only for the value of the goods, but also for outrage and malice in the taking and detention of them. . . . Where the defendant's conduct, measured by the standard of ordinary morality and care, which is the standard of the law, is not chargeable with fraud, violence or wilful negligence or wrong, the value of the property taken and converted is the measure of just compensation. If raw material has, after appropriation and without such wrong, been changed by manufacture into a new species of property, as grain into whisky, grapes into wine, furs into hats, hides into leather, or trees into lumber, the law either refuses the action of tro-

considered; but such notice alone will not necessarily place the wrong-doer in the position of a culpably wilful trespasser and subject him to the more onerous measure of liability.[1]

The severer rule of damages is applied in several states.[2] It is known, in the case of mining ores, as the royalty rule, being

ver for the new article, or limits the recovery to the value of the original article. 6 Hill, 425; 21 Barb. 92; 23 Conn. 523; 38 Me. 174. Where there is no wrongful purpose or wrongful negligence in the defendant, compensation for the real injury done is the purpose of all remedies; and so long as we bear this in mind, we shall have but little difficulty in managing the forms of actions so as to secure a fair result. If the defendant in this case was guilty of no intentional wrong, he ought not to have been charged with the value of the coal after he had been to the expense of mining it; but only with its value in place, and with such other damage to the land as his mining may have caused. Such would manifestly be the measure in trespass for *mesne* profits." Herdic v. Young, 55 Pa. St. 176; Coleman's Appeal, 62 Pa. St. 252, 278; Yahoola, etc. Co. v. Irby, 40 Ga. 479; Coxe v. England, 65 Pa. St. 212; Schlater v. Gay, 28 La. Ann. 340; Ensley v. Nashville, 2 Baxter (Tenn.), 144. See reasoning in opinion in Single v. Schneider, 24 Wis. 300–303; S. C., 30 Wis. 570; Webster v. Moe, 35 Wis. 75; Hungerford v. Redford, 29 Wis. 345; Railway Co. v. Hutchins, 32 Ohio St. 571; Winchester v. Craig, 33 Mich. 205.

The following recent cases are in harmony with the views expressed in those quoted from: Striegel v. Moore, 55 Iowa, 88; Chamberlain v. Collinson, 45 id. 429; Clement v. Duffy, 54 id. 632; Gardere v. Blanton, 35 La. Ann. 811; Thompson v. Moiles, 46 Mich. 42; Hinman v. Heyderstadt, 32 Minn. 250, modifying Nesbitt v. St. Paul Lumber Co., 21 id. 491; King v. Merriman, 38 id. 47; Whitney v. Huntington, 37 id. 197; Oak Ridge Coal Co. v. Rogers, 108 Pa. St. 147; State v. Pacific Guano Co., 22 S. C. 50; Coal Creek M. & M. Co. v. Moses, 15 Lea, 300; Ross v. Scott, id. 479; Lewis v. Courtright, 77 Iowa, 190; Viliski v. Minneapolis, 40 Minn. 304; Austin v. Huntsville Coal & M. Co., 72 Mo. 534, 545; Clowser v. Joplin Mining Co., 4 Dill. 469, note; Ayres v. Hubbard, 57 Mich. 322. See Dougherty v. Chesnutt, 86 Tenn. 1.

[1] Whitney v. Huntington, 37 Minn. 197; King v. Merriman, 38 id. 47; Jegon v. Vivian, L. R. 6 Ch. 742.

[2] Maye v. Tappan, 23 Cal. 306. The trespass was committed by entering upon and taking away gold-bearing earth from the mining claim of the plaintiff. The court held the true measure of damages to be the value of the earth at the time it is separated from the surrounding soil and becomes a chattel. Crocker, J., delivering the opinion, after a review of the cases, said: "It will be noticed that the rule of damages in such cases depends, to some extent, upon the form of the action; whether the action is for an injury to the land itself, or for the conversion of a chattel which had been severed from the land. The complaint in this case alleges that the defendants, at divers times, wrongfully entered upon a portion of plaintiff's mining claim, and extracted the gold and gold-bearing earth from a portion thereof; which gold and gold-bearing earth

measured in point of time as is the royalty usually charged by land-owners for the privilege of mining thereon. The circumstances under which these various rules apply and "the doctrine of the English courts on this subject," said Mr. Justice Miller,[1] "is probably as well stated by Lord Hatherley in the house of lords in the case of Livingston v. Rawyards Coal Co.[2] as anywhere else. He said: 'There is no doubt that if a man furtively, and in bad faith, robs his neighbor of his property, and because it is underground is probably for some little time not detected, the court of equity in this country will struggle, or I would rather say will assert its authority, to punish the fraud by fixing the person with the value of the whole property which he has so furtively taken, and making him no allowance in respect to what he has so done, as would have been justly made to him if the parties had been working by agreement.' But 'when once we arrive at the fact that

they wrongfully carried away and converted to their own use; and the value of the gold thus carried away is alleged to have been $2,000. No demand of the possession of the gold after it was separated from the earth appears to have been made upon the defendants, and the *gravamen* of the action appears to be the injury done to the land itself by the acts of the defendants. The proper rule for damages in a case like the present is the value of the gold-bearing earth at the time it was separated from the surrounding soil and became a chattel. This seems to be a just and proper rule, and one established by the decisions upon this question. In estimating these damages the expense of extracting the gold and separating it from the earth, after it is first moved from its original location, is to be deducted from the value of the gold taken out of the mining ground of the plaintiffs." Goller v. Fett, 30 Cal. 481; Moody v. Whitney, 38 Me. 174; Firmin v. Firmin, 9 Hun, 571; Robertson v. Jones, 71 Ill. 405; McLean Coal Co. v. Long, 81 Ill. 359; Illinois, etc. R. & Coal Co. v. Ogle, 82 Ill. 627; Martin v. Porter, 5 M. & W. 351; Wood v. Morewood, 3 Q. B. 440, n.; Morgan v. Powell, 3 Q. B. 278; Wild v. Holt, 9 M. & W. 672; Barton Coal Co. v. Cox, 39 Md. 1; Bennett v. Thompson, 13 Ired. 146; Parker v. Waycross & F. R. Co., 81 Ga. 387; Benson M. & S. Co. v. Alta M. & S. Co., 15 Pac. Rep. 565 (Arizona); S. C., 145 U. S. 428; Empire Gold Mining Co. v. Bonanza Gold Mining Co., 67 Cal. 406; Franklin Coal Co. v. McMillan, 49 Md. 549; Blaen Avon Coal Co. v. McCulloch, 59 id. 403; Atlantic, etc. Coal Co. v. Maryland Coal Co., 62 id. 135; Cheeney v. Nebraska & C. Stone Co., 41 Fed. Rep. 740 (Colorado); Omaha & Grant S. & R. Co. v. Tabor, 13 Colo. 41 (in trover); Aurora Hill Mining Co. v. Eighty-five Mining Co., 12 Sawyer, 355; 34 Fed. Rep. 515. See Bull v. Griswold, 19 Ill. 631.

[1] Wooden-ware Co. v. United States, 106 U. S. 432; Benson M. & S. Co. v. Alta M. & S. Co., 145 id. 428.

[2] 5 App. Cas. 25.

an inadvertence has been the cause of the misfortune, then the simple course is to make every just allowance for outlay on the part of the person who has so acquired the property, and to give back to the owner, so far as is possible under the circumstances of the case, the full value of that which cannot be restored to him in specie.' There seems to be no doubt," said Judge Miller, "that in the case of a wilful trespass the rule stated above is the law of damages both in England and in this country, though in some of the state courts the milder rule has been applied in this class of cases.[1] On the other hand, the weight of authority in this country as well as in England favors the doctrine that where the trespass is the result of inadvertence or mistake, and the wrong was not intentional, the value of the property when first taken must govern; or if the conversion sued for was after value had been added to it by the work of the defendant, he should be credited with this addition."[2]

[381] **§ 1021. Liability for additional injury to land.** Accompanying trespasses of this nature there is frequently injury done to the land beyond taking away timber or minerals. Where such is the case additional damages are recoverable; and these will be assessed upon the particular facts. In an action for breaking and entering plaintiff's coal lands it was made to appear that the defendant mined coal and made excavations for that purpose, and thereby injured the coal left remaining as pillars; that by bad mining or otherwise he rendered it difficult or impossible for the plaintiff to get out or remove such pillars of remaining coal, and thus depreciated its value. The court held the plaintiff entitled, in addition to damages for the coal actually removed, to recover for such as could not be removed, what it was worth per ton in its native bed, and such damages for so much coal as could be removed with increased expense as the evidence might show such coal to be diminished in value; that if the defendant in mining and excavating under the lands thereby rendered it

[1] Weymouth v. Chicago & N. Ry. Co., 17 Wis. 550; Single v. Schneider, 24 id. 299.

[2] Wooden-ware Co. v. United States, 106 U. S. 432; Winchester v. Craig, 33 Mich. 205; Heard v. James, 49 Miss. 236; Baker v. Wheeler, 8 Wend. 505; Baldwin v. Porter, 12 Conn. 484.

more difficult or expensive for the plaintiff to obtain access to the coal unmined and depreciated its value the plaintiff was entitled to recover such damages as he sustained from such depreciation and the increased difficulty and expense of mining and removing the coal.[1] Where uncultivated and unfenced land was entered upon, fenced, planted and the crop removed therefrom the land-owner was held entitled to recover the value of the crop, and for the depreciation in the value of the land. Additional damages were not recoverable because it was the intention of the owner to allow the land to remain untilled, and because by its cultivation, if it so remained, it would suffer injury from washing and becoming weedy. The owner was bound to use the land as good husbandry required it to be used. The question on this point solely was, how much less was the land worth on account of its having been cultivated.[2] It admits of some question whether this is not making an extreme application of the doctrine of avoidable consequences. There can be no doubt that the washing of the soil and the growth of weeds would be the natural and proximate consequences of the cultivation — both results would follow from the act of the trespasser in the ordinary course of nature. The owner of the land had the right to hold it for an advance in the market price and sell it in its virgin state. He ought not to be compelled to mitigate the effects of the wrong done him by becoming a farmer or selling the land to some one who would have given more for it in its uncultivated condition than it was worth to him as it was left, or by selling in advance of the time he might otherwise have done.

§ **1022. Damage to unsecured ice.** In Illinois the damages for cutting timber or mining ores are measured by their value as soon as they become chattels. The same rule has been applied where ice was cut on a stream bounded by the land of him who sued for its cutting. His right to the ice is exclusive, and the measure of damages suggested applies regardless of the situation or convenience of the parties.[3] In a Michigan case ice was destroyed when it was six inches thick by the gross negligence of a steamer in navigating in unneces-

[1] Barton Coal Co. v. Cox, 39 Md. 1; Wallace v. Goodall, 18 N. H. 439.

[2] Keirnan v. Heaton, 69 Iowa, 136.

[3] Washington Ice Co. v. Shortall, 101 Ill. 46; Piper v. Connelly, 108 id. 647.

sary proximity to it. The damages were measured by the value of so much of the ice as would probably have been secured and saved for the market, less the expense connected with doing so. The defendants contended that the rule was "the true value of the ice, or rather the privilege of taking it—what it would have been shown to be had the matter been settled or the case tried on the very day that the ice was broken;" or, in other words, that the damages could not be affected by the fact that the price of ice was high during the following season. This was disagreed to by the court, and the price during such time was held to have been properly considered.[1] The New York supreme court has entertained the view in a case in which it was found that the ice cut had no market value before the cutting, that the damages for cutting and removing it, if it created any right of action against the defendant, must depend upon whether it can be regarded an injury to the real estate of the owner, and consequently the amount of recovery must be such as to compensate for that injury only.[2] In Massachusetts one who drains the waters of a pond and destroys the ice thereon is liable for the value of the right to harvest the ice upon it and make it property at the time it was destroyed. In determining the value of that right the expense of securing the ice and the risks attending thereupon are factors.[3] In Pennsylvania the measure of recovery is not enhanced by the value bestowed upon the ice by the labor of a trespasser, in the absence of any circumstances of aggravation. If there is no proof of a market value at the time and place where the injury was done the value in the nearest market, respect being had as well to time as place, less the expense of getting the ice to market, including the loss from shrinkage while stored and in handling, measures the recovery.[4]

[1] People's Ice Co. v. Steamer Excelsior, 44 Mich. 229.

[2] Van Rensselaer v. Mould, 48 Hun, 396.

[3] Handforth v. Maynard, 154 Mass. 414; 28 N. E. Rep. 348.

[4] Stauffer v. Miller Soap Co., 25 Atl. Rep. 95 (Penn.).

As to what constitutes a sufficient appropriation of ice on a great pond or on a river to enable the appropriator to maintain trover therefor, see Barrett v. Rockport Ice Co., 24 Atl. Rep. 802 (Me.); People's Ice Co. v. Davenport, 149 Mass. 122; Brown v. Cunningham, 48 N. W. Rep. 1042 (Iowa).

§ 1023. Injuries to crops. For destroying or carrying away growing crops the measure of compensation is their value in the condition in which they were at the time of the trespass.[1] The plaintiff will be entitled to compensation [382] according to the particular facts: he is entitled to be remunerated in respect to property taken or destroyed and for any other injury. The fact that all the labor necessary to produce a crop has been performed and the state of its growth at the time of the defendant's interference will necessarily enter into the calculation.[2] In ascertaining the value of a crop in accordance with this rule a considerable latitude of inquiry is properly open. The capacity of the land to produce crops being in question, evidence of the average yield of like crops upon similar lands in the neighborhood, under like circumstances and conditions, is admissible, and also the average market value of the crop injured, within reasonable limitations as to time, and the expense of harvesting and marketing a like crop.[3] In Iowa it has been held that the value of the

[1] Richardson v. Northrup, 66 Barb. 85; Seamans v. Smith, 46 Barb. 320; Lommeland v. St. Paul, etc. Ry. Co., 35 Minn. 412; Houston, etc. Ry. Co. v. Adams, 63 Texas. 200; Gresham v. Taylor, 51 Ala. 505. See Folsom v. Apple River, etc. Co., 41 Wis. 608-9.

Marston, C. J., pronounces this a very unsatisfactory rule, and says that it affords a way in which parties may be avenged of their adversaries with practical impunity. He said in a case in which it was sought to apply a corresponding rule to the destruction of ice on a navigable river, that "the owner of the growing crops would not be limited in his recovery to the value thereof at the time of their destruction, nor to the fair rental value of the lands. If the action were brought at once, and a trial had, the prospective yield and value of the crop when matured might be shown. The proof might be unsatisfactory and uncertain, and largely a matter of opinion. Such considerations should not, however, absolve the wrong-doer, and the dangers, if any, from such a rule he should incur. If such an action were not commenced or tried until after the time when such crops would have matured, the same elements of uncertainty would not exist. It would then be known whether the season had been a favorable or an unfavorable one; the yield per acre in that vicinity; the market price of the crop; the expense — all could be ascertained with tolerable certainty, and why should the law exclude such proofs?" People's Ice Co. v. Steamer Excelsior, 44 Mich. 229, 237.

[2] Williams v. Currie, 1 Man., Gr. & Scott, 841; Van Wyck v. Allen, 69 N. Y. 61; Jenkins v. McCoy, 50 Mo. 348; Benjamin v. Benjamin, 15 Conn. 347. See Chicago v. Huenerbein, 85 Ill. 594.

[3] Lommeland v. St. Paul, etc. Ry. Co., 35 Minn. 412. See § 1045, *infra*.

crop when matured, less the cost of tillage, etc., from the time of the injury, may be recovered; that the plaintiff may recover as damages reasonable compensation for the labor necessarily expended in trying to save his crop from destruction. If he, in the exercise of ordinary care to preserve his crop, because of defendant's fault, expended money or labor, he should be compensated therefor.[1] This is the rule in Kansas.[2] In Illinois it has been held that if a trespasser cuts wheat the owner is entitled to recover as if he had himself performed the whole labor of harvesting.[3] But in an action against trespassers on land the trouble of looking after them is not to be taken into consideration as an item of damage.[4] If a meadow is destroyed the cost of restoring it measures the damages.[5]

§ 1024. Destruction of fences. In an action for destroying a fence inclosing a ranch used for dairy purposes, thereby letting in other people's cattle which destroyed the grass, it was held erroneous, as tending to the allowance of remote and speculative damages, to admit evidence of profits that the plaintiff might have made from hogs and cows he did not have and had made no arrangements to procure.[6] The value of crops destroyed by cattle may be recovered as a consequential damage from tortiously letting down or removing the fence around the same;[7] at least where successive trespasses are committed.[8] Doubtless if a fence is broken and the owner

[1] Smith v. Chicago, etc. R. Co., 38 Iowa, 518. Compare Drake v. Chicago, etc. Ry. Co., 63 id. 302, 310.

In an action in case to recover for the destruction of a fence and injuries to growing trees, all caused by the direct acts of the defendant, there cannot be a recovery for the inconvenience and labor of preserving crops from damage by animals. Such elements of damage, besides being too remote, were not provable under the declaration. Krueger v. Le Blanc, 62 Mich. 70.

[2] Missouri P. Ry. Co. v. Ricketts, 45 Kan. 617.

[3] Bull v. Griswold, 19 Ill. 631; Benjamin v. Benjamin, 15 Conn. 347.

[4] Longfellow v. Quimby, 29 Me. 196.

[5] Vermilya v. Chicago, etc. Ry. Co., 66 Iowa, 606.

The damages for injuries to growing grass through the incursions of animals can be established by evidence tending to show how many cattle could be grazed upon the land trespassed upon, and what such pasturage would be worth. Buttles v. Chicago, etc. Ry. Co., 43 Mo. App. 280.

[6] Giaccomini v. Bulkeley, 51 Cal. 260.

[7] Daniel v. Obert, 20 Ill. App. 557; Hardin v. Kennedy, 2 McCord, 277. See Crawford v. Maxwell, 3 Humph. 476; Richardson v. Milburn, 11 Md. 340.

[8] Bridges v. Dill, 97 N. C. 222.

is aware of it in time to make it whole before the crops which it inclosed are damaged, he must do so if he can accomplish it at a reasonable expense and with moderate effort.[1] But this duty does not rest upon the land-owner when a railroad company has neglected its statutory obligation to put in cattle-guards.[2]

§ 1025. Injuries to party-walls. If a party-wall is used and holes cut in it for inserting the girders, beams, etc., of a new building which is erected the damages include not only the injury done by the cutting, but also such sum as will compensate the owner for the permanent use of the wall.[3] If an addition is made to such a wall whereby it is weakened the expense of removing the portion added and the damage caused the original wall may be recovered; but damages resulting from the loss of a sale of property of which the wall forms part are too remote.[4] If such a wall is recklessly undermined the trespasser must respond for injury to the plaintiff's goods resulting from the use of water for extinguishing a fire caused by the falling of the wall. No deduction is to be made from the value of the goods because they were insured.[5]

§ 1026. Interest. It is discretionary with the jury to allow interest on the damages awarded.[6] It has been held error to instruct them to allow it as a matter of legal right.[7] It is allowed as matter of law against trespassers on government lands whether the trespass was wilful or inadvertent.[8]

§ 1027. Mitigation of damages. Beyond question, the injured party is bound to use reasonable means to mitigate the injury which has been done him. If his possession of business premises has been so interfered with that he cannot continue in them, he must secure another place in which to carry on his avocation.[9] But benefit which may result to the injured person from the subsequent act of the wrong-doer does not always mitigate the latter's responsibility. Thus an officer

[1] Vol. 1, § 155; Willis v. Branch, 94 N. C. 142.

[2] Houston, etc. Ry. Co. v. Adams, 63 Texas, 200.

[3] Ritter v. Sieger, 105 Pa. St. 400.

[4] Brooker v. McLean, 5 Ont. 209.

[5] Hammond v. Schiff, 100 N. C. 161.

[6] Lawrence, etc. R. Co. v. Cobb, 35 Ohio St. 94; Walrath v. Redfield, 18 N. Y. 457; Pittsburgh, etc. Ry. Co. v. Swinney, 97 Ind. 586.

[7] Chicago v. Allcock, 86 Ill. 384.

[8] United States v. Williams, 18 Fed. Rep. 475.

[9] Willis v. Branch, 94 N. C. 142.

who unlawfully breaks into a dwelling and removes property therefrom cannot lessen his liability by proving that, pursuant to the levy, he sold the property and paid the proceeds to the execution creditor. The levy, being void, all that was done in pursuance of it was invalid.[1] It is otherwise if there is a subsequent valid levy independently of the trespass.[2] The mitigation of exemplary damages is elsewhere considered.[3]

§ 1028. Aggravations and special damages. Where the act complained of was done with force so as to constitute a proper ground for an action of trespass *vi et armis*, all the damages of the plaintiff of which such injurious act is the efficient cause, and for which he is entitled to recover in any form, may be recovered in that action, whether such damage ensues immediately or does not occur until some time after the act is done. If special or peculiar damages are claimed, such as are not the usual consequence of the act, it is proper and necessary to set them forth specifically in the declaration by way of aggravation, that the defendant may have due notice of the claim.[4] Thus where the defendant broke and entered the plaintiff's close lying adjacent to a river, and dug into a bank near a dam across the river and removed some gravel, in consequence of which a flood in the river which took place three weeks afterwards carried away a portion of the close and the cider mill, etc., belonging to the plaintiff, it was held that he might recover damages for the whole of such injury in an action of trespass *quare clausum fregit*.[5] A defendant who had pulled down plaintiff's fence so that his cattle escaped and were lost was held liable for them in an action for pulling down the fence.[6] The defendant's sheep while trespassing upon the plaintiff's land mingled with his sheep and communicated to them a disease of which many of them died. In an action of trespass *quare clausum fregit* it was held that the evidence of this fact was admissible to affect the damages, and that the plaintiff was entitled to recover for the loss of [384] his sheep as well as for the breach of his close; that in

[1] Welsh v. Wilson, 34 Minn. 92.

[2] Howard v. Manderfield, 31 Minn. 337.

[3] § 1032, *post*.

[4] Patchen v. Keeley, 19 Nev. 404; Dickinson v. Boyle, 17 Pick. 78; McTavish v. Carroll, 13 Md. 429; Sherman v. Dutch, 16 Ill. 283.

[5] Dickinson v. Boyle, *supra*.

[6] Damron v. Roach, 4 Humph. 134.

order to recover such damages it was not necessary for him to prove that the defendant had knowledge of the diseased state of his sheep at the time the disease was imparted; but that it was competent for the plaintiff to prove such knowledge to enhance his damages without any allegation to that effect in the declaration.[1] Where the defendant destroyed part of a mill the plaintiff was allowed to recover for the interruption of its use and a consequent loss of profits.[2] And so where he was deprived of the profitable use of pasture for his stock by the tortious conduct of the defendant in turning in his cattle with the plaintiff's; and, in consequence of the overcrowding of the pasture, the plaintiff's cattle suffered, the damages to which he was entitled were held not to be merely the value of the pasturage in the vicinity, but the value of the growth and increase in weight which his cattle might reasonably have been expected to attain but for the over-feeding caused by the trespass; and to show this the testimony of farmers, graziers and drovers having experience with cattle and that mode of feeding was competent; it was also held to be competent to show what would be the market value of the stock in the vicinity but for the act, and what was the reduced value in the same market in consequence of it; the difference in price per head and per pound in cattle of different weights and conditions. The value in a distant market could only be shown so far as it tended to control the home market, the measure of damages being what the cattle would have been worth but for the injury to the pasture by the trespass, and the reduced amount caused by the injury to be estimated up to and at the time of the bringing of the action — unless the cattle have been sold prior to that day — then at the date of the sale. It was also ruled that damage to cattle resulting from loss of feed occasioned by the tortious occupation of plaintiff's pasture by defendant's cattle is not included in the damage to the pasture caused by such occupation; and the condition of the pasture, its value as such for future use at the time of the commencement of the action, are proper sub- [385] jects of inquiry in estimating damages which had then been

[1] Barnum v. Vandusen, 16 Conn. 201; Anderson v. Buckton, 1 Str. 192.

[2] White v. Moseley, 8 Pick. 356; Hammatt v. Russ, 16 Me. 171; McTavish v. Carroll, 13 Md. 429; Whipple v. Wanskuck Co., 12 R. I. 321.

sustained.[1] In actions of tort damages which are the natural and proximate consequences of the defendant's wrongful act may be recovered though not contemplated by the wrong-doer. The injured party enters into no relation with the defendant, and assumes no voluntary risk in the matter of the wrong. Nor is any want of certainty in respect to his loss, resulting from the manner in which it is produced by the defendant, attributable to the plaintiff; therefore, in the determination of damages for compensation, so far as it is measurable upon any legal standard, the same rules will apply as in their assessment for breach of contract; but such damages will not be assumed to be a full reparation unless they appear to include compensation for the entire injury. The injured party is entitled to complete indemnity even though the amount is not ascertainable with certainty and precision. All the facts will be submitted to the jury with proper instructions that they may award such damages as in their discretion and judgment are due for the injury as thus shown.[2]

[1] Gilbert v. Kennedy, 21 Mich. 117.

[2] Id. In this case Christiancy, J., said: "The damages to be awarded should be such as adequately to compensate the actual loss or injury sustained. This is an obvious principle of justice from which we see no reason to depart. But in the application of the principle, difficulties often arise in ascertaining, with anything like accuracy, the actual damages which the plaintiff has suffered from the injury; or what sum will produce adequate compensation. Some cases are such in their nature and circumstances as to furnish an obvious rule by which a just and adequate compensation can be readily and accurately measured; and whenever and so far as this is the case, such rule should be applied in actions of tort as well as in those upon contracts, as we held in Allison v. Chandler, 11 Mich. 542, and in Warren v. Cole, 15 Mich. 265. But such is the almost infinite variety of circumstances under which torts may be committed, that cases will often occur, in which, 1st, no reliable *data*, no element of certainty, can be found by which to measure with accuracy the actual amount of the damages, though it is evident to the court and jury that large damages have resulted from the injury; and 2d, cases in which there will be elements of certainty as to a part only of such damages, leaving it certain that the actual damages must be largely beyond what can be thus accurately measured. Now, in the first class of cases, are the jury to give merely nominal, or, what is the same thing, no damages, and is the injured party to obtain no redress, because the case happens to be one which does not furnish a rule for their accurate measurement? And in the second class of cases, is he only to recover so much as can be measured with certainty, though it may be equally certain that this does not cover the

§ 1029. Same subject. If an employer is deprived of workmen because of the loss of a building used by them for shelter he may recover the amount reasonably expended in providing other shelter, for the protraction of the labor in

tithe of the damages really sustained? This might be well enough if the want of certainty inherent in the nature of the case were properly attributable to the fault of the plaintiff. But he did not make the case; this was made against his will by the defendant, who chose his own time, place and manner of committing the wrong, and the plaintiff is compelled to grapple with the case thus made for him; and therefore such a rule, as one of universal application, can only become just when trespassers become so considerate of the rights of others as to commit their trespasses only in cases and under circumstances where the damages can be calculated by a fixed and certain rule. To deny the injured party the right to recover any actual damages in such cases because they are of a nature which cannot be thus certainly measured would be to enable parties to profit by and speculate upon their own wrongs, encourage violence and invite depredation. Such is not and cannot be the law, though cases may be found where courts have laid down artificial and arbitrary rules which have produced such a result.

"There can be no rule of law founded upon any just or intelligible principle, which, in actions of trespass at least, requires any higher degree of certainty in evidence upon which the damages are to be estimated than in reference to any other branch of the cause. Juries in such cases have as much right, and it is as clearly their duty, to draw reasonable and probable inferences from the facts and circumstances in evidence, in reference to the amount of damages, as in reference to any other subject of inquiry in the case. And in those cases of trespass, or those features of a particular case, where, from the nature of the case, adequate damages cannot be measured with certainty by a fixed rule, all the facts and circumstances tending to show such damages as are claimed in the declaration, or their probable amount, should be submitted to the jury, to enable them to form, under proper instructions from the court, such reasonable and probable estimate as in the exercise of good sense and sound judgment they shall think will produce adequate compensation. There is no sound reason in such a case, as there may be, to some extent, in actions upon contract, for throwing any part of the loss upon the injured party which the jury believe from the evidence he has sustained; though the precise amount cannot be ascertained by a fixed rule, but must be matter of opinion and probable estimate. And the adoption of an arbitrary rule in such a case, which will relieve the wrong-doer from any part of the damages, and throw the loss upon the injured party, would be little less than legalized robbery. Whatever of uncertainty may be in this mode of estimating damages is an uncertainty caused by the defendant's own wrongful act; and justice and sound public policy alike require that he should bear the risk of the uncertainty thus produced; and this is not only when the trespass is wilful and wanton, without a claim of right, but whenever the property, though claimed by

which they were engaged and the value of his own time [386] in consequence of such protraction.[1] Where a trespass is wilful and malicious, or of such character or committed under such circumstances as render it likely to produce injury to [387] persons or property, the trespasser is liable to any person injured. It is not necessary that he should intend to do the particular injury which ensues.[2] Maliciously and wantonly pulling out and throwing away pins used in coupling together the cars of a train whereby they were uncoupled, and the plaintiff, an employee of the company, whose duty it was to hitch and couple cars as required, sustained an injury to one of his hands while in the ordinary discharge of his duties in consequence of such uncoupling, entitled him to recover for such injury.[3] Where the remains of a child were removed from a cemetery lot to which the parent held a deed, it was ruled that the latter might maintain an action of tort in the nature of trespass *quare clausum fregit*, in which the natural injury to his feelings might be taken into consideration.[4] Where in consequence of a trespass the plaintiff's business upon the premises is impaired or destroyed, damages for that injury may be recovered. Where he was engaged in the business of repairing watches, making gold pens and selling jewelry on premises which were rendered untenantable by a trespass, it was held that past profits in that business, though they could not be taken as the exact measure of future profits, were proper to be proved and taken into consideration by the jury, and allowed such weight as they, in the exercise of good sense and sound judgment, should think them entitled to. If in consequence of a trespass rendering the premises untenantable the plaintiff was obliged to remove to another place of business, he is entitled to show that his business fell off in consequence and how much. The court in deciding a case involving the foregoing facts announced this general rule: "When, from the nature of the case, the amount

him, is in the possession of another, and he, taking the law into his own hands, makes himself judge in his own cause, and, knowing his right to be disputed, seizes upon the property without a judicial trial of his rights."

[1] Carlisle v. Callahan, 78 Ga. 320.

[2] Munger v. Baker, 65 Barb. 539; Vandenburgh v. Truax, 4 Denio, 464; Scott v. Shepherd, 2 W. Black. 892.

[3] Munger v. Baker, *supra*.

[4] Meagher v. Driscoll, 99 Mass. 281.

of damages cannot be estimated with certainty, or only a part of them can be so estimated, there is no objection to placing before the jury all the facts and circumstances of the case having any tendency to show damages or their probable [388] amount, so as to enable them to make the most intelligible and probable estimate which the nature of the case will permit. This should, of course, be done with such instructions and advice from the court as the circumstances of the case may require, or as may tend to prevent the allowance of such as may be merely possible, or too remote and fanciful in their character to be safely considered as the result of the injury."[1] In addition to recovering the value of his lease, a tenant who is obliged to leave the demised premises may recover for the time necessarily occupied in removing therefrom, the expense incurred in doing so and for other loss directly resulting. But he cannot recover for the loss of estimated profits nor for the mental suffering resulting from the removal.[2] Such changes were made in the construction of leased premises used for business purposes as necessitated their abandonment by the tenant. The trespasser was liable for the loss of a water privilege acquired by the tenant for business purposes, for the value of the leasehold interest and any advantages constituting a part of or directly growing out of such interest, the expenses of removing to another place of business, any damage resulting from the loss of the use of improvements abandoned with the leased premises, and also for loss of profits.[3] Properly speaking, special damages are those which are stated under a *per quod* as the consequence of the breaking and entry; and where the defendant is guilty of some outrage connected with a particular trespass, and it is a part of the trespass by being done at the same time, it is matter of aggravation or a substantive ground of action and damage.

§ **1030. Same subject.** The taking and carrying away of personal property at the time of breaking and entering the

[1] Allison v. Chandler, 11 Mich. 542; St. John v. Mayor, 13 How. Pr. 527; Sherman v. Dutch, 16 Ill. 283; Clark v. St. Clair, etc. Co., 24 Mich. 508; Freidenheit v. Edmundson, 36 Mo. 226; Kemper v. Louisville, 14 Bush, 87; Walter v. Post, 6 Duer, 363, 373.

[2] Pennsylvania R. Co. v. Eby, 107 Pa. St. 166.

[3] Hawthorne v. Siegel, 88 Cal. 159.

close, or a personal injury, may be alleged as matter of aggravation, either in the count for breaking the close or in a distinct count as a substantive cause of action; the latter is the more orderly method of pleading.[1] If alleged either as aggravation or as a distinct ground of damages in the count for breaking the close it is a dependent claim, and will not, if proved, support the action if the case for breaking the close be not established.[2] But when established, the specific claim for taking and converting property, or for the personal injury, is a part of the *gravamen* of the action, and the plaintiff will be entitled to recover the value of the property taken and converted, or for the personal injury, as well as for breaking and entering the close.[3] But for the purpose of such recovery the trespass to personal property or to person should be stated with the same particularity as when it is the sole ground of action; otherwise such wrongs will be mere matter [**389**] of aggravation, not traversable, not a distinct ground of damage; but only a circumstance tending to give character to the principal charge and to enhance the damages assessable thereon.[4] Where a daughter, either of or under age, is seduced in her father's house he may allege it, and the consequential loss of services, as matter of aggravation in an action of trespass *quare clausum*.[5]

§ **1031. Exemplary damages.** Such damages may be given in this action, and these are in the discretion of the jury, where the facts are such as legally to warrant them. If the trespass is wilfully or maliciously done, or if there is connected with the breaking and entry, otherwise not the subject of punitive damages, circumstances of outrage, insult, or

[1] Bishop v. Baker, 19 Pick. 517; Wright v. Chandler, 4 Bibb, 422.

[2] Eames v. Prentice, 8 Cush. 337; Warner v. Abbey, 112 Mass. 355; Brown v. Lake, 29 Ohio St. 64.

[3] Curlewis v. Laurie, 12 Q. B. 640; Woolley v. Carter, 7 N. J. L. 85; Sampson v. Henry, 13 Pick. 36; Warner v. Abbey, 112 Mass. 355; Razzo v. Varni, 81 Cal. 289; Moore v. Baylis, 10 N. Y. Supp. 62.

[4] Thayer v. Sherlock, 4 Mich. 173; Chamberlain v. Greenfield, 3 Wils. 292; Rucker v. McNeely, 4 Blackf. 179; Keenan v. Cavanaugh, 44 Vt. 268; Allred v. Bray, 41 Mo. 484; Ream v. Rank, 3 S. & R. 215; Bracegirdle v. Orford, 2 M. & S. 77; Bateman v. Goodyear, 12 Conn. 575; Johnson v. Hannahan, 3 Strobh. 425; Brown v. Lake, 29 Ohio St. 64; Plumb v. Ives, 39 Conn. 120.

[5] Mercer v. Walmsley, 5 Har. & J. 27; Woodward v. Walton, 2 B. & P. N. R. 476.

wanton destruction of personal property, the proof of these facts may be submitted as grounds for damages by way of punishment; and the amount to be allowed is left to the sound discretion of the jury. Such damages are given as punishment, and their allowance and amount are submitted only when there is evidence tending to show conduct culpable in point of intention. The act in question, or some act accompanying or connected with it, must be recklessly violent, oppressive, wanton or malicious.[1] The defendant is presumed to know the law, and to have acted with general malice when he violates it.[2] It is said in a recent case that malice is not to be inferred from the fact that the defendant intended to commit a trespass upon unimproved and uninclosed land, in the absence of a purpose to put its owner in a worse condition than he would otherwise have been.[3]

[1] Merest v. Harvey, 5 Taunt. 442; Sears v. Lyons, 2 Stark. 317; Tullidge v. Wade, 3 Wils. 18; Doe v. Filliter, 13 M. & W. 47; Moore v. Crose, 43 Ind. 30; Ames v. Hilton, 70 Me. 36; Cutler v. Smith, 57 Ill. 252; Smalley v. Smalley, 81 Ill. 70; Brown v. Allen, 35 Iowa, 306; Kolb v. Bankhead, 18 Tex. 228; Gordon v. Jones, 27 Tex. 620; Jasper v. Purnell, 67 Ill. 358; Huftalin v. Misner, 70 Ill. 55; Owings v. Ulory, 3 A. K. Marsh. 454; Bateman v. Goodyear, 12 Conn. 580; Major v. Pulliam, 3 Dana, 582; Perkins v. Towle, 43 N. H. 220; Bradshaw v. Buchannan, 50 Tex. 492; Stillwell v. Barnett, 60 Ill. 210; Hamilton v. Third Av. R. Co., 53 N. Y. 25; Boardman v. Goldsmith, 48 Vt. 403; Parker v. Shackelford, 61 Mo. 68; Dearlove v. Herrington, 70 Ill. 251; Devaughn v. Heath, 37 Ala. 595; Ellsworth v. Potter, 41 Vt. 685; Rosser v. Bunn, 66 Ala. 89; Smith v. Thompson, 55 Md. 5; Atlantic, etc. Coal Co. v. Maryland Coal Co., 62 Md. 135; Baltimore & O. R. Co. v. Boyd, 63 Md. 325; Craig v. Cook, 28 Minn. 232; Kemmitt v. Adamson, 44 id. 121; Weyer v. Wegner, 58 Texas, 539; Koenigs v. Jung, 73 Wis. 178; Reynolds v. Braithwaite, 131 Pa. St. 416; Trauerman v. Lippincott, 39 Mo. App. 478.

The government is entitled to exemplary damages for trespass upon its lands under proper circumstances. United States v. Taylor, 35 Fed. Rep. 484.

In O'Conner v. Parrott, 22 Ill. App. 429, plaintiff's premises were broken and entered and property alleged to be worth $1,000 was carried away under a pretense of serving a distress for $50. A verdict for $6,500 was held not so excessive as to show passion or prejudice. In Trauerman v. Lippincott, 39 Mo. App. 478, the verdict was for $50 actual and $1,450 exemplary damages. It was sustained.

In Ireland the jury may award punitive damages if the defendant enters premises in a mode which he knows is illegal. Reeves v. Penrose, 26 L. R. Ire. 141.

[2] Farwell v. Warren, 51 Ill. 467; Raynor v. Nims, 37 Mich. 34.

[3] Keirnan v. Heaton, 69 Iowa, 136.

[390] § 1032. **Same subject; mitigations.** Though an entry is made upon real estate under the conviction that the right to do so exists, if it is in fact wrongful and wilful injury is done to the plaintiff's property, the defendant will subject himself to liability for exemplary damages.[1] So if in making such entry where he is entitled to possession, he uses force to overcome opposition, commits an assault and battery upon the occupant, injures his personal property in removing it from the premises to obtain possession, he may, by reason of such force in the assertion of his rights, and for such injury to person and property, subject himself to exemplary damages.[2] The circumstance, however, that the defendant was entitled to possession of the real estate should be taken into consideration in determining the amount of such damages, for it is less culpable for a person to attempt to recover his own property by force than to attempt to rob another of property to which the actor has no claim.[3] Where an assault in such case was committed upon the occupant's wife, and the injury to personal property done to furniture belonging to the husband, and two suits were brought against the trespasser — one by the husband and wife for the personal injury to her, and the other by the husband alone for the assault on his wife, injury to his furniture, and for breaking his close, the former of which was first tried and exemplary damages given therein,— it was held that on the trial of the second instructions in favor of exemplary damages correct in themselves would be misleading and erroneous if the jury were not reminded that the same transaction had been the subject of such damages on a preceding trial; though the jury had a right to give punitory damages in both suits, yet, on the question of amount, the former verdict should be considered.[4] The fact that a trespass

[1] Shores v. Brooks, 81 Ga. 468; Best v. Allen, 30 Ill. 30.

[2] Reeder v. Purdy, 41 Ill. 279; Bonsall v. McKay, 1 Houst. 520; Hedgepeth v. Robertson, 18 Tex. 858; Champion v. Vincent, 20 Tex. 811; Greenville, etc. R. Co. v. Partlow, 14 Rich. L. 237.

[3] Reeder v. Purdy, 41 Ill. 279.

[4] Id. Lawrence, J., thus commented on this point: "The suit brought by Purdy and wife had been already tried. In that suit the jury had been instructed they might give exemplary damages, and they had undoubtedly given them. The record of that suit was in evidence on the trial of the second suit. The court refused the instructions asked by the defendant, and properly, in

in removing a fence was committed in pursuance of the vote of the town has been allowed to be proved in mitigation of exemplary damages.[1] Such damages may be mitigated by proof of the mischievous language or conduct of the defendant if it was connected with plaintiff's act, although it does not legally justify the injury done.[2] It is no excuse for committing a trespass upon a house that it had a bad reputation.[3]

The principle of permitting damages in certain cases [**391**] to go beyond naked compensation is for example and the punishment of the guilty party for the wicked, corrupt and malignant motive and design which prompted him to the wrongful act. A trespass may be committed from a mistaken notion of power, and from an honest motive to accomplish some good end. But the law tolerates no abuse of power, nor excuses such act; yet in morals and the eye of the law there is a vast difference between the criminality of a person acting mistakenly from a worthy motive and one committing the

the form they were drawn, except as to the one already considered. Neither is there anything in itself wrong in the foregoing instruction, and yet it is of such a character that the court, in order to secure a fair consideration of the case by the jury, and having refused all the instructions drawn by the defendant, should, of its own motion, have modified the somewhat argumentative effect of this one by telling the jury that they were also, in estimating the exemplary damages, to consider the fact that the jury in the other suit had been authorized to give exemplary damages, and to take into consideration on that question the amount of the verdict in the other case. We must hold that, in strict law, exemplary damages are recoverable in both cases, because the suits are brought in different rights. In the suit by Purdy and wife, if Purdy fails to collect the judgment in his life-time, on his death it would go to the wife surviving him, and not to his personal representatives. But, apart from that contingency, the fruits of both judgments go into his pocket. It would therefore be highly proper that the jury, in considering the question of punitive damages, should have taken into consideration not only the circumstances of aggravation enumerated in the instruction, but also the fact that these same circumstances and the same transaction had been submitted to another jury, in a suit prosecuted in reality for the benefit of the same plaintiff, and, so far as related to the single question of the amount of vindictive damages, the amount of the former verdict would have been a proper subject of regard."

[1] Gray v. Waterman, 40 Ill. 522; Jackel v. Reiman, 78 Texas, 588.

[2] Wilson v. Young, 31 Wis. 574.

[3] Weston v. Gravlin, 49 Vt. 507; Love v. Moynehan, 16 Ill. 277; Perkins v. Towle, 43 N. H. 220.

same act in a wanton and malignant spirit, and with a corrupt and wicked design. Hence, where the jury are called upon to give smart money, or damages beyond compensation, to punish the party guilty of the wrongful act, any evidence which would show this difference, or, rather, all the facts and circumstances which tend to explain or disclose the motives and design of such party, are evidence which should go to the [392] jury for consideration.[1] Where the tort survives and the action is brought against the representative of the deceased tort-feasor vindictive damages should never be allowed, no matter how aggravated the trespass.[2] The liability for such damages is restricted to the individual who does the acts which give the right to claim them. While the party who institutes proceedings and the attorney who directs the service of a void writ are liable for compensatory damages resulting from a proper observance of its mandate, they are not answerable for exemplary damages because the officer who served such writ acted in excess of its requirements.[3]

Section 2.

INJURY TO INHERITANCE.

§ 1033. Injury to the rights of parties not in possession. As has been stated, the same act may be injurious to several persons having different interests; to the person having a limited estate in possession, and the person or persons having the fee subject to that possessory title. The owner of the reversionary or expectant estate has no claim for damages where the wrong affects only its present enjoyment; and when it affects the value of the whole estate in possession and in expectancy, he has no claim for damages except for the injury to the inheritance. This injury may arise from the wrongful acts of the owner of the intermediate estate, or a stranger; when done by the former it is waste. Trespass will not lie against either, because the wrong is not to the possession of the injured party. In the appropriate action, however, com-

[1] Simpson v. McCaffrey, 13 Ohio, 508; Camp v. Camp, 59 Vt. 667.

[2] Ripey v. Miller, 11 Ired. L. 247.

[3] Marks v. Culmer, 6 Utah, 419; 24 Pac. Rep. 528; Cooley's Torts, 131.

pensation is meted out to him on the same principles, and in proportion to the injury sustained.[1]

If a house demised to a tenant has been set on fire or thrown down from the negligence of a neighbor, the damages are apportionable between the landlord and tenant. The latter is entitled to recover in respect to the value of his possessory interest and unexpired term, and the landlord in respect to the injury to his reversion.[2] But if the tenant is bound by covenant to keep the house in repair, a substantial injury would accrue to him, and he would be entitled to recover the cost of rebuilding the house, deducting the difference in value between old materials and new.[3] The tenant must, however, first pay or satisfy the claim of the landlord. The amount he expends for this purpose measures his recovery against the wrong-doer.[4]

The declaration in an action brought by a reversioner [**393**] must either expressly allege the act to have been done to the injury of the reversion, or must state an injury of such a permanent nature as to be necessarily prejudicial thereto, and this allegation must be proved.[5] Waste is the abuse or destructive use of property by him who has not the absolute, unqualified title, and differs from trespass in this: that the latter is an injury by the unauthorized use of another's property by one who has no right whatever.[6] Blackstone says it is a spoil or destruction of houses, gardens, trees or other corporeal hereditaments, and the disherison of him that hath the remainder or reversion.[7] It is voluntary when the tenant does some act injurious to the inheritance, and permissive when he omits some duty, and thereby an injury results to the inheritance; to tear a house down is voluntary waste; to suffer it to

[1] Van Deusen v. Young, 29 N. Y. 9; Randall v. Cleveland, 6 Conn. 328; Shadwell v. Hutchinson, 2 B. & Ad. 97; Dutro v. Wilson, 4 Ohio St. 101; California Dry Dock Co. v. Armstrong, 17 Fed. Rep. 216.

[2] Panton v. Isham, 3 Lev. 359; 1 Salk. 19; California Dry Dock Co. v. Armstrong, 17 Fed. Rep. 216.

[3] Lukin v. Goodsall, 2 Peake, 15; 1 Add. on Tort, 315.

[4] California Dry Dock Co. v. Armstrong, 17 Fed. Rep. 216; Wood v. Griffin, 46 N. H. 231.

[5] Baxter v. Taylor, 4 B. & Ad. 72; Jackson v. Pesked, 1 M. & S. 234; Tucker v. Newman, 11 Ad. & El. 40.

[6] Duvall v. Waters, 1 Bland's Ch. 569.

[7] 2 Bl. Com., ch. 18. See Proffitt v. Henderson, 29 Mo. 325.

go to decay for want of necessary repairs is permissive.[1] To be waste it must either diminish the value of the estate, increase the burdens upon it, or impair the evidence of title of him who has the inheritance.[2] The damages for this injury and the remedy for them are generally regulated by statute. In some states only single damages are given, in others double and treble damages.[3]

§ **1034. Same subject.** The damage for waste being by definition for injury to the inheritance, the plaintiff can recover only for such injury as affects his expectant estate. If waste is committed by cutting down timber, removing buildings, carrying away gravel or other substance of the estate the owner of the inheritance will have a right to the same damages as he would have against a stranger who impaired the value of his estate by similar tortious acts. In general, this damage is the amount the estate is diminished thereby in [**394**] value.[4] In determining the amount of damage for cutting and removing wood, the jury are not limited to the value of that actually cut and removed; they may and should also consider the effect which the cutting has had upon the place wasted. The damages are the solid and permanent injury to the inheritance.[5] If one in possession with the right of a tenant for life of agricultural land commits waste by cutting timber necessary to be retained for the use of the farm the reversioner may recover for this damage as well as the value of the timber.[6] There are two lines of authorities concerning the

[1] Id.; 3 Dane Abr. 214; 1 Wash. R. P. 126.

[2] Id.; Huntley v. Russell, 13 Q. B. 588; Young v. Spencer, 10 B. & C. 145.

[3] See 1 Wash. R. P. 142.

[4] Harder v. Harder, 26 Barb. 409; Jesser v. Gifford, 4 Burr. 2141; Agate v. Lowenbein, 6 Daly, 291; Dickinson v. Baltimore, 48 Md. 583; Ayer v. Bartlett, 9 Pick. 156; White v. Stoner, 18 Mo. App. 540; Stoudenmire v. De Bardelaben, 85 Ala. 85; Kankakee & S. R. Co. v. Horan, 131 Ill. 288; Dorsey v. Moore, 100 N. C. 41; Whorton v. Webster, 56 Wis. 356, 369. See Worrall v. Munn, 53 N. Y. 185; S. C., 38 id. 137.

A covenant by a tenant not to commit waste does not subject him for its breach to the same measure of damages as the breach of a covenant to deliver up the property at the end of the term in the same state as it came to him. The damages are measured by the diminution in the value of the reversion, less a discount for immediate payment. Whitham v. Kershaw, 16 Q. B. Div. 613.

[5] Harder v. Harder, 26 Barb. 409.

[6] Van Deusen v. Young, 29 N. Y. 9.

measure of damages a mortgagee may recover for an injury to the estate which diminishes his security. There is no denial of his right, whether he holds the first or second mortgage, to maintain an action for such wrong either against the mortgagor or a stranger.[1] The variance as to the measure of damages results from the difference in the nature of the mortgagee's estate. In Massachusetts the mortgage vests the legal estate in the mortgagee and carries with it the right of possession. Accordingly, it is there held that a second mortgagee may recover the full amount of damages done to the mortgaged premises, notwithstanding the security for his debt remains ample.[2] But where the mortgage is not considered as a common-law conveyance on condition, but as a security for the debt, the damages to the mortgagee are measured by the diminution of his security, regardless of the extent of the injury done to the land.[3] If the wrong is done by a third party he is liable to the extent of the mortgagee's claim, not exceeding, in case of trespass by cutting timber, the value of that cut, including the rate of interest the mortgagor was to pay, at least where he is insolvent.[4]

Section 3.

NUISANCE.

§ 1035. What is a nuisance. A private nuisance has been defined to be anything wrongfully done to the hurt or annoyance of the lands, tenements or hereditaments of another.[5] It may be anything which is calculated to interfere with the comfortable enjoyment of a man's house; as smoke, noise or bad odors, even when not injurious to health.[6] It may be any

[1] Jones on Mort. (4th ed.), §§ 695, 695*a*.

[2] Gooding v. Shea, 103 Mass. 360; Byrom v. Chapin, 113 id. 308.

[3] Schalk v. Kingsley, 42 N. J. L. 32; Van Pelt v. McGraw, 4 N. Y. 110; Atkinson v. Hewett, 63 Wis. 396; Morgan v. Gilbert, 2 Flip. 645; S. C., 2 Fed. Rep. 835.

[4] Atkinson v. Hewett, 63 Wis. 396.

[5] 3 Black. Com. 215; Cooper v. Hall, 5 Ohio, 320.

[6] Rex v. White, 1 Burr. 333; Tenant v. Goldwin, 1 Salk. 360; Rex v. Neil, 2 C. & P. 485; Cleveland v. Citizens' G. L. Co., 20 N. J. Eq. 201; Fish v. Dodge, 4 Denio, 311; First Baptist Church v. Schenectady, etc. R. Co., 5 Barb. 79; Ross v. Butler, 19 N. J. Eq. 294; Whitney v. Bartholomew, 21 Conn. 213; Att'y Gen. v. Steward, 20 N. J. Eq. 417; Ball v. Nye, 99 Mass. 582; Duncan v. Hayes, 22 N. J. Eq. 27; Marshall v. Cohen,

[395] wrongful act which destroys or deteriorates the property of another, or interferes with the lawful use and enjoyment thereof; or any act which unlawfully hinders the enjoyment of a common or public right and thereby causes a special injury.[1] An actionable nuisance may be anything wrongfully done or permitted which injures or annoys another in the enjoyment of his legal rights.[2] It may be created by an affimative act causing annoyance and damage, or by neglect of some duty of prevention.[3] Where it is sought to make one accountable for the consequences of acts done by him upon his own land the question, in general, is not whether he exercised due care, but whether his acts caused the damage. If they necessarily tend to injure his neighbor in his pre-existing rights of property he is liable in damages for the natural and necessary consequences thereof, irrespective of any considerations as to the care and skill with which such operations may have been conducted.[4] The only exception to this rule is where the act which causes the nuisance is done under public authority. In such a case the persons who act within the powers granted are not liable for consequential damages if they so act with care and skill.[5] The statutory authority which will justify an injury to private property and afford immunity for acts which would otherwise be a nuisance must be express, or must be a clear and unquestionable implication

44 Ga. 489; Meigs v. Lister, 23 N. J. Eq. 199; Pottstown Gas Co. v. Murphy, 39 Pa. St. 257; Bliss v. Hall, 4 Bing. N. C. 183; Greene v. Nunnemacher, 36 Wis. 50; McKeon v. See, 4 Robt. 449; Cropsey v. Murphy, 1 Hilt. 126; Brady v. Weeks, 3 Barb. 157; Whalen v. Keith, 35 Mo. 87; Tate v. Parrish, 7 T. B. Mon. 325; Mulligan v. Elias, 12 Abb. (N. S.) 259; Smiths v. McConathy, 11 Mo. 518; Sparhawk v. Union, etc. R. Co., 54 Pa. St. 401; State v. Haines, 30 Me. 65; Walter v. Selfe, 4 De G. & Sm. 315; Soltau v. De Held, 2 Sim. (N. S.) 133, 159; Elliotson v. Feethan, 2 Bing. N. C. 134; Scott v. Bay, 3 Md. 431.

[1] Fay v. Prentice, 1 C. B. 828; Aiken v. Benedict, 39 Barb. 400; Norton v. Scholefield, 9 M. & W. 665; State v. Taylor, 29 Ind. 517; Brown v. Illius, 27 Conn. 84; Woodward v. Aborn, 35 Me. 271.

[2] Cooley on Torts, 565.

[3] Hawkesworth v. Thompson, 98 Mass. 77; Cawkwell v. Russell, 26 L. J. (Exch.) 35.

[4] Cahill v. Eastman, 18 Minn. 324; Heeg v. Licht, 80 N. Y. 579; Bohan v. Port Jervis G. L. Co., 122 id. 18; Pottstown Gas Co. v. Murphy, 39 Pa. St. 257.

[5] Transportation Co. v. Chicago, 99 U. S. 635; Attwood v. Bangor, 83 Me. 582; Uline v. New York, etc. R. Co., 101 N. Y. 98.

from powers expressly conferred, and it must appear that the legislature contemplated the doing of the very act which occasioned the injury.[1] The erector of a nuisance is liable not only for its creation, but also for its continuance.[2] When he who erects a nuisance conveys the land, he does not transfer the liability therefor to the grantee; the latter is not generally liable until upon request he refuses to remove the nuisance; if a tenant or grantee, however, continues a nuisance after request to abate it, he is liable.[3] According to the American cases a landlord is not relieved of liability for an existing nuisance on premises which he demises by a condition in the lease thereof that the tenant shall keep them in repair.[4] There are, however, English adjudications to the contrary.[5] If a nuisance is the result of the joint acts of a lessor and lessee, they are jointly liable for both permanent and temporary injury sustained after the lease was made.[6]

§ 1036. General principles of the law of nuisance. For the purpose of discussing the subject of damages it is not necessary to state the technical difference between nuisance and the wrong called trespass, for the same rules of damage [396] apply in both cases. Trespass is susceptible of very precise definition, but such a variety of wrongs come under the denomination of nuisance that all definitions of it must, in the nature of things, be very general. The remedy against a nuisance by action for damages merely would be, in many instances, imperfect and inadequate because full redress cannot be obtained in a single action. For this reason resort may be

[1] Cogswell v. New York, etc. R. Co., 103 N. Y. 10; Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U. S. 317; Pottstown Gas Co. v. Murphy, 39 Pa. St. 257; Commonwealth v. Kidder, 107 Mass. 188; Bohans v. Port Jervis, G. L. Co., 122 N. Y. 18.

[2] Conhochton, etc. Co. v. Buffalo, etc. R. Co., 52 Barb. 390; Waggoner v. Jermaine, 3 Denio, 306; Fish v. Dodge, 4 Denio, 311; Smith v. Elliott, 9 Pa. St. 345; Pickard v. Collins, 3 Barb. 444.

[3] Woodman v. Tufts, 9 N. H. 88; Johnson v. Lewis, 12 Conn. 307; Angell on Water-courses, 403; Pillsbury v. Moore, 44 Me. 154; Morris Canal, etc. Co. v. Ryerson, 27 N. J. L. 457; Beavers v. Trimmer, 25 id. 97; McDonough v. Gilman, 3 Allen, 264; Thornton v. Smith, 11 Minn. 15; Waggoner v. Jermaine, 3 Denio, 306; Hubbard v. Russell, 24 Barb. 404.

[4] Ingwersen v. Rankin, 47 N. J. L. 18; Swords v. Edgar, 59 N. Y. 28.

[5] Pretty v. Bickmore, L. R. 8 C. P. 401; Gwinnell v. Eamer, L. R. 10 C. P. 658.

[6] Railroad Co. v. Hambleton, 40 Ohio St. 496.

had to equity for prevention by injunction. And provision is very generally made by statute for judicial abatement at law, in addition to the award of damages.[1] A nuisance is generally of a continuing nature by the continuous fault of the person creating it; though it may be so by the fault of some other person who has become so connected with it as to be also answerable for it. This continuous fault may consist in a repetition of affirmative acts, keeping alive and perpetuating the nuisance, or in neglect to remove one which otherwise would, of itself, continue. The wrong in the latter case is in omitting to perform the necessary act to cause the nuisance to cease, when the doing of such act is a legal duty.[2] Every man has a right to use his own property as to him seems proper, subject to this important qualification: that he so use it as not to injure another. Nuisances may be, and generally are, created and continued on the pretext of the wrong-doer using his own property to make the same conducive to his profit and enjoyment, and by neglecting the legal restriction of that use to avoid injury to others. If he carry on a lawful trade or business in such a manner that it becomes a nuisance to his neighbor he must answer in damages.[3]

§ 1037. Wrong-doer liable for at least nominal damages. The creation or continuance of a nuisance in any form which [397] involves the physical invasion of or interference with the plaintiff's property is a wrong for which an action will lie, and at least nominal damages may be recovered.[4] But when the act complained of is lawful in itself a different rule prevails. It is then only when some actual injury is done that a

[1] Remington v. Foster, 42 Wis. 608; Davis v. Lambertson, 56 Barb. 480.

[2] Fish v. Dodge, 4 Denio, 317; Smith v. Elliott, 9 Pa. St. 345; Holmes v. Wilson, 10 A. & El. 503; Bowyer v. Cook, 4 M., G. & S. 236; Loweth v. Smith, 12 M. & W. 582; Thompson v. Gibson, 7 id. 456; Staple v. Spring, 10 Mass. 74; Cumberland, etc. Co. v. Hitchings, 65 Me. 140; Esty v. Baker, 48 Me. 495; Russell v. Brown, 63 Me. 203.

[3] Pickard v. Collins, 23 Barb. 444; Campbell v. Seaman, 63 N. Y. 568; Columbus Gas, etc. Co. v. Freeland, 12 Ohio St. 392; Keiser v. Mahanoy City Gas Co., 143 Pa. St. 276.

[4] Clark v. Pennsylvania R. Co., 145 Pa. St. 438; Alexander v. Kerr, 2 Rawle, 83; Foote v. Clifton, 22 Ohio St. 247; Jones v. Hannovan, 55 Mo. 462; Phillips v. Phillips, 34 N. J. L. 208; Butman v. Hussey, 12 Me. 407; Freudenstein v. Heine, 6 Mo. App. 267; Chatfield v. Wilson, 27 Vt. 670; Hilliard on Torts, 608; Casebeer v. Mowry, 55 Pa. St. 419.

right of action ensues. Every man has a right to use his own as to himself seems proper; but he must be careful to so use it that no injury is done to another. If the thing complained of as a nuisance causes neither hurt, inconvenience, annoyance or damage, it is not a nuisance: but if it causes either in a material degree the person creating it must be liable for the consequences, no matter how small the damage. The person sustaining it will have a right of action, but there must have been some damage in fact, not merely in imagination.[1] In Columbus Gas, etc. Co. v. Freeland[2] Gholson, J., said: "It is evident that what amount of annoyance or inconvenience will constitute a legal injury, resulting in actual damage, dependent on varying circumstances, cannot be precisely defined, and must be left to the good sense and sound discretion of the tribunal called upon to act. Any rule on the subject can only serve as a guard against an unreasonable exercise of that discretion. Thus, in the one above cited,[3] we are cautioned to regard the proper mean, the ordinary standard of comfort and convenience, and not particular or exceptional cases above, nor, it may be added, below. Regard should be had to the notions of comfort and convenience entertained by persons generally of ordinary tastes and susceptibilities. What such persons would not regard as an inconvenience materially interfering with their physical comfort may be properly attributed, when alleged to be a nuisance, to the fancy or fastidious taste of the party. On the other hand, the charge of a nuisance, if it be of a thing offensive to persons generally, cannot be escaped by showing that to some persons it is not at all unpleasant or disagreeable."[4] In Thompson v. [398] Crocker,[5] the action being brought for inconvenience to the

[1] Cooper v. Hall, 5 Ohio, 322; McElroy v. Goble, 6 Ohio St. 187; Elliot v. Fitchburg R. Co., 10 Cush. 191; Monk v. Packard, 71 Me. 309; Stadler v. Grieben, 61 Wis. 500; Pennoyer v. Allen, 56 id. 511; Sturges v. Bridgman, 11 Ch. Div. 852.

In Ohio it is said that the least degree of hurt, inconvenience, annoyance or damage resulting from the use of property is a nuisance. Cooper v. Hall, 5 Ohio, 322.

[2] 12 Ohio St. 392.

[3] Soltau v. De Held, 2 Sim. (N. S.) 133.

[4] Price v. Grautz, 118 Pa. St. 402; Cooley on Torts, 600; First Baptist Church v. Schenectady, etc. R. Co., 5 Barb. 79; St. Helen's Smelting Co. v. Tipping, 11 House of L. Cas. 642.

[5] 9 Pick. 59.

plaintiff in working his mill, caused by increasing the water below it by the defendant's dam, the judge instructed the jury that if the plaintiff had sustained any actual perceptible damage in consequence of the erection of the dam he was entitled to recover, but that for a theoretic injury or damage to be inferred from the obstruction of the water, and from the principle that any obstruction below would prevent the water from passing from the plaintiff's mill so rapidly as it would without such obstruction, the defendant was not answerable.[1] In such cases the cause of action depends on actual damage, and the statute of limitations begins to run from the time when such damage occurs.[2]

§ 1038. Usually a continuous wrong requiring successive actions. Successive actions may be brought if the nuisance continues by the continuous fault of the defendant. In the first, the question whether the acts complained of constitute a nuisance or not is to be determined; and where there is no ground for imputing any wanton or intentional wrong the damages are confined to the actual injury from the nuisance and its continuance to the date of the writ. If it continues afterwards the damages resulting therefrom can only be recovered by a new suit, and they may be so recovered; for every continuance of the nuisance is a new nuisance.[3] In such subsequent action all damages for such continuance since the

[1] See Oakley Mills, etc. Co. v. Neese, 54 Ga. 459.

[2] Delaware, etc. Canal Co. v. Wright, 21 N. J. L. 469; Powers v. Council Bluffs, 45 Iowa, 652. See Wells v. New Haven & N. Co., 151 Mass. 46.

[3] Baltimore & P. R. Co. v. Fifth Baptist Church, 137 U. S. 568; Stadler v. Grieben, 61 Wis. 500; Joseph Schlitz Brewing Co. v. Compton, 47 Alb. L. J. 28; — Ill. —; Cole v. Sprowl, 35 Me. 161; Vedder v. Vedder, 1 Denio, 257; Blunt v. McCormick, 3 id. 283; Savannah, etc. Co. v. Bourquin, 51 Ga. 378; Bare v. Hoffman, 79 Pa. St. 71; Seely v. Alden, 61 id. 302; Anderson, etc. R. Co. v. Kernodle, 54 Md. 314; Freudenstein v. Heine, 6 Mo. App. 287; Whitmore v. Bischoff, 5 Hun, 176; Hopkins v. Western P. R. Co., 50 Cal. 190; Hartz v. St. Paul, etc. R. Co., 21 Minn. 358; Sackrider v. Beers, 10 Johns. 241; Duncan v. Markley, Harp. 179; Cumberland, etc. Co. v. Hitchings, 65 Me. 140; Allen v. Worthy, L. R. 5 Q. B. 193; Queen v. Waterhouse, L. R. 7 Q. B. 545; Beckwith v. Griswold, 29 Barb. 291; Mahon v. New York, etc. R. Co., 24 N. Y. 658; Thayer v. Brooks, 17 Ohio, 489; Slight v. Gutzlaff, 35 Wis. 675.

The damages recovered in the first suit are wholly independent of those subsequently sued for, and cannot mitigate them. Baltimore & P. R. Co. v. Fifth Baptist Church, 137 U. S. 568.

commencement of the prior action are recoverable; and [399] the defendant will be regarded, for such continued wrong, as wilful and contumacious, and subject to such exemplary damages as may insure the abatement of the nuisance.[1]

§ 1039. What recoverable in the first action. In the first action all damages may be recovered which have resulted from the nuisance, and which will ensue without any further fault, neglect or positively wrongful act of the defendant. If he is subject to successive actions until he removes the nuisance, then, of course, in the first action nothing can be included in the recovery which will enter into the estimate of damages in any subsequent suit. For illustration, suppose a business is conducted which causes discomfort and annoyance to others. That injury will continue so long as the offensive business is conducted; each day's business produces a day's discomfort; the business and annoyance are continuing cause and effect. In the first suit for such a nuisance it cannot be proved, nor will the law assume, that the wrong and injury will continue. If in fact it is continued during the pendency of the action, it is a wrong not in issue; it is a new wrong, and the resulting damage is a fresh cause of action. So if a person has erected a dam or embankment on his own land or elsewhere, and thereby water to which another is entitled is diverted from his property; or by such means his property is flooded or otherwise injured, the injury will continue so long as the dam or embankment is maintained. If it is permanent the injury will also be so unless the cause is removed, and if the law requires the defendant to remove the cause every day he neglects that duty he is guilty of continuing the nuisance, and successive actions may be brought. According to the general current of decision and on principle this is a continuous wrong; for if, on such or a similar case, the plaintiff is compelled to assess his damages once for all he is precluded from bringing a second suit, though the damage may turn out to be greater than the recovery.[2] In effect, the defendant

[1] Bradley v. Amis, 2 Hayw. 399; Cumberland, etc. Co. v. Hitchings, 65 Me. 140.

[2] Fowle v. New Haven, etc. Co., 112 Mass. 334; Illinois, etc. R. Co. v. Grabill, 50 Ill. 241; Jeffersonville, etc. R. Co. v. Esterle, 13 Bush, 667; Uline v. New York, etc. R. Co. 101 N. Y. 116; Tallman v. Metropolitan E. R. Co., 114 id. 119.

[400] would thus, by his wrongful act, acquire a right to continue the wrong; a right equivalent to an easement. A right to land cannot thus be acquired.[1] On the other hand, such a principle would involve the injustice of compelling the defendant to pay for a perpetual wrong which he would, perhaps, put an end to at once on the adjudication that the erection is a nuisance.[2] In a late case in Pennsylvania[3] the parties were owners of tanneries on opposite sides of the same stream, the defendant's being the lower one. The plaintiff was the owner of land on each side of the stream below both tanneries. He had a dam from which he conducted water to his tannery; the defendant made a dam below into which the surplus water from plaintiff's dam flowed; from this dam the defendant by a pipe conducted the water to his tannery, by which the plaintiff lost the use of the water required to carry offal from his tannery. The court say: "A severance of the connection of the pipe with the stream would cause the water to run in its accustomed channel and remove the whole cause of complaint. It is not a case of an entry on another's land and a severance of a part of the freehold, nor the depositing a permanent nuisance thereon." The act committed was not of such a permanent character that it could be assumed to continue through all coming time and to justify the assessment of damages accordingly. It was therefore deemed error to permit evidence to be given of a permanent injury to the market value of the tannery, and to instruct the jury that the plaintiff was entitled to recover the permanent damage done to the freehold. He was deemed entitled to the damages he had sustained prior to the commencement of the suit, and to be entitled to them as of that date; and the jury were permitted to compute interest thereon down to the verdict.[4] Where the defendant filled up about two hundred yards of [401] the plaintiff's canal bed without authority, but under

[1] Atlantic, etc. R. Co. v. Robbins, 35 Ohio St. 531; Thompson v. Morris Canal, etc. Co., 17 N. J. L. 480; Anderson, etc. R. Co. v. Kernodle, 54 Ind. 314.

[2] See *post*, §

[3] Bare v. Hoffman, 79 Pa. St. 71; Duryea v. Mayor, 26 Hun, 120.

[4] The reason for the allowance of interest was deemed the same as in the prior cases of Railroad Co. v. Gesner, 20 Pa. St. 240; Pennsylvania R. Co. v. Cooper, 58 id. 408; Delaware, etc. R. Co. v. Burson, 61 id. 369.

color of official power, to make a street, it was held to be a nuisance erected on the plaintiff's land, which it was the duty of the defendant to remove; that successive actions could be brought until such removal; that in one action it was wrong to give as damages the diminution of the value of the property, as that would lead to an erroneous result.[1] If damages are sustained subsequently to the commencement of the action they may be considered if they are the natural and necessary result of the act complained of,[2] and are not in themselves sufficient as a ground for a separate suit.[3]

§ 1040. Continuing liability of the erector. The continuing liability of the erector of a nuisance which consists of a permanent structure is very strongly illustrated by an English adjudication, made in an action on the case for continuing a nuisance to the plaintiff's market by a building which excluded the public from a part of the space on which the market was lawfully held. It appeared that the building was erected under the superintendence and direction of the defendants, though not on their own land, but land of the corporation of K. The plaintiff became a lessee of the market after the erection of the encroaching building. It was contended on behalf of the defendants that they were not responsible for the continuing of the nuisance; that they were distinct persons from the corporation; and that though they were guilty of erecting, they could not be considered as having continued the nuisance because they were not in possession or interested in the soil on which the building stood. Parke, B., said: "That the defendants were responsible for some consequences of the original erection of the building to the then owner of the market, though the defendants were not acting for their own benefit, but for that of the corporation, is not disputed; nor could it be. If they are considered merely as servants of the corporation they would be liable just as the servant of an individual is if he is actually concerned in erecting the nuisance; and as they would clearly

[1] Cumberland, etc. Canal Co. v. Hitchings, 65 Me. 140. See Dority v. Dunning, 78 id. 381; Stadler v. Grieben, 61 Wis. 500; Benson v. Chicago & A. R. Co., 78 Mo. 504.

[2] Goodrich v. Dorset Marble Co., 60 Vt. 280.

[3] Frostburg v. Dufty, 70 Md. 47, 55.

have been responsible to the then owner of the market for the immediate consequences of their wrongful act, how can their liability be confined to the injury by the interruption of the first market, or what limit can be assigned to their responsibility other than the continuance of the injury itself? Is he who originally erects a wall by which ancient lights are [402] obstructed to pay damages for the loss of the light for the first day only? Or does he not continue liable so long as the consequences of his own wrongful act continue, and bound to pay damages for the whole time? And if the then owner of the market might have maintained the action against the defendants for the injury to his franchise for the whole period during which the defendants' act continued to be injurious to him, his lessee must be in the same condition as to subsequent injuries; for it is clearly established that he has a right of action for every continuing nuisance. . . . It was also said that the defendants could not now remove the nuisance themselves without being guilty of a trespass to the corporation, and that it would be hard to make them liable. But that is a consequence of their own original wrong, and they cannot be permitted to excuse themselves from paying damages for the injury it causes by showing their inability to remove it without exposing themselves to another action."[1] Erecting the nuisance was not deemed the entire wrong; that was done to the owner; the continuance of it was a distinct and additional wrong, and gave an action to the succeeding tenant.[2] The continuance of a dam flooding the plaintiff's property is ground for successive actions as for a continuous wrong.[3] So is the occupation of the plaintiff's land or of a street adjacent thereto for a railroad.[4] This proposition is not universally agreed to.[5] A nuisance produced by a private erection or other work on land will not be regarded as permanent, no matter what the intention was when the work was done.[6]

[1] Thompson v. Gibson, 7 M. & W. 456. See Blunt v. Aikin, 15 Wend. 522.

[2] See Russell v. Brown, 63 Me. 203; Esty v. Baker, 48 Me. 495; Bowyer v. Cook, 4 M., G. & S. 236; Holmes v. Wilson, 10 Ad. & El. 503.

[3] Pillsbury v. Moore, 44 Me. 154; Staple v. Spring, 10 Mass. 72.

[4] Mahon v. New York C. R. Co., 24 N. Y. 658; Sherman v. Milwaukee, etc. R. Co., 40 Wis. 645.

[5] § —, *infra*.

[6] Joseph Schlitz Brewing Co. v. Compton, 47 Alb. L. J. 28; — Ill. —.

§ 1041. Damages may include future expenditures. The authorities agree that damage done at the date of the writ is to be compensated, and that only. If that damage consists in causing the party to expend money the test is not the time when the expenditures were made, for they may be paid at once or their payment delayed, without in any way affecting the rights of the parties. The question is not when the money was paid, whether before or after suit; but was the lia- [403] bility to those expenditures occasioned by the acts complained of? Or was it by the continuance of the same acts, or of the state of things produced by those acts, after the action was brought? If they are the result and consequence of the wrongful act complained of they are to be recovered in that action; if they result from the wrongful continuance of the state of facts produced by those acts they form the basis of a new action.[1]

§ 1042. When nuisance not a continuous wrong. When a wrongful act is done which produces an injury which is not only immediate, but from its nature must necessarily continue to produce loss independently of any subsequent wrongful act, then all the damages resulting, both before and after the commencement of the suit, may be recovered in one action.[2] Thus in a Minnesota case, in which it was held that occupying land for a railroad was a continuing wrong, the court say: "If the construction of the road and track on the plaintiff's land necessarily lessened the value of the property; that is to say, if it would be worth less because of the mere existence thereon of said road-bed and track, without reference to any wrongful use which the defendant might or might not make of them, such depreciation accrued immediately upon the construction thereof, and was in its nature permanent; and being a direct and immediate result of the trespass might be recovered at once. And if such erection necessarily caused the surface water to stand upon plaintiff's land and run into his

[1] Troy v. Cheshire R. Co., 23 N. H. 83; Holmes v. Wilson, 10 Ad. & El. 503; Staple v. Spring, 10 Mass. 72; O'Riley v. McChesney, 3 Lans. 278; affirmed, 49 N. Y. 672.

[2] Chicago, etc. R. Co. v. Loeb, 118 Ill. 203; Same v. Schaffer, 26 Ill. App. 280; Comminge v. Stevenson, 76 Texas, 642; Cooper v. Randall, 59 Ill. 321; Hayden v. Albee, 20 Minn. 159.

cellar and well, he could recover therefor in the same action; though such injury might not accrue for some time after the completion of the road-bed and track." [1] If the injury to real estate is in the nature of waste, as where a building is demolished, trees destroyed or fences broken down, there is no legal obligation or duty resting upon the wrong-doer to abate the wrong or repair the mischief. He is liable only for the [404] damages. Only one action then can be maintained; and he is liable in that for the whole damage, prospective as well as retrospective.[2]

Damages have not been invariably assessed as for a continuing wrong where deposits of soil or other substances have been made on another's land, or other encroachment made thereon of a nature to continue unless active measures are taken for their removal. If the process of deposit goes on, and there is a continued accretion of foreign matter by defendant's fault, successive actions may, of course, be brought, but it is not the uniform American rule to regard the wrong of making the deposit and that of its continuance on the land as distinct or divisible wrongs. Thus, in an action by the owners of a water-power against the owner of a tannery higher up the stream for permitting tan bark to be conveyed into the plaintiff's pool to the detriment of his mill, the court, recognizing that the rule for measuring damages is that which aims at actual compensation for the injury, and that whatever ascertains this is proper evidence for the jury, held that the plaintiff was entitled to permanent damages; in other words, to recover all his damages in one action, measured either by the depreciation of the value of his property or by the cost of removing the deposit.[3] Agnew, J., said: "The owner of the freehold may undoubtedly recover for an injury which permanently affects or depreciates his property. . . . Being the owner of the property, and in its actual possession and

[1] Adams v. Hastings, etc. R. Co., 18 Minn. 265.

[2] Cumberland, etc. Co. v. Hitchings, 65 Me. 140.

[3] Seely v. Alden, 61 Pa. St. 302.

In Babb v. Curators of State University, 40 Mo. App. 173, realty was damaged by the discharge of sewage upon it. It was contended that because the nuisance was discontinued there could be no recovery for permanent depreciation in the value of the land. This view was disapproved and a recovery therefor was allowed as well as for loss of rents up to the time suit was brought.

use, . . . (the plaintiff) . . . had a right to all the damages flowing directly from the tort of the defendant. If, therefore, a permanent injury was created by the lodgment of the tan bark in the pool of their dam which actually depreciates the property in value as a water-power it must affect the value of the land to which it belongs; and why should not this be compensated in damages? . . . Compensation for the diminished enjoyment or use of the property for a certain number of years is not compensation for the diminished value of the estate itself. The profit of the land must not be confounded with the land itself. If the land were under lease an injury which diminished its annual profit to the tenant and also depreciated and diminished the value [405] of the property itself would be the subject of a double action in which the tenant and the landlord would each recover the amount of his own loss. Of course, when the owner claims in both cases he cannot be allowed double compensation for the same loss. So that the damages for use must not represent in any part the damages for the permanent injury. It is the duty of the court to see that one does not overlap the other. We think the court erred in refusing to admit both methods of computing the permanent damages, to wit: that which measures the damages by the different values of the land with and without the deposit, and that which measures them by the cost of removing the deposit. It is often difficult for the court to determine the true measure until the evidence is in; it may turn out that the cost of removing the deposit in a certain case would be less than the difference in the value of the land, and then the cost of removal would be the proper measure of damages; or it may be that the cost of removal would be much greater than the injury by the deposit, when the true measure would be the difference in value merely." A similar ruling has been made in New York. The owner of a flax mill upon a natural stream permitted flax shives to float down the current and collect in a mass or deposit in a mill-pond below thereby impairing the use of the mill. The cost of removing the deposit was held to be a direct consequence of the injury, and was recoverable although it had not been removed. The removal being necessary to restore the property to its former condition, the expense of it would measure

the diminution of value by the wrong done. But this was not deemed to be exclusive of other elements of damage, as, for example, the effect of the shives upon cattle in drinking, and the filling in at high water of the trunks leading from the pond to the mill.[1]

§ **1043. Same subject.** In New Hampshire it has been laid down that wherever the nuisance is such that its continuance is necessarily an injury, and is of a character that will continue without change from any cause but human labor, the measure of damages is an equivalent for the original and [**406**] entire injury, and it may at once be fully compensated, since the injured person has no means of compelling the individual doing the wrong to apply the labor necessary to remove the cause of injury, and can only accomplish that, if at all, by the expenditure of his own means.[2] This compre-

[1] O'Riley v. McChesney, 3 Lans. 278; affirmed, 49 N. Y. 672.

[2] The case and the application of the principle thereto were thus stated by the court: "The town is made by law chargeable with the duty and expense of maintaining the road which this railroad company have in part destroyed and in part obstructed, according to the declaration; they have a qualified interest in the roadway and bridge which they have constructed and have the right to maintain, and in the materials of which they are composed, and are entitled to recover the value of that roadway and material. The railroad is in its nature and design and use a permanent structure which cannot be assumed to be liable to change; the appropriation of the roadway and materials to the use of the railroad is, therefore, a permanent appropriation; the use of the land set apart to be used as a highway by the railroad company for the use of their track is a permanent diversion of that property to that new use, and a permanent dispossession of the town of it as the place on which to maintain the highway. The injury done to the town is then a permanent injury, at once done by the construction of the railroad, which is dependent upon no contingency of which the law can take notice, and for the injury thus done to them they are entitled to recover at once their reasonable damages. Those damages are, first, the value to them of the property and rights of which they have been deprived, for the use and purpose to which they are by law bound to apply them. Assuming, then, that they were sufficient to meet the requirements of the law and the public wants for a highway, their value is to be measured by the cost of the new ground they are bound to furnish to the community for a way, if it will be less costly and more reasonable, having reference to the accommodation of the public by the highway and the railway to procure new ground, rather than to build a highway over or under the railway; by the cost of the materials which will be requisite to make a road, which will as well meet the requirements of the legal duty of the

hensive remedy for the damage from a permanent nuisance is adopted in Iowa. "In the light of it," said the court, "we can see that in a case of overflow from a mill-dam, the injured party should be allowed to maintain successive suits. Somewhat depends on the way the dam is used. The injury, therefore, is not uniform. But what is of controlling importance, the dam if not maintained will go down, as surely as the sun will go down, and the nuisance of itself will come to an end. Its duration will be determined by freshets and other forces which are contingent, and therefore incalculable. It may, indeed, be so built that it should be regarded as permanent. In such case it is said that the damage should be considered and treated as original.[1] While no infallible test can be applied to enable us to determine whether a structure is permanent or not, inasmuch as nothing is absolutely permanent, yet when a structure is practically determined to be a permanent one, its permanency, if it is a nuisance, and will necessarily result in damages, will make the damages original."[2] The case

town to the public in relation to the road as the old, and the expense of applying those materials to that use in the new road, and the fund that will be permanently required in all future time to defray the increased expense of supporting and maintaining the new road in suitable repair beyond what would have been necessary for the old road. These ingredients go to make up the present value of the old road of which the town has been deprived, and they are to be recovered, not as prospective damages, but as a compensation for the injury the town has now sustained. When these expenses shall be paid by the town, or whether they shall ever be paid, is a question with which these defendants have nothing to do. If, from change of circumstances, the town should be relieved from the burden of maintaining the road, the amount paid by the railroad will be applied, as in equity it should, to replace to the town the cost of the land for the road and the expense of making it, long since paid by them." Troy v. Cheshire R. Co., 23 N. H. 102.

Referring to the test laid down by the New Hampshire court the Tennessee court pronounces it artificial and arbitrary. "There are supposable instances which, by the effect of time, might at last abate themselves, but by far the greater number of trespasses, wrongs and nuisances would continue indefinitely without the expenditure of human labor to remove or abate them. It is a rule which does not commend itself by either its reasonableness, its certainty of application or its justice." Nashville v. Comar, 88 Tenn. 415, 420. Uline v. New York, etc. R. Co., 101 N. Y. 98, is a very interesting and important case on this subject, and is in accord with the Tennessee case.

[1] Citing Troy v. Cheshire R. Co., *supra*.

[2] Powers v. Council Bluffs, 45 Iowa, 655.

[408] was this: The defendant had constructed a ditch along a street by the plaintiff's property in such a negligent and unskilful manner that it was injured thereby; one ditch was made to empty into another by a fall, making a cavity below the fall, and wearing away the land at its brink. The court held that the damage resulting from the construction of the ditch was original damage. It was said: "After the ditch was constructed and the water of the creek first began to work upon plaintiff's land, its continuance was just as certain as that water would flow in the creek, unless changes were made therein by human hands. Its continuance would just as certainly be an injury as that the floods of the creek would wash the soil and earth through which the ditch was dug. It follows then that the plaintiff's cause of action accrued for all injury sustained or that in the future would be suffered." Also: "We have seen no case where successive actions have been allowed for damages resulting from negligence combining with a natural cause, however gradual the operation of that cause. Successive actions are allowed only when the defendant is in continuous fault. It may be a fault of commission or omission, but if the latter, it must be something else than an omission to repair or arrest an injury resulting from negligence or unskilfulness, unless the remedy is to be applied upon the wrong-doer's premises."[1] This rule, as applied to such a case, affords the defendant no option or opportunity to put an end to the injury by amending his work; but the permanent or "original damages" are reducible to the amount it would cost the plaintiff himself to amend it if the injurious feature of it may be corrected at a moderate expense.[2] A subsequent case occurred which was unaffected by this mitigation. A railroad company and a city were defendants. The latter had, in the exercise of its powers, granted the company the right to locate its road along a street, adjacent to which the plaintiff owned and occupied property. The complaint was that there was negligence in selecting a line for the road on that street, and it was fixed unnecessarily near the plaintiff's premises, thereby causing him great inconven-[409] ience and damage. The true measure of damages was

[1] See Finley v. Hershey, 41 Iowa, 389.

[2] Simpson v. Keokuk, 34 Iowa, 568; Van Pelt v. Davenport, 42 id. 314.

held to be the difference in value of the plaintiff's property with the road constructed upon its present line in the street, and what that value would have been if the road had been constructed upon a line therein selected with reasonable care and a proper regard for the rights of all interested.[1] In another case the plaintiff was the owner of a lot abutting on a slough or arm of the Mississippi river, and occupied it with a slaughter or pork-house; the defendant owned a saw-mill on the same slough, and partially filled up this slough in front of his premises, and thereby impeded and cut off the flow of water from the river. The wrong was treated as an entirety, and the damages were measured and ascertained by comparison of the value of the property affected by the filling up of the slough, prior thereto, and its value as depreciated by such filling. It was insisted that the true measure was the difference between the value of the use of the property before and after the filling. On this point the court said: "The injury sustained by plaintiffs affected the property itself and incidentally the value of its use was depreciated. It is evident that the rule contended for by defendant's counsel would, if applied to the case, fail to make full compensation to plaintiffs. The property depreciated in value because the value of its use was affected, and because the property itself was injured by the acts complained of. In order to compensate the plaintiffs for the injury to their property they should recover to the extent its value was depreciated. If plaintiffs could only recover for the depreciated value of the use of the property whenever the property was used, as defendant claims, there would be a continually recurring cause of action in favor of plaintiffs, and the rights of the parties would not be settled in the present suit, a thing which the law will avoid."[2]

§ 1044. Same subject. In a late Massachusetts case[3] a railroad company, for the construction of its road-bed in such a

[1] Cadle v. Muscatine, etc. R. Co., 44 Iowa, 11; O'Connor v. St. Louis, etc. R. Co., 56 id. 735.

[2] Finley v. Hershey, 41 Iowa, 389.

[3] Fowle v. New Haven, etc. Co., 112 Mass. 334. The court say: "The permanent character of the structure, and the fact that the plaintiff accepted damages which were assessed for the permanent injury, and necessarily involved a consideration of the probable future effect upon the plaintiff's land of the changed current of such a stream in its different stages of water, remain unaffected by the evidence. The jury may have

manner as unnecessarily to turn the current of a stream against plaintiff's land and wash away his soil, was held liable [410] for prospective as well as past injury. A recovery of prospective damages in a prior suit was held to bar an action for subsequent damage, though caused by an unusual freshet. The declaration in the former suit was for soil washed away and for diminution in the value of the residue. The courts of Kentucky also allow recovery for past and prospective injury from a permanent nuisance; as for a railroad laid and operated in a street of a city impairing the value of the easement therein of adjacent lot-owners, and subjecting such owners occupying their lots to daily annoyance from smoke, soot, noise and hazard of fire.[1] In a subsequent case it was held

intended to compensate the plaintiff for the injury now complained of, or to give him the means to protect himself against it. As a general rule, a new action cannot be brought unless there be a new unlawful act and fresh damage. There is no exception to this rule in the cases of nuisance, where damages after action brought are held not to be recoverable, because every continuance of a nuisance is a new injury and not merely a new damage. The case at bar is not to be treated strictly in this respect as an action for an abatable nuisance. More accurately it is an action against the defendant for the construction of a public work under its charter in such a manner as to cause unnecessary damage by want of reasonable care and skill in its construction. For such an injury the remedy is at common law. And if it results from a cause which is either permanent in its character, or which is treated as permanent by the parties, it is proper that entire damages should be assessed with reference to the past and probable future injury. This is the course which appears to have been taken in this case, and to allow a recovery here might subject the defendant to double damages." See Wells v. New Haven & N. Co., 151 Mass. 46; Aldworth v. Lynn, 153 id. 53; North Vernon v. Voegler, 103 Ind. 314.

[1] Elizabethtown, etc. R. Co. v. Combs, 10 Bush, 382. The injury and damage are thus stated by the court: "We adjudge that if appel- [411] lant's road has been so located as to deprive appellee of the means of ingress and egress to and from his lot on W. street with ordinary vehicles on either side of its road when its trains are passing or standing on the street in front of his lot, he is entitled to recover such damages as he has thereby sustained; and if his houses are damaged by having smoke, soot or fire from passing engines thrown or blown into or against them, he is entitled to recover for this also. The diminution of the value of the adjacent property occasioned by these circumstances will be the measure of his right to recover. We have heretofore held in actions for injury to real estate by trespassers that the plaintiff can only recover compensation for the injury done up to the commencement of the action; but that was in cases of in-

that if the railway tracks have been so located as to unreasonably obstruct the abutting lot-owner's means of ingress and egress over the street to and from his lot; or if his houses have been injured by having smoke, sparks or cinders thrown or blown into or upon them; or if their walls have been cracked by the rapid movement of heavy trains of cars, he is entitled to recover for the damages directly resulting from all or any one or more of these causes; that the measure of damages which the lot-owner may recover, if entitled to recover at all, is the diminution in value of his houses and lot by the location of the railway tracks, and the uses to which they are authorized to be put by the grant under which they are built. If the location and operation of the roads in front of the houses diminish their value, say twenty per centum, then the diminution should be proportioned to their value just preceding the time at which it became generally known that the street had been selected as the line of the road. The jury should ascertain what the value of the property was just before it became generally known that the roads were to [412] be located in front of it, and then determine what proportion of that value was taken from the houses and lot by the obstruction of the street, and the annoyance incident to the movement of engines and trains of cars along and over the roads. Benefits arising out of or from an unauthorized act may sometimes be considered in the determination of the sum to be recovered by the injured party; but in all cases these benefits must be direct and immediate. They must be confined to the approximate consequences of the act complained of, and be of like kind with the opposite injuries for which the recovery is sought. If the railways afford the complaining lot-owner increased or additional facilities for ingress or egress to and from his houses and lot, or for the movement of articles in which he may deal, or supplies which it is necessary that he shall procure, this benefit may be taken into consideration in estimating the damages he has sustained. The same case announced the principle, that by instituting an action for permanent damages the lot-owner in effect consents that the

jury not continuing or permanent in their character. The injury in this case, if any, is permanent and enduring, and no reason is perceived why a single recovery may not be had for the whole injury to result from the acts complained of."

railroad company may continue for all future time to use the street as it is now using it, and, as consideration therefor, to accept such judgment as may be therein rendered.[1]

§ 1045. Same subject. In Illinois the doctrine has been carried still further. In an action by the owner and occupant of a lot situated near the right of way of a railroad on which the company erected cattle pens so conducted as to become a nuisance, the court held that in estimating the damages it was proper to consider the depreciation in the value of the plaintiff's property occasioned by such nuisance; and in addition the injury and annoyance to him while occupying the premises; that one recovery for such depreciation would bar any future action for the same cause; but if the former recovery [413] was for annoyance merely, and for rendering the atmosphere unwholesome, then a similar recovery might be had at every term of court so long as the nuisance continues.[2] In a recent case in the Illinois appellate court this test is suggested as proper for the determination of the question as to the permanence of a nuisance: Where a permanent structure is lawfully erected and thereby an injury is occasioned to adjoining property, if the structure is properly built with reference to its use, and so as to produce no unnecessary damage, the cause of action arising from an injury resulting from it is an entirety; but if the injury complained of results from an improper construction it is otherwise.[3] The supreme court, however, does not approve of this rule as applied to erections on private land, as where the wrong done consists in causing water to flow from a building on the land of the owner to the land of another.[4]

[1] Jeffersonville, etc. R. Co. v. Esterle, 13 Bush, 667.

In Kemper v. Louisville, 14 Bush, 87, the defendant was a municipal corporation; by a street improvement it dammed a natural drain, and thus flooded the plaintiff's lot where he lived. It was held that the plaintiffs were entitled to recover for the injury to their house and lot, and that while no recovery could be had for physician's bills, or loss of time to the occupants, on account of sickness caused by the stagnant water, still these facts might be proved with a view to show the extent to which the value of the property had been lessened by reason of the act complained of.

[2] Illinois, etc. R. Co. v. Grabill, 50 Ill. 241; Chicago, etc. R. Co. v. Baker, 73 Ill. 316.

[3] Chicago, etc. R. Co. v. Schaffer, 26 Ill. App. 280.

[4] Joseph Schlitz Brewing Co. v. Compton, 47 Alb. L. J. 28; — Ill. —.

§ 1046. Same subject; result of the cases. The apparent discrepancy in the American cases on this subject may, perhaps, be reduced by supposing that where the nuisance consists of a structure of a permanent nature, and intended by the defendant to be so, or of a use or invasion of the plaintiff's property, or a deprivation of some benefit appurtenant to it for an indefinitely long period in the future, the injured party has an option to complain of it as a permanent injury and recover damages for the whole time, estimating its duration according to the defendant's purpose in creating or continuing it; or to treat it as a temporary wrong to be compensated for while it continues; that is, until the act complained of becomes rightful by grant, condemnation of property or ceases by abatement. The recovery of damages on a declaration alleging the permanency of the nuisance, on principle, would estop the plaintiff not only from recovering future damages, but also from taking any steps to abate the nuisance during the period for which damages had been recovered. This is apparently the law in Kentucky and Illinois. By such an action the plaintiff consents to the continuance, according to his allegations of the duration of the injury for which he recovered judgment; and accepts the recovery as a compensation therefor.[1] In the Massachusetts case which has been referred to the plaintiff's second action was deemed barred on account of the scope of his first declaration and the acceptance of damages assessed for the permanent injury.[2] Thus considered, such a recovery will have the effect to give the defendant a permanent right to do the acts which [414] constitute the nuisance as fully as though there had been a condemnation of the property by the exercise of the power

[1] Jeffersonville, etc. R. Co. v. Esterle, 13 Bush, 667; Chicago, etc. R. Co. v. Loeb, 118 Ill. 203.

[2] Fowle v. New Haven, etc. Co., 112 Mass. 338.

In Johnson v. Porter, 42 Conn. 234, the plaintiff alleged in his declaration that the defendant had annoyed him by offensive odors from a barnyard, placed by the latter near the plaintiff's dwelling-house, and that thereby he was prevented from the comfortable use of his house; and his family was made sick, and he was subjected to medical expense. It was held that he could not under this declaration, for the purpose of enhancing damages, show the diminished value of his dwelling-house and lot by reason of the offensive odors. See Illinois, etc. R. Co. v. Grabill, 50 Ill. 241.

of eminent domain. But the option to recover permanent damages in a common-law action, with this effect, is not generally admitted in this country and is wholly unknown in England.[1] We agree with the Tennessee court that "the true rule deducible from the authorities is that the law will not presume the continuance of a wrong, nor allow a license to continue a wrong, when the cause of the injury is of such a nature as to be abatable, either by the expenditure of labor or money; and that where the cause of the injury is one not presumed to continue, that the damages recoverable from the wrong-doer are only such as have accrued before action brought, and that successive actions may be brought for the subsequent continuance of the wrong or nuisance."[2]

§ 1047. Depreciation in value as damages. If permanent damages are allowed they are measured by the depreciation of value caused by the nuisance, or by adding to the damages allowed for past injury the amount necessary to restore the premises to their former condition, or to protect the plaintiff against future injury.[3] Where, however, the damages are assessed for the continuance of the nuisance to the commencement of the suit only it may affect and injure the inheritance as well as the value of the possession; they may therefore be assessed for any permanent injury so caused and for the de-

[1] Nashville v. Comar, 88 Tenn. 415; Harmon v. Railroad, 87 id. 614; Uline v. New York, etc. R. Co., 101 N. Y. 98; Adams v. Hastings, etc. R. Co., 18 Minn. 260; Hartz v. St. Paul, etc. R. Co., 21 Minn. 358; Brewster v. Sussex R. Co., 40 N. J. L. 57; Ford v. Chicago, etc. R. Co., 14 Wis. 609; Harrington v. St. Paul, etc. R. Co., 17 Minn. 215; Blesch v. Chicago, etc. R. Co., 43 Wis. 183; Ellsworth v. Central R. Co., 34 N. J. L. 93; Carl v. Sheboygan, etc. R. Co., 46 Wis. 625; Atlantic, etc. R. Co. v. Robbins, 35 Ohio St. 531; Battishill v. Reed, 18 C. B. 696; Devery v. Grand Canal Co., 9 Irish C. L. 194; Mellor v. Pilgrim, 3 Ill. App. 476. See § ——, *post;* Denver v. Bayer, 7 Colo. 113.

[2] Nashville v. Comar, 88 Tenn. 415, 426.

[3] Finley v. Hershey, 41 Iowa, 389; Illinois, etc. R. Co. v. Grabill, 50 Ill. 241; Chicago, etc. R. Co. v. Baker, 73 Ill. 316; Powers v. Council Bluffs, 45 Iowa, 655; Elizabethtown, etc. R. Co. v. Combs, 10 Bush, 382; Fowle v. New Haven, etc. Co., 112 Mass. 338; O'Riley v. McChesney, 3 Lans. 278; Bare v. Hoffman, 79 Pa. St. 71; Givens v. Van Studdiford, 4 Mo. App. 498; Chicago, etc. R. Co. v. Carey, 90 Ill. 514; Drake v. Chicago, etc. R. Co., 63 Iowa, 302; Loughran v. Des Moines, 72 id. 382; Chicago, etc. R. Co. v. Andrews, 41 Kan. 370; Chouteau v. St. Louis, 8 Mo. App. 48; Autenrieth v. St. Louis, etc. R. Co., 36 id. 254; Trinity & S. Ry. Co. v. Schofield, 72 Texas, 496.

preciation of rental value; by the difference, in other words, between the rental value free from the effects of the nuisance and subject to it; but to the occupant the latter damages may be computed on the diminution of the value of the use to him.[1] The rule of liability based upon depreciation in rental value may be applied as well where the owner occupies the affected premises as where they are rented or offered for rent.[2] Where the action is brought by the owner alone there cannot be a recovery in addition to such depreciation and the cost of repairs and protection from further injury, for depreciation in value, unless permanent damages are recovered.[3] Where the action is brought to recover for past injuries and the measure of liability depends upon the rental or usable value of the property affected, the estimate must be made upon the basis of the value of the property in the condition it was during the time it was affected. Damages cannot be recovered upon the basis of its value for uses to which it might have been but was not put.[4] It is probable that if any circumstances of aggrava-

[1] Francis v. Schoellkopf, 53 N. Y. 152; Wiel v. Stewart, 19 Hun, 272; Whitmore v. Bischoff, 5 Hun, 176; Emery v. Lowell, 109 Mass. 197; Walrath v. Redfield, 11 Barb. 368; Hatfield v. Central R. Co., 33 N. J. L. 251; Carl v. Sheboygan, etc. R. Co., 46 Wis. 625; Bare v. Hoffman, 79 Pa. St. 71; Chicago v. Huenerbein, 85 Ill. 594; Schuylkill Nav. Co. v. Farr, 4 W. & S. 362; Gile v. Stevens, 13 Gray, 146; Jutte v. Hughes, 67 N. Y. 267; Pinney v. Berry, 61 Mo. 359; Eufaula v. Simmons, 86 Ala. 515; Jackson v. Kiel, 13 Colo. 378; Georgia R. & B. Co. v. Berry, 78 Ga. 744; Sullens v. Chicago, etc. R. Co., 74 Iowa, 659; Shively v. Cedar Rapids, etc. R. Co., id. 169; Hussner v. Brooklyn City R. Co., 114 N. Y. 433; Schwab v. Cleveland, 28 Hun, 458; Pond v. Metropolitan E. Ry. Co., 42 Hun, 567; Harmon v. Railroad, 87 Tenn. 614; Gulf, etc. Ry. v. Helsley, 62 Texas, 593; Same v. Tait, 63 id. 223; Sabine, etc. Ry. Co. v. Johnson, 65 id. 389; Same v. Brousard, 69 id. 617; Comminge v. Stevenson, 76 id. 642; Willey v. Hunter, 47 Vt. 479; Langfeldt v. McGrath, 33 Ill. App. 158; Woodin v. Wentworth, 57 Mich. 278; Colrick v. Swinburne, 105 N. Y. 503; Van Buren v. Fishkill Water-works Co., 50 Hun, 448.

In Hatch v. Dwight, 17 Mass. 289, a mortgagee who had taken possession was held entitled to recover interest on the value of a mill privilege rendered useless for the erection of a mill by a dam built below.

[2] Michel v. Supervisors, 39 Hun, 47; Brown v. Woodliff, 15 S. E. Rep. 491 (Ga.).

[3] Barrick v. Schifferdecker, 123 N. Y. 52.

[4] Tallman v. Metropolitan E. R. Co., 121 N. Y. 119; Hatfield v. Central R. Co., 33 N. J. L. 251; Dorlan v. East Brandywine & W. R. Co., 46 Pa. St. 520. These cases may be distinguishable from an English case brought

tion exist or there is great difficulty in proving the damage that the plaintiff will not be required to produce the most convincing proof as to its amount.[1]

§ **1048. Other elements of damages.** The measure of dam- [**415**] ages thus stated compensates the ordinary or general loss from the nuisance. If there are special elements of damage, as there may be and in most cases are, recovery may be increased accordingly. If the injury done makes repairs necessary their expense may be recovered as well as the rent which would have been received from the property if it was occupied during the time they were being made.[2] The owner is not entitled to recover, in addition, for a depreciation of rental value because of a prejudice which exists against his property in consequence of the nuisance. That is not damage which is the natural result of or caused by the injury.[3] Where land temporarily injured or permanently destroyed is so connected with other land that the value of the latter is permanently impaired the extent of such impairment is an element of damages.[4] Where the defendant caused the nuisance by digging a ditch, and by means thereof conducted water from his brewery into a clay pit on the plaintiff's premises, and such water became stagnant and offensive, and plaintiff incurred expense in filling up the pit by direction of the board of health, the expense so incurred was allowed as an item of damage.[5] The owner and occupier may recover for expenses

to recover for the obstruction of ancient lights. In such an action the damages are not to be assessed solely with reference to the effect the diminished light has for the purposes of occupation or business to which the premises have been or were put at the time of the obstruction; the uses to which they might thereafter be put are to be considered. Moore v. Hall, 3 Q. B. Div. 178, disapproving Martin v. Goble, 1 Camp. 320.

[1] In Tuebner v. California Street R. Co., 66 Cal. 171, there was a verdict for $1,000. In answer to the contention that the amount was excessive the court said: "It was not incumbent on the plaintiffs to prove their injury by value; it may have been of trivial cost to sweep up a pail of soot, and yet the soot may have caused serious injury; it may also have been quite out of the question to prove the loss in value sustained by the jarring. It was for the jury to determine a reasonable sum to be proper compensation."

[2] Rust v. Victoria Graving Dock Co., 36 Ch. Div. 113, 131.

[3] Id.; Robb v. Carnegie, 145 Pa. St. 324.

[4] Trinity & S. Ry. Co. v. Schofield, 72 Texas, 496.

[5] Shaw v. Cummiskey, 7 Pick. 76.

incurred to protect the premises affected by the nuisance against a continuance of the injury, as well as to repair those already done.[1] The owner of the reversion may also recover expenditures reasonably made to guard against additional injury;[2] but interest on such expenditures cannot be recovered.[3] The cost of restoring property to its previous condition is the proper measure of damages for injury thereto when it is less than the diminution in the market value of the property by reason of the injury; but if the cost of restoration would exceed the diminution in value, the latter measures the damages.[4] The owner of logs scattered and delayed by reason of a boom by which the defendant obstructed a floatable stream has been allowed the depreciation in the market value during the detention, for loss of logs carried away and the expense of searching for others.[5]

§ 1049. Injuries to crops, trees, etc. For injury done to the plaintiff's crops by flowing his land he is entitled to recover their value, standing upon it, so far as destroyed, and the depreciation in value of such as are only injured or partially destroyed.[6] In Texas interest is allowed on the value of the crop destroyed or the amount of its depreciation from the date thereof.[7] In determining the value of a growing crop it is competent to show any fact or circumstance pertaining to its condition and prospects; and the jury may consider whatever it may be presumed would have been considered by a careful person desiring to buy the land.[8] Where grass is

[1] Barrick v. Schifferdecker, 123 N. Y. 52; Sayre v. State, id. 291; Sherman v. Fall River Iron Works, 2 Allen, 524; Barden v. Portage, 79 Wis. 126; Jutte v. Hughes, 67 N. Y. 267; Kankakee, etc. Ry. Co. v. Horan, 22 Ill. App. 145; Chicago, etc. Ry. Co. v. Carey, 90 Ill. 514.

[2] Comstock v. New York, etc. R. Co., 48 Hun, 225.

[3] Sayre v. State, 123 N. Y. 291.

[4] Hartshorn v. Chaddock, 17 L. R. A. 426; 31 N. E. Rep. 997; — N. Y. —.

[5] Plummer v. Penobscot L. Ass'n, 67 Me. 363.

[6] Sabine, etc. Ry. Co. v. Joachimi, 58 Texas, 456; Chicago, etc. R. Co. v. Carey, 90 Ill. 514; Same v. Schaffer, 26 Ill. App. 280; Drake v. Chicago, etc. Ry. Co., 63 Iowa, 302; Byrne v. Minneapolis, etc. Ry. Co., 38 Minn. 212; G., C. & S. F. Ry. Co. v. Holliday, 65 Texas, 513; Gulf, etc. R. Co. v. Pool, 70 id. 713; Trinity & S. Ry. Co. v. Schofield, 72 id. 496; Folsom v. Apple River L. D. Co., 41 Wis. 602. See *ante*, § 1023.

[7] G., C. & S. F. Ry. Co. v. Holliday; Trinity & S. Ry. Co. v. Schofield, *supra*.

[8] Drake v. Chicago, etc. Ry. Co., 63 Iowa, 302.

"The most satisfactory means of arriving at the value of a growing

submerged and its value has been recovered the owner is not entitled to recover the amount paid for other pastures nor the expense of driving his animals to them. The value of milk which cows would have given if they had not been prevented from grazing on lands owned by others than the plaintiff is too remote to be considered. But if, in consequence of an overflow of lands, animals are drowned either upon plaintiff's lands or the lands of others the wrong-doer is liable for their value.[1] If the growth of grass is prevented and the owner is deprived of the use of a pasture for a considerable time his damages are measured by the value of the use of the land for pasturage in the condition it would have been but for the wrong done. Starvation of animals cannot be added to that measure because the damages would be doubled, and besides that loss is too remote.[2] For depriving a party of the use of land by a nuisance recovery can be had only of the rental value; not the supposed value of what might have been raised by cultivation, less the cost of raising and marketing crops.[3] For injuries done to a house, grounds, fruit-trees and garden by water turned on the land by the defendant in con-

crop is to prove its probable yield under proper cultivation, the value of such yield when matured and ready for sale, and also the expense of such cultivation as well as the cost of its preparation and transportation to market. The difference between the value of the probable crop in the market and the expense of maturing, preparing and placing it there will in most cases give the value of the growing crop with as much certainty as can be obtained by any other method." International R. Co. v. Pape, 73 Texas, 501. See § 1023, *ante*.

[1] Sabine, etc. Ry. Co. v. Johnson, 65 Texas, 389; Broussard v. Sabine, etc. Ry. Co., 80 id. 329.

[2] Broussard v. Sabine, etc. Ry. Co., 80 Texas, 329.

[3] Chicago v. Huenerbein, 85 Ill. 594. The rules deducible from the Illinois cases are thus stated by Baker, J., in Kankakee & S. R. Co. v. Horan, 17 Ill. App. 650: "1st. That for lands plaintiff was prevented from tilling he is entitled to recover the rental value. 2d. That for the lands where the crops were not up the damage should be estimated upon the basis of the rental value, and the cost of seed and labor in breaking up and planting or sowing. 3d. That in cases of destruction where the crops were up or more or less matured, plaintiff should recover as is last above stated, and in addition thereto the cost of any labor be stowed after the planting or sowing; or, at his option, he may recover the value of the crop at the time of its destruction, with the right to the purchaser to mature the crop and harvest or gather it. 4th. That where the crop was injured but not destroyed, the assessment should be commensurate with the depreciation in value."

structing a railway, damages may be ascertained in favor of the owner by the difference between the value of the premises before and their value immediately after the injury, taking into account only the damages which have resulted from the defendant's acts.[1] Under such circumstances the owner is bound to use reasonable care, skill and diligence adapted [416] to the occasion to save his property from being injured by the water, notwithstanding it came on his premises by the fault and negligence of the defendant.[2] Where crops were injured by the smoke and gas produced in manufacturing coke, and it was claimed that there was a permanent impairment of the productiveness of the soil by the formation on its surface of sterilizing and poisonous substances, it was held that the rule which governs the ascertainment of damages in condemnation proceedings did not apply; in other words, there could not be a recovery for the depreciation in the selling value of the farm. The extent of the depreciation in the producing qualities of the farm was best provable by a chemical analysis of the soil, and that depreciation and the damage sustained by crops which had been secured afforded the basis for measuring the defendant's liability.[3]

§ 1050. Liability for remoter consequences. Where the plaintiff is the owner and occupier of the land affected by the nuisance the particular circumstances of the injury may be taken into account and damages given, not only for the diminished value of his use and for any peculiar annoyance suffered or expense rendered necessary or incurred in respect thereto,

[1] Chase v. New York, etc. R. Co., 24 Barb. 273; Trinity & S. Ry. Co. v. Schofield, 72 Texas, 496.

The Arkansas court objected to this statement of the rule in a case where lands were overflowed as the result of the erection of a levee, because it ignores the fact that owing to the improvement there may have been a shrinkage in the value of the property, although the work was skilfully done. "The true rule, and the one in this case easily applicable by a jury of practical men, was to take the actual value of the land at the time the work was completed, supposing the consequences to be known, compare it with what the value would have been if the overflow had remained as formerly, and fix the damages at the difference. This allows all appreciation of land to complainant and affords just compensation for want of care and skill." Railway Co. v. Morris, 35 Ark. 622.

[2] Chase v. New York, etc. R. Co., 24 Barb. 273; Sabine, etc. Ry. Co. v. Joachimi, 58 Texas, 456.

[3] Robb v. Carnegie, 145 Pa. St. 324, 342.

but also for any act which permanently injures the inheritance. For the unauthorized maintenance of a dam so as to overflow his land he may recover damages for loss of the use of a ford which he had habitually used in hauling crops and wood from one part of his farm to another, and for the loss of growing timber killed by such overflow prior to the suit, though the timber did not in fact die until afterwards.[1] A city authorized a canal corporation to change the course of a sewer into which a street and house were drained, the owner of the latter having consented to the corporation's making the change on its promise to hold him harmless from the consequences. The drain became obstructed and the water flowed back into the house. In an action against the city for the obstruction, under a declaration alleging that the defendants obstructed the drain so that water and filth flowed into the plaintiff's cellar and destroyed his property therein, and put him to trouble and expense to get the water out, the plaintiff was held entitled to damages for any injury which affected his estate or diminished its value for use and occupation by reason of the inconvenience and annoyance of flooding the cellar, and of unwholesome and disagreeable smells, or of insects thereby generated or attracted to the house; and also his reasonable expense in preventing or removing the nuisance, and of changes and repairs thereby rendered necessary, and which he could not, by reasonable care and diligence, have avoided.[2] Where a sewer caved in a property owner recovered for permanent injury to his building, the cost of repairs and for the loss of rent during the time they were being made.[3]

§ **1051. Same subject.** A railroad company, by permitting a horse killed by its locomotive to remain on the side of [417] the railroad track so near an adjacent house as to render its occupancy unwholesome, is subject to an action by the owner thereof, and he may show, not only the sickness of himself, but also of his wife, his family and its different members to affect the damages.[4] A plaintiff suffering from a

[1] Hayden v. Albee, 20 Minn. 159.

[2] Emery v. Lowell, 109 Mass. 197.

[3] Vanderslice v. Philadelphia, 103 Pa. St. 102.

[4] Ellis v. Kansas City, etc. R. Co., 63 Mo. 131; Jarvis v. St. Louis, etc. Ry. Co., 26 Mo. App. 253.

nuisance by water flooding the ground about his house, destroying his shrubbery and garden, and injuring the health of his family, may not only recover for the injury to the house and lot, but he may prove physicians' bills paid, loss of time of his family on account of sickness caused by stagnant water, not as constituents of the measure of damages, but for the purpose of showing the extent to which the value of the property has been lessened by reason of the acts complained of.[1] Unhealthiness resulting from a nuisance is an element of damage,[2] at least to the extent of the time lost and expense incurred on account of it.[3] The later cases go further and allow the recovery of such sums "as will fairly and reasonably compensate for the bodily sickness, pain and discomfort" suffered by reason of the nuisance,[4] either by the plaintiff or his family.[5] If a homestead is affected the owner may recover, in addition to its rental value, for the inconvenience and discomfort suffered and the deprivation of the comfortable enjoyment of it by himself and his family.[6] The same elements enter into the damage to a religious corporation when the nuisance interferes with the holding of its regular services.[7] As a result of the obstruction of a highway plaintiff's children were unable to attend school, and he lost his proportion of the school fund. This sum he was entitled to recover unless the difficulty could have been surmounted by the expenditure of a less amount.[8] The working of quarries and blasting of rock, whereby large quantities of stones are thrown upon the dwelling-house and premises of plaintiff, breaking the doors, windows and roof, is, as to such injuries, a trespass; and if by such operations persons on and about premises are kept in continual fear and jeopardy of their lives, rendering a proper attention to business full of apprehension and danger, such

[1] Kemper v. Louisville, 14 Bush, 87; Francis v. Schoellkopf, 53 N. Y. 152; Wiel v. Stewart, 19 Hun, 272; Lockett v. Fort Worth, etc. Ry. Co., 78 Texas, 211.

[2] Eufaula v. Simmons, 86 Ala. 515; Nevins v. Peoria, 41 Ill. 502; Aurora v. Gillett, 56 id. 132.

[3] Loughran v. Des Moines, 72 Iowa, 382.

[4] Ferguson v. Firmenich Manuf. Co., 77 Iowa, 576.

[5] Pierce v. Wagner, 29 Minn. 355.

[6] Id.; Randolf v. Bloomfield, 77 Iowa, 50.

[7] Baltimore & P. R. Co. v. Fifth Baptist Church, 108 U. S. 317.

[8] Sabine, etc. Ry. Co. v. Johnson, 65 Texas, 389.

acts constitute a nuisance, and in case therefor the damages for diminution of the value of the property for the purpose of renting, and the prevention of the plaintiff's servants from performing their labor, and for injury from leakage in the roof through holes so caused, may be recovered.[1] The owner of a ferry established by law may have an action against an owner who sets up a ferry in opposition to him without authority, and uses unwarrantable means to divert his customers; and may recover, as his measure of damages, the defendant's clear gains from the rival ferry.[2]

§ 1052. Exemplary damages. One who commits a nuisance with malice or wantonness subjects himself to exemplary damages,[3] but these should not be awarded for the continuance of a nuisance if it has been abated with reasonable promptness under the circumstances.[4] If a nuisance is not abated after an action is brought to recover damages therefor that fact may be considered in determining whether exemplary damages should be awarded or not; but the fact that there is a failure to abate it during the pendency of a bill in equity to restrain the continuance of it has no bearing upon that question.[5]

[1] Scott v. Bay, 3 Md. 431.

[2] Stark v. McGowen, 1 N. & McC. 387; Chenango Bridge Co. v. Lewis, 63 Barb. 111.

[3] Hughes v. Anderson, 68 Ala. 280; Besso v. Southworth, 71 Texas, 765.

[4] Oursler v. Baltimore & O. R. Co., 60 Md. 358.

[5] Keiser v. Mahanoy City Gas Co., 143 Pa. St. 276. It is said in this case: "The fact that the defendant continued the negligent practice complained of after the suit was brought was, if shown, a proper subject for consideration in determining whether exemplary damages should be awarded or not. But the equity case was pending and undecided when this case was tried. The plaintiff had a right to go into equity in order to restrain and to go into a court of law to recover damages for the negligent manner of dealing with the waste of the gas works; but the fact that an action at law was pending would not help a chancellor in reaching a proper conclusion, nor would the fact that a bill was pending in equity be of any service to a jury in settling the damages which should be awarded to the plaintiff. Equally without significance was the fact that an application for an attachment was pending in the equity case. The application is the act of the plaintiff. When it is heard and determined, the defendant, if found guilty, will be punished for the contempt in the court whose mandate he has disregarded. But the jury in this case have no right to inquire whether or not said injunction was violated by the defendant and punish it for such violation by imposing exemplary

§ 1053. Removal of lateral support to land. Removal of lateral support of land by which it drops away is a legal injury for which the owner is entitled to damages. There is incident to the land in its natural condition a right of [418] support from that adjoining; and if land not subject to artificial pressure sinks and falls away in consequence of the removal of such support, the owner of the latter is entitled to damages to the extent of the injury.[1] The measure is not the cost of restoring the lot to its former situation, or building a wall to support it, but it is the diminution of value by reason of the defendant's act.[2] In estimating the difference in the value of the land, the entire lot and the improvements on it may be taken as the value of the land alone.[3] All the damages which may reasonably be apprehended to result from the wrong done are recoverable in one action.[4] It is well settled that where the owner of a lot builds upon his boundary line, and the building is thrown down by reason of excavations made upon the adjoining lot, in the absence of improper motive and carelessness in the execution of the work, no recovery can be had for such injury.[5] But though the adjacent owner is not obliged to refrain from excavating near his line,

damages upon it. It is not the violation of an order of a court of equity but some act of wantonness directed toward the plaintiff that must be found by the jury as a basis for the imposition of exemplary damages. If this was not so it might happen that the court whose process it is charged has been violated might on full hearing acquit the defendant of the alleged contempt, and discharge the rule for the attachment; while in the meantime a jury sitting in another court may have convicted and punished him for the offense which a chancellor after full investigation finds that he did not commit."

[1] McGuire v. Grant, 25 N. J. L. 356; Thurston v. Hancock, 12 Mass. 220; Foley v. Wyeth, 2 Allen, 131; Beard v. Murphy, 37 Vt. 99; Farrand v. Marshall, 19 Barb. 380; Guest v. Reynolds, 68 Ill. 478; Baltimore, etc. R. Co. v. Reaney, 42 Md. 117; Charless v. Rankin, 22 Mo. 566; Hay v. Cohoes Co., 2 N. Y. 162; Carlin v. Chappel, 101 Pa. St. 348.

[2] McGuire v. Grant, *supra;* Moellering v. Evans, 121 Ind. 195. Compare Snarr v. Granite C. & S. Co., 1 Ont. 102. See § 1017.

[3] Williams v. Missouri Furnace Co., 13 Mo. App. 70.

[4] Id.; Lamb v. Walker, 3 Q. B. Div. 389. But see vol. 1, § 114 *et seq.*

[5] McGuire v. Grant, 25 N. J. L. 356; Gayford v. Nicholls, 9 Exch. 702; Humphries v. Brogden, 12 Q. B. 739; Partridge v. Scott, 3 M. & W. 220; Panton v. Holland, 17 Johns. 92; Wyatt v. Harrison, 3 B. & Ad. 871; Brown v. Windsor, 1 Cromp. & J. 29; Moellering v. Evans, 121 Ind. 195; Moody v. McClelland, 39 Ala. 45; Beard v. Murphy, 37 Vt. 693; Charless v. Rankin, 22 Mo. 566; Winn v. Abe-

except to preserve the lateral support of the adjoining land in its natural condition, still, if there are buildings upon the latter, he is bound to proceed with care for their protection, and must give reasonable notice of his intended excavation to the owner, and also make the excavation with care.[1] Owners of the surface are entitled to absolute subjacent support; they have a right to the support of their land with any erections thereon.[2] If the owner of improvements is not chargeable with negligence in making them, and they are injured through the want of due care, he may recover their value, although the lot upon which they stood did not abut upon the land on which the excavation was made.[3] Where there is gross negligence merely, the removal of lateral support to land designed for a burial place, and upon which trees have been set out, does not give a right to recover for injured feelings.[4]

§ 1054. Interference with business. The interruption or impairment of an established business is an element of damage which may be proved as a distinct injury, or as bearing [**419**] upon the inquiry how much the value of the plaintiff's use of the premises affected has been lessened by the defendant's wrong-doing. If a stream is fouled the damages must be assessed with respect to the improvements made for ordinary and useful purposes in connection with it.[5] The nature and extent of the business interfered with, and its past productiveness, may be proved, not with a view to measure the damages by expected profits prevented by the nuisance, but to assist the jury in the exercise of their judgment with a view to awarding adequate compensation.[6] It is established

les, 35 Kan. 85; Quincy v. Jones, 76 Ill. 231.

In Boothby v. Androscoggin, etc. R. Co., 51 Me., 319, it was held that the railroad company was not liable for removing the lateral support of adjacent land in excavations made for their road in pursuance of their charter. But see Richardson v. Vermont, etc. R. Co., 25 Vt. 465.

[1] Cooley on Torts, 595; Wyrley Canal Co. v. Bradley, 7 East, 368; Shrieve v. Stokes, 8 B. Mon. 453.

[2] Hext v. Gill, L. R. 7 Ch. App. 699; Bononi v. Backhouse, El. B. & El. 622; S. C., 9 H. of L. Cas. 503; Smith v. Thackerah, L. R. 1 C. P. 564; Cooley on Torts, 595.

[3] Keating v. Cincinnati, 38 Ohio St. 141.

[4] White v. Dresser, 135 Mass. 150.

[5] Sanderson v. Pennsylvania Coal Co., 102 Pa. St. 370.

[6] Simmons v. Brown, 5 R. I. 229; Pollitt v. Long, 58 Barb. 20; White v. Moseley, 8 Pick. 356; Bucknam v.

in England that where there is an unlawful obstruction of the right of access to a highway whereby customers are prevented from entering a place of business, lost profits may be recovered.[1] For obstructing the water below a mill by means of a dam so as to prevent its running, it has been held in New York that the owner and occupier of the mill is only entitled to recover the value of its use during the time he is necessarily deprived thereof, and the amount of the permanent diminution of value by the erection of the dam. It was intimated that damage from the deterioration or fall in the market price of saw-logs on hand to be sawed, suffered without negligence of the plaintiff in omitting to make other disposition of them, should be disallowed as being analogous to unearned and contingent profits.[2] It is believed that this intimation is not supported by the supposed analogy because the loss in question is not a loss of profits; and upon the cases truly analogous such loss should be compensated.[3] If a boat is injured by an obstruction in a navigable river her charter value during the time of detention may be recovered and also the cost of repairs made necessary.[4] A loss of rent for neglecting to keep privies and drains in repair has been recovered for,[5] and also a depreciation in the value of property resulting from a like cause, though the nuisance had been discontinued.[6] Recovery has also been had as for a permanent injury for establishing a brothel on property adjoining tenements held for renting.[7] In such a case a fair means of arriving at the actual

Nash, 12 Me. 474; St. John v. Mayor, etc., 6 Duer, 315; 13 How. Pr. 527; Park v. C. & S. W. R. Co., 43 Iowa, 636; Shafer v. Wilson, 44 Md. 268; Stetson v. Faxon, 19 Pick. 147; Bonner v. Welborn, 7 Ga. 296; St. Louis, etc. R. Co. v. Capps, 67 Ill. 607; Terre Haute v. Hudnut, 112 Ind. 542; French v. Connecticut River L. Co., 145 Mass. 261.

[1] Rose v. Graves, 5 Man. & G. 613; Lyon v. Fishmongers' Co., 1 App. Cas. 662; Fritz v. Hobson, 14 Ch. Div. 542.

[2] Walrath v. Redfield, 11 Barb. 368; 18 N. Y. 457.

[3] Plummer v. Penobscot L. Ass'n, 67 Me. 363; Ward v. New York, etc. R. Co., 47 N. Y. 29; Manville v. Western U. T. Co., 37 Iowa, 214; Shepard v. Milwaukee Gas Co., 15 Wis. 318; Thunder Bay River B. Co. v. Spechly, 31 Mich. 336, 345.

[4] Missouri River P. Co. v. Hannibal, etc. R. Co., 79 Mo. 478, 493.

[5] Jutte v. Hughes, 67 N. Y. 268.

[6] Babb v. Curators of State University, 40 Mo. App. 173.

[7] Givens v. Van Studdiford, 4 Mo. App. 498; S. C., 86 Mo. 149, 159; Besso v. Southworth, 71 Tex. 765.

damage would be to ascertain the loss of rent and depreciation of the value of the property caused by the nuisance; that is, how much less the property would sell for on account of the existence of the nuisance and what loss of rent has re-
[420] sulted from the same cause. But in ascertaining these facts all circumstances that would show a depreciation in value should be considered.[1] And the damage recovered must be the actual depreciation shown to be caused by the existence of the nuisance. Where property is changing in character, and what has been formerly a good residence neighborhood is invaded by business establishments which destroy its quiet, it is matter of common observation that it passes through a period in which it is neither good for business of the better class nor for residences; and drinking saloons, and other establishments more or less objectionable or disreputable, settle down for a time in what were once the residences of wealthy citizens. When a bawdy house is opened in such a neighborhood it may be very difficult to say how much any depreciation of value is attributable to that fact alone. But if it be shown that after the defendant's house was so occupied other disreputable houses sprang up in the neighborhood, the mere fact that it may be impossible to say how much of the damage was occasioned by the nuisance on the defendant's premises, and how much by the other brothels, will not bar a recovery.[2] If the injury complained of is to property the damages are to be ascertained by the diminution in its value for the purposes for which during the continuance of the nuisance the property was used, or would have been used but for the wrong done or suffered.[3]

§ **1055. Mitigation of damages.** Neither the right of action nor the amount of the recovery is affected by the abatement of a nuisance so far as damages were sustained prior thereto.[4] The fact that the plaintiff might have abated a nuisance caused by obstructing a ditch, but did not, it being

[1] Id.; Illinois, etc. R. Co. v. Grabill, 50 Ill. 241.

[2] Givens v. Van Studdiford, *supra*. See *post*, § 1059.

[3] Clark v. Pennsylvania R. Co., 145 Pa. St. 438; § 1047.

[4] Tuebner v. California Street R. Co., 66 Cal. 171; Gleason v. Gary, 4 Conn. 418; Pierce v. Dart, 7 Cow. 609; Renwick v. Morris, 3 Hill, 621; People v. Albany, 11 Wend. 539.

necessary to go upon the defendant's land for that purpose, will not affect his right of action or the damages.[1] Where, however, the plaintiff has access to the nuisance, or the means or opportunity of avoiding or mitigating the injury it causes, it is his duty to abate it or to take the proper measures for preventing or lessening the damages therefrom.[2] Where this duty arises damages will be limited to such as are or would [**421**] be suffered if it had been performed, added to the expense incident to the performance of it.[3] What might have been realized by one whose crop has been destroyed if he had replanted the land is too uncertain to be made the subject of proof in mitigation of damages.[4] If the plaintiff, having the opportunity without incurring a liability for trespass, neglects to exercise ordinary care and diligence to prevent injury, he may be denied any recovery on the ground of contributory negligence.[5] He is not obliged, however, to take notice of defendant's threat to commit a wrong, and thereupon to take such measures; it is sufficient for him if he exercises ordinary care in the preservation of his property after he has knowledge that wrong has been done.[6] It is no defense that the plaintiff is a lessee and rented the premises injured after the business causing the nuisance had been established, and with knowledge of its existence, and for small rent on that account;[7] nor that the business is necessary to be carried on, and is useful to the public.[8] The operation and effect of natural agencies are presumed to be contemplated by a wrong-

[1] Chicago, etc. Ry. Co. v. Carey, 90 Ill. 514; White v. Chapin, 102 Mass. 138; Walrath v. Redfield, 11 Barb. 368; Heaney v. Heeney, 2 Denio, 625. See Gilbert v. Kennedy, 22 Mich. 133. A plaintiff is not bound to remove obstructions in a navigable river which cause him special injury. French v. Connecticut River L. Co., 145 Mass. 261.

[2] Chase v. New York, etc. R. Co., 24 Barb. 273. *Contra*, Jarvis v. St. Louis, etc. Ry. Co., 26 Mo. App. 253; Paddock v. Somes, 102 Mo. 226.

[3] Emery v. Lowell, 109 Mass. 197; Fowle v. New Haven, etc. R. Co., 112 Mass. 334; O'Riley v. McChesney, 3 Lans. 278; Terry v. Mayor, 8 Bosw. 504.

[4] G., C. & S. F. Ry. Co. v. Holliday, 65 Texas, 512.

[5] Simpson v. Keokuk, 34 Iowa, 568; Van Pelt v. Davenport, 42 Iowa, 308; Irwin v. Sprigg, 6 Gill, 200. *Contra*, Jarvis v. St. Louis, etc. Ry. Co., 26 Mo. App. 253; Paddock v. Somes, 102 Mo. 226.

[6] Plummer v. Penobscot L. Ass'n, 67 Me. 363.

[7] Smith v. Phillips, 8 Phila. 10; Central R. v. English, 73 Ga. 366; Mississippi & T. R. Co. v. Archibald, 67 Miss. 38.

[8] Smith v. Phillips, 8 Phila. 10;

door, and he cannot avoid or mitigate his liability because the injury done has been increased thereby.[1] Hence, where an obstruction in a navigable stream delays the rafting of logs when high water usually occurs, the increased expense of rafting them during a season of low water may be recovered.[2] Keeping a nuisance similar to that complained of does not defeat a recovery.[3]

§ **1056. Same subject; deduction for benefits.** If some incidental advantage accrues to the plaintiff from the act of the defendant which causes the nuisance that circumstance may be considered in mitigation. In an action for damages occasioned by the filling up by the defendant of his land, adjacent to that of the plaintiff, whereby the free flow of water off the latter's land had been prevented, the jury were held properly instructed that they should take into consideration the evidence on both sides bearing on this point, and if they were satisfied that the filling up had actually benefited the plaintiff's estate in any particular they should make an allowance for such benefit, and give the plaintiff such sum in damages as they found would fully indemnify and compensate him for all the damages actually sustained.[4] The authorities of the city in which the plaintiff's premises were situated gave [422] a railroad company the right to locate and operate their road on the street in front of those premises, on condition that they should macadamize certain neighboring streets and construct a sewer; these improvements were made. In an action for damages to the plaintiff for occupying the street in front of his premises without extinguishing his right therein as a highway, it was held that the company were entitled to show in diminution that the work so done enhanced the value

Shively v. Cedar Rapids, etc. Ry. Co., 74 Iowa, 169; Marcy v. Fries, 18 Kan. 353. Compare Dunsmore v. Central Iowa Ry. Co., 72 Iowa, 182.

[1] Mississippi & T. R. Co. v. Archibald, 67 Miss. 38; Brink v. Kansas City, etc. Ry. Co., 17 Mo. App. 177, 199; Bird v. Hannibal, etc. R. Co., 30 id. 365.

[2] Gates v. Northern Pacific R. Co., 64 Wis. 64.

[3] Randolf v. Bloomfield, 77 Iowa, 50.

[4] Luther v. Winnisimmet Co., 9 Cush. 171; Brower v. Merrill, 3 Chand. (Wis.) 46; 3 Pin. 46.

So far as water diverted from a stream is returned thereto the damages sustained by a lower proprietor are mitigated. Manville Co. v. Worcester, 138 Mass. 89.

of his property.[1] The benefit occasioned to a meadow below a mill-dam by a ditch dug at the time of the erection of the dam by its owner through his own land below the meadow cannot be set off against the damage done the meadow by subsequent flowing occasioned by the dam; and the cost of the ditch is immaterial in assessing such damages.[2] In New Hampshire it has been held that the damage caused in washing away the bank of a stream, flowing land, and depreciating the grass thereon, by a mill-owner accumulating water in the wet season and letting it off in the summer, cannot be mitigated by any benefit that such flowing makes on any other part of the same proprietor's land.[3] A party liable for conducting a tannery and other offensive business, where they constitute a nuisance to the owner of houses for rent, is not entitled to show in mitigation of damages that since his tannery has been operated it has enhanced the value of plaintiff's premises and the rental thereof, in consequence of the number of persons employed therein creating a demand for dwellings in the vicinity.[4] If damages for permanent depreciation in value are recovered special benefits resulting to the property are doubtless to be estimated.[5] If benefit results to property from the grading of a street or other public improvement, and the work is done with reasonable skill, the damages recoverable are thereby diminished. But if, as the result of negligence or unskilfulness in doing the work, damage ensues, the benefits resulting cannot affect the damages.[6] To entitle the defendant to show any incidental benefit to the plaintiff it must accrue directly from the act or business which causes or constitutes the nuisance and confers the benefit in

[1] Porter v. North Missouri R. Co., 33 Mo. 128. In Palmer Co. v. Ferrill, 17 Pick. 58, it was held that in assessing damages under the statute for flowing lands the proper rule was to estimate the loss arising to the proprietor from the direct injury done to the land, taken as a whole, by the flowing, deducting therefrom any benefit which may be done to the same land by the same cause, namely, by the flowing.

[2] Gile v. Stevens, 13 Gray, 146.

[3] Gerrish v. New Market M. Co., 30 N. H. 478; Talbot v. Whipple, 7 Gray, 122.

[4] Francis v. Schoellkopf, 53 N. Y. 153.

[5] Chicago Forge & B. Co. v. Major, 30 Ill. App. 276; Same v. Sanche, 35 id. 174.

[6] Atlanta v. Word, 78 Ga. 276.

[423] the same manner as it operates to produce the injury; the allowance for benefits must be confined to the proximate consequences of the act complained of and be effects of like kind with the opposite injuries for which the recovery is sought.[1]

It has been held in Massachusetts that tenants who have continued in the occupancy of premises, diminished in value by a nuisance, in consideration of reduced rents given by the landlord cannot maintain an action to recover for the decreased value of the premises to them.[2] There are forcible objections to this view, which are well expressed by Dixon, J., in a recent case.[3] The adjustment of the rent is not a satisfaction of the damages suffered by the tenant from the defendant's wrong. "By the letting the tenants acquired the right to the enjoyment of the property unimpaired by any wrongful acts of the defendant. That, through fear of such acts they had been enabled to obtain that right at a diminished price, neither licensed the acts nor relieved the defendant in any degree from the duty of reparation. The measure of the tenants' damages did not depend upon the amount of rent which they paid, but upon the diminution in the value of the use of the premises resulting from the wrongful diversion of water. The landlords in leasing to the tenants at reduced rates were not to be regarded as agents of the defendant adjusting with the tenants the compensation for the injury to be done. Both landlords and tenants were acting independently of the defendant, and not in any sense detracting from the rights which they then had or thereafter might acquire against the defendant. Notwithstanding their acts, the wrongdoer remained answerable to the landlords for lessening the value of the reversion, and to the tenants for lessening the value of the use during the term." The deduction in the rent was of course set off against the tenants' damages.[4]

§ 1057. Damages affected by interest in estate. The damages recoverable against the party responsible for a nuisance will be limited to the title or right of the plaintiff as in tres-

[1] Jeffersonville, etc. R. Co. v. Esterle, 13 Bush, 667.

[2] Baker v. Sanderson, 3 Pick. 348.

[3] Halsey v. Lehigh Valley R. Co., 45 N. J. L. 26, 37.

[4] Id.

pass.[1] Where a husband and wife joined in an action on the case for permanently obstructing a right of way appurtenant to her inheritance, and she died while it was pending, the suit did not abate; the surviving husband recovered judgment; he was entitled to recover the whole amount of damages sustained until the death of the wife, and afterwards a proportion equal to his interest in her estate as heir.[2] A reversioner can only sue in respect of permanent injury which will continue to affect the property when his interest comes into possession. It has been ruled that when the land damaged is held for the purpose of letting it on building leases and selling the ground rent, any depreciation in the value of such rent is not a cause of damage to the reversioner because that is not the natural way of dealing with a reversion.[3] Where the reversioner had contracted to lease land to builders and to make and had made them advances, and sought to recover for the depreciation in his securities resulting from an injury done to the buildings, it was held that the builders' right to leases depended upon their payment of whatever advances had been made; and the reversioner's recovery was determinable by the sum necessary to repair the injury directly caused by the nuisance, and by ascertaining how far the houses before they were repaired would have been a sufficient security for the advances. If there was a deficiency he was entitled to so much of the sum required to pay the damage done the houses as in addition to their value in their injured state would have been sufficient to make good the advances.[4] Damages were allowed for delay in letting vacant land which had been overflowed.[5]

§ 1058. Private remedy for public nuisance. A nuisance may be both public and private in its character, and in so far as it is public the person who suffers a peculiar damage therefrom has a right of action.[6] There are three things which one

[1] Hufnagel v. Mt. Vernon, 49 Hun, 286; Francis v. Schoellkopf, 53 N. Y. 153; Seely v. Alden, 61 Pa. St. 305; Staple v. Spring, 10 Mass. 72. See *ante*, §§ 1012, 1013.

[2] Jeffcoat v. Knotts, 11 Rich. 649.

[3] Rust v. Victoria Graving Dock Co., 36 Ch. Div. 113, 131.

[4] Id.

[5] Id.

[6] Park v. C. & S. W. R. Co., 43 Iowa, 636; Crommelin v. Coxe, 30 Ala. 318; Abbott v. Mills, 3 Vt. 521; Mills v. Hall, 9 Wend. 315; Myers v. Malcolm, 6 Hill, 292; Hay v. Cohoes Co., 3 Barb. 48; Fort Plain Bridge

who sues on account of a public nuisance must show, in addition to the existence thereof, before he can recover. 1. A particular, or more exactly speaking, a peculiar injury to himself beyond that which is suffered by the rest of the public. 2. The injury to him must be direct, and not merely consequential. 3. It must be of a substantial character, not fleeting or evanescent.[1] Justice Fry has observed of the expression "fleeting or evanescent" that that is not deemed to be so which results in substantial damage; the language has not so much reference to time as to the effects upon the plaintiff.[2] One who has sustained damage peculiar to himself from a common nuisance has a cause of action against the person erecting or maintaining it, although a like injury has been sustained by numerous other persons.[3] Grover, J., thus forcibly states this doctrine: "The idea that if by a wrongful act a serious injury is inflicted upon a single individual recovery may be had therefor against the wrong-doer, and that if by the same act numbers are so injured no recovery can be had by any one, is absurd. . . . It is said that holding the defendant liable to respond in an action to each one injured will lead to a mul- [424] tiplicity of actions. This is true, but it is no defense to the wrong-doer when called upon to compensate for the damages sustained from his wrongful act to show that he by the same act inflicted a like injury upon numerous other persons. The position is unsustained by any authority. While in the application to particular cases there is some conflict, yet there is none whatever in the rule itself. That rule is that one erecting or maintaining a common nuisance is not liable to an action at the suit of one who has sustained no damage therefrom except such as is common to the entire community; yet he is liable at the suit of one who has sustained damage peculiar to himself. No matter how numerous the persons may be who have sustained this peculiar damage, each is entitled to com-

Co. v. Smith, 30 N. Y. 62; Welton v. Martin, 7 Mo. 307; Grigsby v. Clear Lake Water Co., 40 Cal. 396; Venard v. Cross, 8 Kan. 248; Clark v. Peckham, 10 R. I. 35; Greene v. Nunnemacher, 36 Wis. 50; Ford v. Santa Cruz R. Co., 59 Cal. 290; Holmes v. Corthell, 80 Me. 31; French v. Connecticut River L. Co., 145 Mass. 261.

[1] Per Lord Justice Brett in Benjamin v. Storr, L. R. 9 C. P. 406.

[2] Fritz v. Hobson, 14 Ch. Div. 542, 556.

[3] Francis v. Schoellkopf, 53 N. Y. 153.

pensation for his injury. When the injury is common to the public, and special to none, redress must be sought by a criminal prosecution in behalf of all."[1] The plaintiff must suffer some special damage beyond that which is suffered in common with the public.[2] This may be direct or consequential.[3] It must be specially alleged.[4]

§ **1059. Joint and several liability.** All persons who jointly participate in the creation of a nuisance or in its maintenance during the same period may be held liable jointly or severally as in other cases of tort.[5] But parties liable only as tenants or grantees of the premises on which a nuisance is situated cannot be held jointly liable with the party creating it; for, while the creator of a nuisance continues to be liable in the tenant's or grantee's time, the latter are not liable before their connection with the property. And in case of a succession of tenants each is severally liable during his term [425] only; and successive grantees in the same manner.[6]

If several, independently, and without concert, create a nuisance they are not jointly liable; but each is liable in respect to his own wrongful act, and for the damages which resulted therefrom. A dam was filled by deposits of coal dirt from different mines on the stream above the dam; some mines were worked by defendants and their tenants, and others by persons entirely unconnected with the defendants. The court held that the latter were not liable for the combined re-

[1] Id.; Lansing v. Smith, 4 Wend. 9; Mills v. Hall, 9 id. 315; First Baptist Church v. Schenectady, etc. R. Co., 5 Barb. 83. See Shawbut v. St. Paul, etc. R. Co., 21 Minn. 502.

[2] Dudley v. Kennedy, 63 Me. 465; Yolo County v. Sacramento, 36 Cal. 193; Coburn v. Ames, 52 Cal. 385; Cole v. Sprowl, 35 Me. 161; Harrison v. Sterett, 4 Har. & McH. 540; Bunyon v. Bordine, 14 N. J. L. 472; Baxter v. Wynoski T. Co., 22 Vt. 114; Hatch v. Vermont, etc. R. Co., 28 Vt. 142; Brown v. Watson, 47 Me. 161; Marini v. Graham, 67 Cal. 130; McCloskey v. Kreling, 76 id. 511; Hogan v. Central Pacific R. Co., 71 id. 83; Gilbert v. Greeley, etc. Ry. Co., 13 Colo. 501.

[3] Rose v. Miles, 4 M. & S. 101; De Laney v. Blizzard, 7 Hun. 7.

[4] Baker v. Boston, 12 Pick. 184; S. C., 22 Am. Dec. 241; Memphis, etc. R. Co. v. Hicks, 5 Sneed, 427.

[5] Cooley on Torts, 133–4.

[6] Greene v. Nunnemacher, 36 Wis. 50; Lull v. Fox & W. Imp. Co., 19 Wis. 101; Hess v. Buffalo, etc. R. Co., 29 Barb. 391; Wayland v. St. Louis, etc. Ry. Co., 75 Mo. 548. A grantee is not liable for the erection or continuance of a nuisance caused by his grantor on land not owned by the latter. Wayland v. Railway Co., *supra*.

sults of all the deposits; that the ground of the action was not the deposit of the dirt in the dam by the stream, but the negligent act above; throwing the dirt into the stream was the tort; the deposit only the consequence. The liability of the defendants began with their acts on their own land, and was wholly separate and independent of concert with others. Their tort was several when committed, and it did not become joint because its consequences united with other consequences; and they were not liable for the acts of their tenants not done by their authority or command.[1] "It may be difficult to determine how much dirt came from each colliery, but the relative proportion thrown in by each may form some guide, and a jury in a case of such difficulty, caused by the party himself, would measure the injury with a liberal hand. But the difficulty of separating the injury of each from the others would be no reason that one man should be held liable for the torts of others without concert. It would be simply to say because the plaintiff fails to prove the injury one man does him he may therefore recover from that one all the injury that the others do."[2]

The defendant constructed a covered channel for a small brook that ran through his premises. The channel proved [426] insufficient for all the water that came down the brook in times of heavy rain, and by its obstruction caused water to overflow upon and injure the adjoining premises of the plaintiff. The local authorities, after making such channel, constructed several sewers and drains which emptied into the brook above these premises, by which a considerable quantity of sewage and surface water that would have gone in other directions was let into the brook. It was held that the defendant was not liable for any damage beyond that caused by the natural flow of the water, including its increased flow from heavy rains and other natural causes; that he and the

[1] Little Schuylkill, etc. Co. v. Richards, 57 Pa. St. 142.

[2] Chipman v. Palmer, 9 Hun, 517; Wallace v. Drew, 59 Barb. 413; Van Steenburgh v. Tobias, 17 Wend. 562; Russell v. Tomlinson, 2 Conn. 206; Adams v. Hall, 2 Vt. 9; Buddington v. Shearer, 20 Pick. 477; Auchmuty v. Ham, 1 Denio, 495; Partenheimer v. Van Order, 20 Barb. 479; Elgin v. Welch, 16 Ill. App. 483; Loughran v. Des Moines, 72 Iowa, 382. But see Boyd v. Watt, 27 Ohio St. 259; Givens v. Van Studdiford, 4 Mo. App. 498.

city which constructed such sewers were not joint tort-feasors.[1] There may be a like limitation where the wrongful acts have produced consequences multiplied by unforeseen and extraordinary natural causes. A railway company threw the waste water from its tank upon the premises of another, where it spread and froze, doing damage to the property of the owner; it was held that the company could not claim exemption from liability on the ground that the freezing of the water was the act of nature; for such result from the wrongful act might have been foreseen. To excuse from liability for an act of nature in combination with the defendant's act it must have been such as could not have been foreseen or prevented by the exercise of ordinary care and prudence.[2] Where all the water which so freezes on another's lot is not the water turned thereon by the defendant, but a part is flowing surface water in its natural course, the defendant is liable only for the damages resulting from the water caused to flow upon the land by himself. The jury should not return nominal damages in such a case merely because they cannot determine how much of the actual damage was so caused. They must estimate in the best way they can how much of the whole damage was occasioned by the water turned on the land by the defendant.[3]

§ 1060. Pleading. The general allegation of damage will suffice to let in proof and warrant recovery of all such damages as naturally and necessarily result from the wrongful act complained of; the law implies such damages; that is, [**427**] damages of that sort, and proof is necessary only to show their extent and amount.[4] But where damages actually sustained do not necessarily result from the act complained of, and consequently are not implied, the plaintiff must state in his declaration the particular damage which he has sustained for notice thereof to the defendant; otherwise the plaintiff will not be permitted to give evidence of it on the trial.[5] The

[1] Sellick v. Hall, 47 Conn. 260.

[2] Chicago, etc. R. Co. v. Hoag, 90 Ill. 339; Cobb v. Smith, 38 Wis. 21.

[3] Chicago, etc. R. Co. v. Hoag, *supra;* Learned v. Castle, 78 Cal. 454.

[4] 1 Chitty Pl. 395; Solms v. Lias, 16 Abb. Pr. 311; Taylor v. Dustin, 43 N. H. 493; De Forest v. Leete, 16 Johns. 122; Bristol, etc. Co. v. Gridley, 23 Conn. 201; Burrell v. New York, etc. Co., 14 Mich. 39; Teagarden v. Hetfield, 11 Ind. 522; Ellicott v. Lamborne, 2 Md. 131.

[5] Holmes v. Corthell, 80 Me. 31; Squier v. Gould, 14 Wend. 159; Plimpton v. Gardiner, 64 Me. 360;

damages which enter into or constitute the general measure of recovery are those provable under the usual allegation of damage; but in many cases of tort there is no such state of facts that the whole injury would be covered by any general rule more precise than the elementary principle which entitles the injured party to just compensation. The question, therefore, whether any particular injurious result of the tortious act committed by the defendant, not stated in the pleadings, can still be proved to enhance the damages must depend on whether it is the necessary consequence of that act. If not the direct consequence, it must be alleged, and so specifically as that the defendant may be apprised of the claim. Where the use of a mill was impaired by the obstruction of the water by a dam below on the stream, and the declaration alleged that the obstruction subjected the plaintiff to great loss and expense by the interruption of the business of the mill, and in depriving him of the profits thereof, it was held he was not entitled to recover for the loss or diminution of rent. "Profits," say the court, "are clearly distinguishable from rents. Both terms are technical in their nature, and neither necessarily includes the other; there may be profits without rent and *vice versa*." [1] In an action for obstructing a right of way leading to an estate held by the plaintiff's wife in mortgage [428] the declaration contained only the general allegation of damages; and it was held that those for the consequent diminution of rents could not be recovered because not specially alleged.[2] So in an action for obstructing a natural watercourse and thereby injuring the plaintiff's buildings, loss of rents was treated as special damages.[3] In an action for the pollution of the water of a stream which ran through the plaintiff's land he was not permitted to prove the cost of boiling and skimming the water to fit it for household purposes, in the absence of an allegation that the water was, and had to be, so treated.[4] It was also held that proof was inadmissible

Taylor v. Dustin, 43 N. H. 498; Spencer v. St. Paul, etc. R. Co., 21 Minn. 352; Wampach v. Same, id. 364; Ellicott v. Lamborne, 2 Md. 131; vol. 1, § 39.

If it is alleged that the nuisance has caused several distinct injuries the complaint is ambiguous and uncertain if it does not specify the amount of damage produced by each. Grandona v. Lovdal, 70 Cal. 161.

[1] Plimpton v. Gardiner, 64 Me. 360.

[2] Adams v. Barry, 10 Gray, 361.

[3] Parker v. Lowell, 11 Gray, 353.

[4] Porter v. Froment, 47 Cal. 165.

to show that the rental value of the farm was diminished by the wrong done in polluting the waters of such stream because the complaint failed to allege that the plaintiff rented the farm or was prevented from renting it for that reason.[1]

The plaintiff, owner of a paper mill, set forth in his declaration as its *gravamen* that earth, sand and other substances were washed into his mill-dam, and so filled and choked the dam as to make it in a great degree useless to him in the working of his mill. The court held that he could not offer evidence to prove that he could not wash his rags because the stream was rendered impure and muddy by the earth and clay deposit in and upon the margin, and that by reason of such impurity of the water he was prevented from making white paper. That the manufacture of paper is one thing and the preparation of the materials is another distinct process; and evidence showing damage as resulting from the interruption of the latter is not proper and legal, unless the fact is expressly pleaded. That the fact that the plaintiff owned a paper mill operated by water from the dam in question did not necessarily suggest the additional fact that he made white paper in his mill, and that the rags for the same were washed from the water in the dam. His inability to wash his rags and make paper could not therefore be regarded as the necessary and inseparable consequence of the washing of the earth into and filling up of the dam; and he could not recover [429] for those particular injuries without specially alleging them.[2] But where the allegation was that the defendant failed to keep the privies, drains and drain pipes connected with his building in proper repair, but suffered the same to become and remain out of order so that water and filth escaped therefrom and percolated through the wall of the plaintiff's house on adjoining premises and into the cellar in such quantities as to soak and cover its floor and to make the same permanently unfit for use; and, also, to greatly injure the walls and other portions of the building; and to create such an offensive stench and smell as to interfere with the use of said premises and with the letting thereof, it was held that the allegations were sufficient to authorize evidence of the loss of the use of the cellars and of the rental thereof.[3]

[1] Porter v. Froment, 47 Cal. 165.

[2] Ellicott v. Lamborne, 2 Md. 131.

[3] Jutte v. Hughes, 67 N. Y. 267.

CHAPTER XXVI.

TAKING PROPERTY FOR PUBLIC USE.

§ 1061. The power of eminent domain.
1062. Consequential injury where property not taken.
1063. What is just compensation.
1064. Measure of compensation.
1065. Injury to property not taken.
1066–1070. Same subject; what facts pertinent.
1071. Same subject; remote damages.
1072, 1073. Same subject; expenditures to lessen loss.
1074. Basis for estimating value of land.
1075. Same subject; value for special purpose.
1076. Compensation for wrong-doer's improvements.
1077. Compensation affected by title and nature of interest taken.
1078. Same subject; condemnation of railroad property.
1079. Same subject; injury to franchise.
1080. Same subject; New York elevated road cases.
1081, 1082. Same subject; injuries to various interests.
1083. Assessment of damages and benefits, time of.
1084–1087. Deductions for benefits.
1088. What lands considered in assessing benefits and damages.
1089. Proof of value and damages.
1090. Effect of judgment for compensation.
1091. Interest.

[430] **§ 1061. The power of eminent domain.** By the exercise of the right or power of eminent domain an individual owner may be compelled to sell and surrender his property when the public necessities require it.[1] Not only land, but incorporeal rights connected therewith, may be taken for public use.[2] The taking is deemed to be for such use as well when the state or some municipal division thereof exercises the power as when it is invoked by certain private corporations in aid of their undertakings to subserve the public interest, as

[1] Fletcher v. Peck, 6 Cranch, 145; Trombley v. Humphrey, 23 Mich. 474; San Francisco, etc. R. Co. v. Caldwell, 31 Cal. 367; Redf. on Railroads, ch. 11, sec. 1.

[2] People v. Supervisors, 4 Barb. 64; Furniss v. Hudson River R. Co., 5 Sandf. 551; Ladd v. Boston, 151 Mass. 285; Lycoming Gas & W. Co. v. Moyer, 99 Pa. St. 615; Story v. New York E. R. Co., 90 N. Y. 122; Newman v. Metropolitan E. R. Co., 118 id. 618.

for railroads, canals and other improved means of travel or transportation.[1] This right of eminent domain can be exercised to take private property only on the inseparable condition of making just compensation therefor.[2] This compensation must be of a pecuniary nature,[3] and is secured by constitutional inhibition of the exercise of the right except upon its payment. Statutes which provide for the exercise of [**431**] the right universally direct how the amount shall be ascertained and paid. Many statutes give a right to compensation for consequential injuries that are not within the requirement to make just compensation; for the legislature may authorize the exercise of the right of eminent domain without providing for all consequential damage. In the past few years there has been an extension of the liability of corporations for such damage. Nearly all the recently adopted constitutions require that compensation shall be made for property "injured," "damaged" or "destroyed," as well as for that "taken."[4] The imposition of that liability by constitution or statute creates no new right, but preserves the common-law right to recover in respect of any injury resulting from the enterprise, although that enterprise which is the cause of the injury has the sanction of law.[5]

The land-owner cannot be deprived of this compensation secured by the constitution or by statutes, except by his own act of waiver or discharge, or by his dereliction.[6] The right to it exists not only when land is taken, but when it is in any manner injuriously invaded though not taken.[7] Where a rail-

[1] Buffalo, etc. R. Co. v. Brainard, 9 N. Y. 100; Weir v. St. Paul, etc. R. Co., 18 Minn. 155; Boston Water-power Co. v. Boston, etc. R. Co., 23 Pick. 360; Giesy v. Cincinnati, etc. R. Co., 4 Ohio St. 308.

[2] Bonaparte v. Camden, etc. R. Co., Baldwin, 226; Bloodgood v. Mohawk, etc. R. Co., 18 Wend. 9; 2 Kent's Com. 339; Cooley's Const. Lim., ch. 15; Bradshaw v. Rogers, 20 Johns. 103; Carson v. Coleman, 11 N. J. Eq. 106; Symonds v. Cincinnati, 14 Ohio, 148.

[3] Id.; Chicago, etc. R. Co. v. Melville, 66 Ill. 329; Weckler v. Chicago, 61 Ill. 142; Sutton v. Louisville, 5 Dana, 28; Ferris v. Bramble, 5 Ohio St. 109; Covington, etc. Ry. Co. v. Piel, 87 Ky. 267.

[4] See ch. 2, Lewis on Eminent Domain.

[5] Columbia, etc. Bridge Co. v. Geisse, 35 N. J. L. 563.

[6] Western, etc. R. Co. v. Johnston, 59 Pa. St. 290.

[7] Pumpelly v. Green Bay Co., 13 Wall. 166; Eaton v. B. C. & M. R. Co., 51 N. H. 504; Grand Rapids B. Co. v. Jarvis, 30 Mich. 308; Stetson

road corporation claiming to act under legislative authority removed a natural barrier situated between the land, the injury to which was in question, and the railroad, such barrier having theretofore completely protected the meadow on such land from the effect of freshets and floods in a neighboring river, it was held that, although the barrier was wholly beyond the boundaries of such land, yet, as its removal caused the water to overflow such land, the owner had the same right to compensation as though a portion of it had been taken by the company.[1] If, however, land is not taken or [432] touched in the construction and operation or use of a public work, there can be no claim for damages for any consequential injury unless the constitution or a statute uses a broader term than "taken." Under the sanction of the legislature a railroad bridge was built over a stream within the limits of a city; on the destruction of the bridge by fire the city proceeded to erect another bridge on substantially the same site, but built it so that it might be used not only for a railroad bridge, but also for the accommodation of foot passengers and teams. The plaintiff, who owned a foundry on the stream, and mainly relied on it for power to propel his machinery, sought to enjoin the construction of the bridge until compensation was awarded him for the loss produced by building the piers for the bridge in the channel of the stream. It was held no cause of action existed, as his land was not touched, and the damage, if there was any at all, was too indirect or consequential.[2]

§ 1062. Consequential injury where property not taken. The general scope of the provisions of the several constitutions concerning the taking, injuring or damaging of private property under the power of eminent domain cannot be

v. Chicago, etc. R. Co., 75 Ill. 74; Conniff v. San Francisco, 67 Cal. 45. See Transportation Co. v. Chicago, 99 U. S. 635.

[1] Eaton v. B. C. & M. R. Co., *supra;* Nevins v. Peoria, 41 Ill. 502; Aurora v. Reed, 57 Ill. 29; Toledo, etc. R. Co. v. Morrison, 71 Ill. 616; St. Louis, etc. R. Co. v. Capps, 72 Ill. 191; Gillham v. Madison C. R. Co., 49 Ill. 488.

[2] Swett v. Troy, 12 Abb. (N. S.) 100; Cleveland, etc. R. Co. v. Speer, 56 Pa. St. 325; Davidson v. B. & M. R. Co., 3 Cush. 91; Kokomo v. Mahan, 100 Ind. 242; In re Thompson, 43 Hun, 416. See Fitchburg R. Co. v. Boston & M. R. Co., 3 Cush. 58; In re Union Village, etc. R. Co., 53 Barb. 457.

discussed here. The necessity for doing so does not exist because the subject has been fully considered and treated of in a recent work.[1] It will serve the writer's purpose to call attention to a few of the leading cases which construe the constitutional provisions requiring compensation to be made for property "injured," "damaged" or "destroyed." After some fluctuation in opinion and contrariety of decision the Illinois court has settled its doctrine to be that under the clause in the constitution of that state which provides for compensation if property is "damaged," that "a recovery may be had in all cases where private property has sustained a substantial damage by the making and using an improvement that is public in its character, that it does not require that the damage shall be caused by a trespass or an actual physical invasion of the owner's real estate; but if the construction and operation of the railroad or other improvement is the cause of the damage, though consequential, the party damaged may recover," if his damage is special and such as gave him a right of action at common law.[2] This is in harmony with later cases in other states.[3] In California the right to compensation when property is "damaged" is not restricted to a case in which its owner would be entitled to recover as for a tort at common law. "If he is consequentially damaged by the work done, whether it is done carefully and with skill or not, he is still entitled to compensation for such damage, if it is special to him over and above that which is sustained by the public in general."[4] All the cases agree that the injury or damage must be special. If noise, smoke, dust, cinders or things of that sort are shown to have damaged the property itself, they may be considered in fixing the amount of recovery; but they are to be disregarded if they result merely in an inconvenience, or only cause discomfort to the occupants of the property.[5] In Nebraska the liability for consequential injury to property not taken exists although the property used and

[1] Lewis on Eminent Domain.

[2] Rigney v. Chicago, 102 Ill. 64; Chicago, etc. R. Co. v. Ayres, 106 id. 511.

[3] Griffin v. Shreveport & A. R. Co., 41 La. Ann. 808; Chicago, etc. R. Co. v. Hazels, 26 Neb. 364; Pennsylvania, etc. R. Co. v. Walsh, 124 Pa. St. 544; Same v. Ziemer, id. 560.

[4] Reardon v. San Francisco, 66 Cal. 492.

[5] Id.; Campbell v. Metropolitan Street R. Co., 82 Ga. 320; McMahon v. St. Louis, etc. R. Co., 41 La. Ann. 827.

from the use of which the injury proceeds was obtained by purchase.[1] Where payment is required to be made or secured in advance of doing the work, only such injuries are contemplated as are capable of being estimated at the time the work is being done.[2] The measure of compensation is governed by the difference between the market value of the property before and after the injury.[3]

§ **1063. What is just compensation.** There is some conflict of decision in respect to what constitutes just compensation. According to the best authorities, however, it is believed to be remuneration for the net injury which is suffered from the exercise of this sovereign right. The word "compensation" imports that a wrong or injury has been inflicted and must be redressed in money. Money must be paid to the extent of the injury. This may be less or more than the value of the property taken; but when compensation has been made to the extent of the injury, the language and just purpose of the constitution are satisfied.[4] A loss of the property taken will often be but a part of the injury to its owner; and on the other hand, the value of the part taken may be wholly or partially compensated in fact by benefits resulting from taking his adjacent property. Where the value of that taken is not arbitrarily required to be paid for, and the constitution or statute requires only full indemnity, its value and the dam- [433] ages or benefits to the residue, if any, are taken into account, and such sum allowed as will make the owner whole.[5]

[1] Chicago, etc. Ry. Co. v. Hazels, 26 Neb. 364.

[2] Pennsylvania R. Co. v. Marchant, 119 Pa. St. 541; Montgomery v. Townsend, 84 Ala. 478.

[3] Montgomery v. Townsend, 80 Ala. 489; McMahon v. St. Louis, etc. R. Co., 41 La. Ann. 827; Omaha Belt Ry. Co. v. McDermott, 25 Neb. 714; Springer v. Chicago, 135 Ill. 552.

[4] Symonds v. Cincinnati, 14 Ohio, 175.

[5] San Francisco, etc. R. Co. v. Caldwell, 31 Cal. 374; Betts v. Williamsburgh, 15 Barb. 255; Commonwealth v. Norfolk, 5 Mass. 435; Meacham v. Fitchburg R. Co., 4 Cush. 291; Bangor, etc. R. Co. v. McComb, 60 Me. 290; Kilbourne v. Suffolk, 120 Mass. 393; Jones v. Chicago, etc. R. Co., 68 Ill. 380; Commonwealth v. Coombs, 2 Mass. 492; Commonwealth v. Middlesex, 9 Mass. 388; Matter of Furman Street, 17 Wend. 658; People v. Mayor, 4 N. Y. 419; Indiana C. R. Co. v. Hunter, 8 Ind. 74; McIntire v. State, 5 Blackf. 384; Greenville, etc. R. Co. v. Partlow, 5 Rich. 421; White v. Charlotte, etc. R. Co., 6 Rich. 47; Upton v. South, etc. R. Co., 8 Cush. 600; McMasters v. Commonwealth, 3 Watts, 292; Alexander v. Baltimore,

Where, by reason of the location of a railroad over a part of a lot of land, and the filling up of a canal in which the owner of the lot had a privilege, the value of the land was so enhanced that it was worth more than the entire lot was before, he was held to have no claim for damages.[1] It is said to be long settled law in Connecticut that where the owner has a claim for damages for land taken, and has received local and special benefits equal thereto, these shall be set off against the damage, and he shall be allowed nothing. It is true that his entire benefit may be exhausted in this application, while the benefits received by his neighbors are assessed only a small percentage, and thus there may be a seeming and perhaps a real inequality; but so long as his benefit equals his damage he cannot be said to suffer by the taking of his property for public use, and there would be an injustice in compelling others to pay him for damage that really has no existence.[2]

§ **1064. Measure of compensation.** The general measure of just compensation is the fair market value of the land taken where all the owner's land is taken;[3] and where a part only is taken, the difference in value of the whole before the [434] taking and its value as affected by it.[4] In a limited number of

5 Gill, 383; Livermore v. Jamaica, 23 Vt. 361; White v. County Commissioners, 2 Cush. 361; Shaw v. Charlestown, 2 Gray, 107; Dickenson v. Fitchburg, 13 Gray, 546; Young v. Harrison, 17 Ga. 30; Alton, etc. R. Co. v. Carpenter, 14 Ill. 190; Root's Case, 77 Pa. St. 276; Green v. Chicago, 97 Ill. 370; Chicago & E. R. Co. v. Jacobs, 110 Ill. 414.

[1] Whitman v. Boston, etc. R. Co., 3 Allen, 133.

[2] Trinity College v. Hartford, 32 Conn. 478; Nichols v. Bridgeport, 23 Conn. 189; Nicholson v. New York, etc. R. Co., 22 Conn. 74.

[3] Kiernan v. Chicago, etc. Ry. Co., 123 Ill. 188; Indiana, etc. Ry. Co. v. Allen, 100 Ind. 409; Chaffee's Appeal, 56 Mich. 244; Newman v. Metropolitan E. Ry. Co., 118 N. Y. 618; Alloway v. Nashville, 88 Tenn. 511; San Francisco, etc. R. Co. v. Caldwell, 31 Cal. 374; Bohm v. Metropolitan E. R. Co., 129 N. Y. 576; Odell v. New York E. R. Co., 130 id. 690.

[4] Id.; Bigelow v. West W. R. Co., 27 Wis. 478; Parks v. Wisconsin C. R. Co., 33 Wis. 413; Howe v. Ray, 113 Mass. 88; Tucker v. Massachusetts C. R. Co., 118 Mass. 546; Dickenson v. Fitchburg, 13 Gray, 546; Page v. Chicago, etc. R. Co., 70 Ill. 324; Harrison v. Iowa, etc. R. Co., 36 Iowa, 323; Curtis v. St. Paul, etc. R. Co., 20 Minn. 28; Colvill v. Same, 19 Minn. 283; Chicago, etc. R. Co. v. Francis, 70 Ill. 238; Wilson v. Rockford, etc. R. Co., 59 Ill. 273; Mix v. La Fayette, etc. R. Co., 67 Ill. 319; Peoria, etc. R. Co. v. Sawyer, 71 Ill. 361; Bloomington v. Miller, 84 Ill.

cases this measure of recompense is not admitted to be just. In Kentucky it has been held that the value of the taken land to its owner, "considering its relative position to his other lands, and the other circumstances which may diminish or enhance that value, can alone afford him a just compensation for its loss."[1] In a recent case the property condemned consisted of a homestead. The jury was directed to assess the owner's damage at the real value in money to him of the premises, and the court refused to instruct that the consequential injury or inconvenience to him should be considered. In answering objections to the instruction and refusal the appellate court observed: "The appellee owned no property adjacent to the property condemned, and the damages he sustained, if any, in addition to the value of the property taken, were caused by the inconvenience and loss resulting from his being deprived of his home and place of business; and to say that no such facts should enter into the estimate of value would be unjust to the owner and place him in a condition where he had sustained actual injury, other than the market value of his property, without affording him any remedy for the wrong. This character of case is unlike an appropriation of a strip of land where the mere market value is the criterion,

621; Bangor, etc. R. Co. v. McComb, 60 Me. 290; Wilmington, etc. R. Co. v. Stauffer, 60 Pa. St. 374; Cummings v. Williamsport, 84 id. 472; Pennsylvania, etc. R. Co. v. Bunnell, 81 id. 414; Shenango, etc. R. Co. v. Braham, 79 id. 447; East Brandywine, etc. R. Co. v. Ranck, 78 id. 454; St. Louis, etc. R. Co. v. Teters, 68 Ill. 144; Jones v. Chicago, etc. R. Co., 70 Ill. 380; Haslam v. Galena, etc. R. Co., 64 Ill. 353; Dearborn v. Boston, etc. R. Co., 24 N. H. 179; Atchison, etc. R. Co. v. Blackshire, 10 Kan. 477; Hooper v. Savannah & M. R. Co., 69 Ala. 529; Little Rock, etc. Ry. Co. v. Allen, 41 Ark. 431; Chicago, etc. Ry. Co. v. Smith, 111 Ill. 363; Chicago & E. R. Co. v. Blake, 116 id. 163; Same v. Bowman, 112 Ill. 595; Reisner v. Union Depot & R. Co., 27 Kan. 382; Wichita & W. R. Co. v. Kuhn, 38 id. 104; Asher v. Louisville & N. R. Co., 87 Ky. 391; Benton v. Brookline, 151 Mass. 250; Grand Rapids, etc. R. Co. v. Chesebro, 74 Mich. 466; Port Huron, etc. Ry. Co. v. Voorheis, 50 id. 506; Wilmes v. Minneapolis & N. Ry. Co., 29 Minn. 242; Sullivan v. Lafayette Co., 61 Miss. 271; Balfour v. Louisville, etc. R. Co., 62 id. 508; Fremont, etc. R. Co. v. Whalen, 11 Neb. 585; Chicago, etc. R. Co. v. Wiebe, 25 id. 542; Philadelphia v. Linnard, 97 Pa. St. 242; Washburn v. Milwaukee, etc. R. Co., 59 Wis. 364, 375; Bohm v. Metropolitan E. R. Co., 129 N. Y. 576; Odell v. New York E. R. Co., 130 id. 690.

[1] Henderson & N. R. Co. v. Dickerson, 17 B. Mon. 178; Robb v. Maysville, etc. T. Co., 3 Met. 117. See § 1087.

the taking working no other injury. Here the owner and his family have been deprived of their homestead and his place of business taken from him, and to allow him simply what such property is worth, or would bring in the market, would not compensate him for the injury sustained."[1]

§ 1065. Injury to property not taken. If property is materially or permanently diminished in value in consequence of a railroad running over it, or the taking of part of it for any public use, the owner is entitled to full satisfaction in damages. Equity and justice require that he be compensated, not only for the land actually appropriated, but also for the incidental injury to the value of the residue. By so much as the real value of it as a whole is diminished in consequence of the taking and public use of a part, by so much is its owner injured. If the value of a farm is thus in fact depreciated damages therefor are recoverable without regard to the cause of such depreciation.[2] In a case in Wisconsin it was said to be inconvenient and troublesome to cross the track of a railroad from one part of a farm to another with cattle and agricultural implements; that there was more or less danger to person and property in doing so; that grain and other property near the track were exposed to fire from locomotives; that horses were liable to be frightened by passing trains of cars, and to run away and destroy property; and that on account of these things the farm was less valuable. The evidence relating to these subjects was not offered for the purpose of laying the basis for the recovery of damages for such remote and speculative injuries, but the object was to account [**435**] for the decrease in the value of the property. On this subject Cole, J., said: "If in consequence of its exposure to these remote injuries the property is diminished one-half in value, then this decrease in value measures the actual loss to the owner, and, when compensated for this depreciation in the value of his property, he is not receiving compensation for some imaginary injury, some fanciful loss which may or may not occur, but he is paid for the real loss which he sustains by the building of the railroad across his property. If the con-

[1] Covington, etc. Ry. Co. v. Piel, 87 Ky. 267, 276. See § 1068.

[2] Patterson v. Boom Co., 3 Dill. 465; Newgass v. Railway Co., 54 Ark. 140.

struction of the road across his land depreciates the property one-half its value in the market, then he is damnified to this extent; it matters not what causes the depreciation in value, whether exposure to fire, annoyance from trains, or danger to person and property; the real question is whether, in consequence of the railroad, the property is diminished in value, and if so, how much; for this will measure the direct and necessary loss which the owner has sustained by the construction of the road over his land."[1]

If the land is rendered less valuable because it is exposed to fire, or if access to it is rendered more difficult, or if the use of the remainder is more inconvenient by reason of the railroad; or if its value is depreciated by the noise, smoke, or increased dangers caused by the use of the railroad, all these are to be included in the estimate of damages; not that witnesses are to be called upon to estimate the damages for each or any of them; for though they enter into the estimates the question is what is the market value of the land without, and what is the market value of the remainder of the piece with, the railroad; in other words, what is the value of the piece which is taken, and how much is the residue depreciated in its market value by its separation and by the construction of the railroad. These two sums added together give the amount of compensation to which the injured party is entitled.[2] The claimant must prove his damages, not necessarily with precision and accuracy, but approximately; unless he does so his recovery cannot exceed a nominal sum.[3]

§ **1066. Same subject; what facts pertinent.** To ascertain the fact of depreciation as a consequence of the taking and use of part of a parcel of land before the improvement is [**436**] actually completed and its ultimate effect on the value is practically realized, the consequences of particular facts have to be in some measure anticipated. There is not entire agreement as to the particular facts or kind of facts which

[1] Snyder v. Western U. R. Co., 25 Wis. 60; Weyer v. Chicago, etc., R. Co., 68 id. 180; Little Rock, etc. Ry. Co. v. Allen, 41 Ark. 431. See Hutchinson v. Chicago & N. Ry. Co., 37 Wis. 582, 610; Neilson v. Chicago, etc. Ry. Co., 58 id. 516.

[2] In re Utica, etc. R. Co., 56 Barb. 464.

[3] Peoria, etc. Ry. Co. v. Peoria & F. Ry. Co., 105 Ill. 110.

may be proved and considered in order to determine such depreciation. In Pennsylvania only such can be proved as are fair to be considered as a ground of damages on general principles; such as show injury as the certain and immediate consequence of the construction and proposed use of the part taken.[1] In other states the facts relied on or available to prove such depreciation are not uniformly subjected to that precise test, but their admissibility and force are decided by their supposed tendency to affect in fact the price and value of the property. All the facts which a prudent person desiring to buy the property affected would consider may be made the subject of evidence. Hence circumstances are often taken into account which in no other view could be a ground of damage.[2] The increased exposure to fire, not resulting from negligence,[3] by laying and operating railroads near buildings and through fields is very generally allowed to be proved to show damage by depreciation.[4] So the danger to which [437]

[1] The language of Gibson, C. J., has often been quoted in Pennsylvania: "The jurors are to consider the matter just as if they were called on to value the injury at the moment when compensation could be first demanded; they are to value the injury to the property without reference to the person of the owner or the actual state of his business, and in doing that the only safe rule is to inquire what would the property, unaffected by the obstruction, have sold for at the time the injury was committed. What would it have sold for as affected by the injury? The difference is the true measure of compensation." Schuylkill N. Co. v. Thoburn, 7 S. & R. 411. See New York, etc. R. Co. v. Young, 33 Pa. St. 175; Patten v. Northern C. R. Co., id. 426; Searle v. Lackawanna, etc. R. Co., id. 57; Watson v. Pittsburgh, etc. R. Co., 37 id. 469; Lehigh, etc. R. Co. v. Lazarus, 28 id. 203; Chambers v. South Chester, 140 id. 510.

[2] Bigelow v. West W. R. Co., 27 Wis. 478; Western P. R. Co. v. Hill, 56 Pa. St. 460; Patterson v. Boom Co., 3 Dill. 465; St. Louis, etc. R. Co. v. Teters, 68 Ill. 144; Jones v. Chicago, etc. R. Co., 68 Ill. 380; Keithsbury, etc. R. Co. v. Henry, 79 Ill. 290; Somerville, etc. R. Co. v. Doughty, 22 N. J. L. 495.

[3] Chicago, etc. R. Co. v. Palmer, 44 Kan. 110.

[4] Hatch v. Cincinnati, etc. R. Co., 18 Ohio St. 92; Jones v. Chicago, etc. R. Co., 68 Ill. 380; Colvill v. St. Paul, etc. R. Co., 19 Minn. 283; Curtis v. Same, 20 Minn. 28; Bangor, etc. R. Co. v. McComb, 60 Me. 290; Somerville, etc. R. Co. v. Doughty, 22 N. J. L. 495; Pierce v. Worcester, etc. R. Co., 105 Mass. 199; Adden v. White M. R., 55 N. H. 413; Little Rock, etc. Ry. Co. v. Allen, 41 Ark. 431; Chicago, etc. R. Co. v. Bowman, 122 Ill. 595; Same v. Aldrich, 134 id. 9; Centralia & C. R. Co. v. Brake, 125 id. 393; Dudley v. Minnesota & N. Ry. Co., 77 Iowa, 408; Pingrey v. Cherokee & D. Ry. Co., 78 id. 438; Kansas City & E. R. Co. v. Kregeto, 32 Kan. 608; Johnson v. Chicago, etc. R. Co., 37 Minn.

the owner and his family[1] and stock[2] are exposed in crossing the track from one part of a farm to another is provable for the same purpose. If the remainder of a lot is rendered less valuable by reason of being severed or disfigured by the taking and proposed use of a part, such damage may be allowed as shall be found to have resulted therefrom. In determining the consequent depreciation the jury may consider the use to which the part taken is appropriated; the character, situation, present and probable use of the remainder, the distance of the owner's buildings from the public use, and any facts which

519; Pittsburgh, etc. Ry. Co. v. McCloskey, 110 Pa. St. 436; Setzler v. Pennsylvania, etc. R. Co., 112 id. 56. *Contra*, Fremont, etc. R. Co. v. Whalen, 11 Neb. 585, 590; In re Union Village & J. R. Co., 53 Barb. 457.

In Lehigh V. R. Co. v. Lazarus, 28 Pa. St. 203, it was held that the risk to fire being communicated from locomotives to buildings cannot be taken into consideration in estimating the damages sustained by the owner of land arising from the construction of a railroad over it, because of the uncertain and contingent nature of such damages. Sunbury & Erie R. Co. v. Hummell, 27 Pa. St. 99. In Wilmington, etc. R. Co. v. Stauffer, 60 Pa. St. 374, it was held that if the railroad were laid near to a barn, and the danger of fire was necessarily so imminent that no man of common prudence would use the barn as such, then the premises would be depreciated by its being rendered useless. In Patten v. Northern C. R. Co., 33 Pa. St. 426, it was held that increased cost of insurance could not be considered. This is held in Iowa on the ground that the property owner is not bound to insure his buildings. Pingery v. Cherokee & D. Ry. Co., 78 Iowa, 438. And inasmuch as the liability of the railroad company would not be affected by any insurance there might be on the property, this position seems tenable. But it is held otherwise in Minnesota. Cedar Rapids, etc. Ry. Co. v. Raymond, 37 Minn. 204.

Evidence concerning the experience another land-owner has had with fires caused on his land by the same railroad company is inadmissible. Pittsburgh, etc. Ry. Co. v. McCloskey, 110 Pa. St. 436.

This element of depreciation in value is not eliminated by proof that the precautions taken by the company are such as to render it probable or even certain that no fires will be caused by it, because there is no assurance that the precautions will always be observed. Pingery v. Cherokee & D. Ry. Co., 78 Iowa, 438. If by statute absolute liability is imposed for fires caused by railroad companies, the danger therefrom must not be considered. St. Louis, etc. Ry. Co. v. North, 31 Mo. App. 345; S. C., id. 351.

[1] Weyer v. Chicago, etc. Ry. Co., 68 Wis. 180; Laflin v. Chicago, etc. R. Co., 33 Fed. Rep. 415, 421; Chicago, etc. Ry. Co. v. Aldrich, 134 Ill. 9. Compare McReynolds v. Burlington, etc. Ry. Co., 106 Ill. 152.

[2] Id.; Chicago, etc. R. Co. v. Bowman, 122 Ill. 595; Jones v. Chicago, etc. R. Co., 68 Ill. 380. Compare McReynolds v. Burlington, etc. Ry. Co., 106 id. 152.

they, from a view of the testimony, shall find injure the value of the premises by the proper and legal use of the appropriated part.[1] The existing physical condition of land over which a railroad is to be laid, whether affected by another railroad, a water-course, or other natural or artificial object, may be considered in ascertaining the damage that will result to it.[2] If a proper construction of the proposed road will necessitate making a cut through a portion of the land taken, that fact may be considered in awarding compensation for that not appropriated.[3] Where a part has been taken for a railroad, it is proper to consider all inconveniences from the sounding of whistles, ringing of bells, rattling of trains, jarring of the ground, or from smoke, so far as they severally arise from the use of the strip taken and upon it, excluding all common and indirect damages, that is, such as affect the owner in common with all other members of the community.[4] The extent of the use which will be made of the land taken, as its proximity to the depot and the number of tracks laid, is the subject of proof.[5] Evidence that the location of a railroad across a farm made it more difficult to rent it has been received on the question of damages.[6] A land-owner is entitled to compensation for the taking of his property; hence

[1] Peoria, etc. R. Co. v. Sawyer, 71 Ill. 361; Hannibal B. Co. v. Schaubacher, 57 Mo. 582; Bangor, etc. R. Co. v. McComb, 60 Me. 290; Tucker v. Massachusetts C. R., 118 Mass. 546; Watson v. Pittsburgh, etc. R. Co., 37 Pa. St. 469; Cleveland, etc. R. Co. v. Ball, 5 Ohio St. 569; Wilson v. Rockford, etc. R. Co., 59 Ill. 273; Little Rock, etc. Ry. Co. v. Allen, 41 Ark. 431; Commissioners of Dickinson Co. v. Hogan, 39 Kan. 606; Grand Rapids, etc. R. Co. v. Chesebro, 74 Mich. 466; Missouri P. Ry. Co. v. Hays, 15 Neb. 224; St. Louis, etc. R. v. Anderson, 39 Ark. 167; McReynolds v. Burlington, etc. Ry. Co., 106 Ill. 159; Chicago, etc. R. Co. v. Bowman, 122 id. 595; St. Louis, etc. R. Co. v. McAuliff, 43 Kan. 185; Commissioners v. Harkleroads, 62 Miss. 807; Pittsburgh, etc. Ry. Co. v. McCloskey, 110 Pa. St. 436; Same v. Bentley, 88 id. 178.

[2] Chicago, etc. R. Co. v. Bowman, 122 Ill. 595.

[3] Cummins v. Des Moines, etc. Ry. Co., 63 Iowa, 397.

[4] Ham v. Wisconsin, etc. Ry. Co., 61 Iowa, 716; Dudley v. Minnesota & N. Ry. Co., 77 id. 408; Kansas City & E. Ry. Co. v. Kregelo, 32 Kan. 608; Leroy & W. R. Co. v. Ross, 40 id. 598; Blue Earth Co. v. St. Paul, etc. R. Co., 28 Minn. 503; Bowen v. Atlantic, etc. R. Co., 17 S. C. 574.

[5] Cedar Rapids, etc. Ry. Co. v. Raymond, 37 Minn. 204.

[6] Pittsburgh, etc. R. Co. v. Rose, 74 Pa. St. 363.

Where a statute prohibited the erection of new buildings within five feet of the existing street line and the owner built that distance back

he is not injured by the laying out of streets or highways upon it; his cause of complaint has its foundation in the opening of them. Where a street is opened through land the injury to the latter is to be estimated without reference to the fact that an unopened street is laid out over the same land. If the latter street shall be opened the damages resulting will be ascertained with regard to the physical condition of the land as it may then be.[1]

§ **1067. Same subject.** Where a part of the owner's land was liable to be washed and to cave off where there was a [438] bank, and the sand drifted from the road to the injury of the adjoining land, and these facts resulted unavoidably from the building of a railroad in a suitable and proper manner, this loss was considered in estimating the depreciation from building the road.[2] So where the right of way for a railroad ran through a farm so as to sever a strip of about two acres from the body of the farm, thus rendering the strip useless for farming purposes, it was held that while compensation could not be demanded for such strip, it not being taken, yet it would form an element in estimating the damages the owner would sustain, if any, by the construction and operation of the road.[3] The owner of land over which a railroad sought to condemn a right of way may recover for loss of the beneficial use of a spring of water from which he is thus cut off,[4] and for injury to riparian rights generally;[5] but not for the loss of a mere privilege which he enjoys in common with the

therefrom and in a recess between two buildings standing evenly with the former line of the street, the inconvenience to occupants of the new building caused by its situation and the difficulty of procuring tenants for it were held to be facts affecting the value of the land at the time it was injured. But the assessment was to be made in view of the requirement of the statute as to the erection of other buildings and on the assumption that at some indefinite future time there will be an appreciation in the value of the property by reason of the removal of the projecting portions of the adjoining buildings. Philadelphia v. Linnard, 97 Pa. St. 242.

[1] Opening of Negley Avenue, 146 Pa. St. 456.

[2] Dearborn v. Boston, etc. R. Co., 24 N. H. 179; Colvill v. St. Paul, etc. R. Co., 19 Minn. 282.

[3] Wilson v. Rockford, etc. R. Co., 59 Ill. 273; Springfield & M. Ry. v. Rhea, 44 Ark. 258; Commissioners v. Harkleroads, 62 Miss. 807.

[4] Peoria, etc. R. Co v. Bryant, 57 Ill. 473; Winklemans v. Des Moines N. Ry. Co., 62 Iowa, 11.

[5] Organ v. Memphis, etc. R. Co., 51 Ark. 235, 272; Drury v. Midland R., 127 Mass. 571; Trowbridge v. Brook-

public.[1] So a party who had procured fixtures for a water-cure establishment, which were rendered useless to him in consequence of taking a part of his premises for a public improvement, was entitled, in addition to other damages, to recover his loss on such fixtures.[2] In estimating the value of fixtures in a building which has been appropriated they are considered only so far as they enhance the value of the estate for any purpose for which it might be used.[3] If taking a part of a tract of land destroys a water-power on the residue, damages therefor may be assessed.[4] If water which would otherwise come to a mill is diverted therefrom, the mill-owner's damages are measured by the difference between the fair market value of his mill with all the water rights appurtenant thereto, and its value as diminished by the decrease in the quantity received, with interest from the time of the first diversion.[5] Where three tracts of land in a body are owned in severalty by three persons, and pursuant to a contract between them the whole was used in common, and such tract was more valuable because it was so used, such owner was entitled to damages resulting from the separation of the land with water on it from the land used as pasture.[6] The party who has exercised the right of eminent domain and has thereby cut off a water supply may show that other sources of supply are open to the person who claims damages, and the expense at which they can be utilized,[7] or that the water diverted was practically worthless.[8] If a brook is converted into a sewer, a mill-owner upon a river into which the brook empties and who has used its water for power may recover for the loss sustained by the depreciation in the quality of the water.[9]

line, 144 id. 139; Washburn & M. Manuf. Co. v. Worcester, 153 id. 494.

[1] Gorgas v. Philadelphia, etc. R. Co., 144 Pa. St. 1.

[2] Price v. Milwaukee, etc. R. Co., 27 Wis. 98; Chicago, etc. Ry. Co. v. Ward, 128 Ill. 349.

[3] Allen v. Boston, 137 Mass. 319; Finn v. Providence Gas & W. Co., 99 Pa. St. 631.

[4] Lake Superior, etc. R. Co. v. Greve, 17 Minn. 323; Barclay R. etc. Co. v. Ingham, 36 Pa. St. 194.

[5] Cowdery v. Woburn, 136 Mass. 409.

[6] Commissioners v. Labore, 37 Kan. 480. See Gorgas v. Philadelphia, etc. R. Co., 144 Pa. St. 1.

[7] Illinois, etc. R. & C. Co. v. Switzer, 117 Ill. 399.

[8] Kiernan v. Chicago, etc. Ry. Co., 123 Ill. 188.

[9] Washburn & M. Manuf. Co. v. Worcester, 153 Mass. 494.

§ 1068. Same subject. The commissioners or jury in determining just compensation for taking land for a railroad may always take into consideration all incidental loss, inconvenience and damage, present and prospective, which will, or may be reasonably expected to, result from the construction and operation of the road in a legal manner, so far as they are special to the owner of the land not taken. Accordingly they may always take into consideration the exact condition in which the road may be when they make the assessment;[1] except so far as it is the result of an improper construction of the improvement, when it must be recovered for in an independent proceeding or action.[2] All injury sustained otherwise up to the time the assessment is made should be compensated for in the award.[3] If a railroad company does not provide farm crossings under the statute, the damages to the land-owner are to be assessed in view of that fact, and are not to be reduced because they have been furnished at his request. In such a case his right to use them depends upon the will of the company.[4] The owner of flats crossed by a railroad bridge having raised the flats around and under the bridge within the location of the road, but without the consent of the proprietor thereof, was entitled to recover by way of [439] damages against such proprietor for so much of the expense of such raising and filling up as was necessary to enable him to enjoy his other lands, provided such necessity was caused by the location and construction of the railway.[5] Land was taken by a city to widen a highway after such land had been previously filled in by the owner in pursuance of an order of the municipal authorities to abate a public nuisance; the measure of damages was held to be the value of the land as it stood at the time of the taking; the expense incurred in filling it entering into the measure only so far as it

[1] Alloway v. Nashville, 88 Tenn. 510; Shenandoah V. R. Co. v. Shepherd, 26 W. Va. 672; Missouri, etc. R. Co. v. Haines, 10 Kan. 439; Hayes v. Ottawa, etc. R. Co., 54 Ill. 373; Wichita & W. R. Co. v. Kuhn, 38 Kan. 104; Chicago, etc. R. Co. v. Bowman, 122 Ill. 595.

[2] Neilson v. Chicago, etc. Ry. Co., 58 Wis. 516; Lyon v. Green Bay, etc. Ry. Co., 42 id. 538; Alloway v. Nashville, 88 Tenn. 510.

[3] Newgass v. Railway Co., 54 Ark. 140.

[4] Cedar Rapids, etc. Ry. Co. v. Raymond, 37 Minn. 204; Drury v. Midland R., 127 Mass. 571, 584.

[5] Commonwealth v. Boston, etc. R. Co., 3 Cush. 25.

had effect in increasing the value of the land.[1] If property has been put to a particular use or business, and its productive value is chiefly therefor, and the taking of part impairs that use, it is sometimes an important fact and may be proved to enhance damages according to the depreciation caused by destroying or impairing such business or use. Thus where the construction and use of a railroad over plaintiff's land had the effect of destroying the business of a mill thereon by driving away custom, it was held a ground of damage. It appeared that after the road was built and operated that customers ceased to carry grain there to be ground, and at least one-half of the custom had fallen off. The reason given was simply the danger in going to the mill with horses and teams, owing to the location of the road with reference to the mill.[2] The supreme court of Pennsylvania has recently emphasized the rule previously announced there, that such facts as these are relevant only for the purpose of showing that the loss of custom detracted from the value of the land, and to what extent. There cannot be a recovery for the loss of custom as a specific item of claim, because the logical application of such a rule might enlarge the recovery beyond the value of the land.[3] This is not harmonizable with the view taken in Michigan. Judge Campbell, writing for the court, said: "Both of the appellants were using their property in lucrative business, in which the locality and its surroundings have some bearing on its value. Apart from the money value of the property itself they were entitled to be compensated so as to lose nothing by the interruption of their business and its damage by the change. A business stand is of some value to the owner of the business, whether he owns the fee of the land or not, and a diminution of business facilities may lead to serious results. There may be cases when the loss of a particular location may destroy business altogether for want of access to another that is suitable for it. Whatever damage is suffered must be compensated. Appellants are not legally bound to suffer for

[1] Squire v. Somerville, 120 Mass. 579.

[2] Western P. R. Co. v. Hill, 56 Pa. St. 460; Dupuis v. Chicago, etc. Ry. Co., 115 Ill. 97; Jacksonville & S. Ry. Co. v. Walsh, 106 id. 253.

[3] Pittsburgh, etc. Ry. Co. v. Vance, 115 Pa. St. 325; Miller v. Windsor Water Co., 23 Atl. Rep. 1132.

petitioner's benefit. Petitioner can only be authorized to oust them from their possession by making up to them the whole of their losses."[1]

§ 1069. **Same subject.** Where a strip of land appropriated by defendant for the purpose of its railway was part of a larger tract used and occupied as an entirety as a site for a brick yard, it was ruled that evidence was admissible to show that by the appropriation the plaintiffs were prevented from enlarging their works, and that, in consequence, the value of the brick yard as it was became depreciated; that it was proper to consider as an element of damage the effect upon the value of the premises, and upon the convenience of conducting the plaintiffs' business thereon, the circumstance that, in consequence of the railway, the plaintiffs were put to the necessity of frequently, [440] for instance, one hundred times a day, crossing the track in hauling clay to their pits.[2] So it has been held in Wisconsin that evidence of the business to which the plaintiff's adjoining property was devoted, and of the effect upon such business of the taking of the property in question, was properly admitted as bearing upon the question of damages; the court having duly instructed the jury that the proper measure of such damages was the value of the land condemned and the diminution in market value of the other property.[3] Where part of a lot was condemned and there was annexed to it as appurtenances a right of way over the other part, a coal office and scales and a side track in an adjacent alley, and these formed the principal elements of value of the condemned part, it was held that the value of the appurtenances was to be regarded.[4] A railroad company built its road along the street of a town under an ordinance granting the right of way upon condition that the company should pay all damages that might accrue to property owners on such street by reason of the construction of the road. And it was held that the company was liable to a property owner for whatever deterioration in

[1] Grand Rapids & I. R. Co. v. Weiden, 70 Mich. 390; Commissioners v. Moesta, 51 N. W. Rep. 903. See Detroit v. Beecher, 75 Mich. 454, 467, and Kentucky cases cited in § 1064, *ante*. See, also, Patterson v. Boston, 23 Pick. 425.

[2] Sherwood v. St. Paul, etc. R. Co., 21 Minn. 127.

[3] Driver v. Western U. R. Co., 32 Wis. 569; King v. Minneapolis U. Ry. Co., 32 Minn. 224.

[4] Chicago, etc. Ry. Co. v. Ward, 128 Ill. 349.

value his real estate may have undergone in consequence of laying the railroad track, and for damages for interruption of his business during such time as it would necessarily require to provide another equally eligible place to remove to, and that the damages to his business during such time should be ascertained by proof of the probable reasonable profits which might have been made had there been no interruption of it. In that case, if he chose to remain and submit to the interruption and loss of profits, he would, nevertheless, be entitled to recover as damages the necessary cost to avoid such loss by a removal.[1]

If a recovery may be had for property injured as well as that taken the owner and lessee may join in an action to recover for the injury and the taking. The latter need not show that he holds under a written lease; his right is established by proof of a tenancy from year to year at a fixed annual rent. In estimating his damages it is proper to consider the facts that the removal of the business was made necessary, the depreciation in the value of the leasehold and of the machinery and personal property used in the business as affected by the removal. The difference between the value of the machinery in connection with the business conducted where it was and its value after removal for the same or other use is an element of damage.[2] The fact that the tenancy would have terminated at the end of the year and the tenant's removal from the premises been thereby necessitated will not be assumed.[3] If the tenant's estate is limited to a particular use, and the appliances used by him in conducting business are rendered useless by an entry thereon, and it becomes necessary to reconstruct them, and thereby the expense of doing business is increased and the profits are diminished by waste, all these matters may be proven as descriptive of the injury sustained and as affecting the market value of the lease, but not as specific items of damage.[4]

[1] St. Louis, etc. R. Co. v. Capps, 72 Ill. 188; S. C., 67 Ill. 607; Chicago, etc. Ry. Co. v. Hock, 118 id. 587 (cost and inconvenience of removal). See Virginia, etc. R. Co. v. Henry, 8 Nev. 165.

[2] Getz v. Philadelphia & R. R. Co., 105 Pa. St. 547; Philadelphia & R. R. Co. v. Getz, 113 id. 214.

[3] Philadelphia & R. R. Co. v. Getz, *supra*.

[4] Kersey v. Railroad Co., 133 Pa. St. 234.

§ 1070. Same subject. If a building stands in the way of a road, and it is necessary to destroy it, its value must be paid, estimating it as a building, and not the materials composing it;[1] but should the owner appropriate any of the *debris* remaining after its removal his claim of damages will be lessened *pro tanto*.[2] Among the inconveniences resulting to a farmer from a railroad crossing his farm may be considered the fact that he is deprived of access to a river, and excluded from its bank for the purpose of fishing, and from a fishing ground.[3] Under a statute providing that in estimating damages sus- [441] tained "regard should be had to all the damages done to the party, whether in taking his property or in injuring it in any manner," the owner of part of a building was held entitled to recover for the loss of support and of shelter caused by removing from his part the portion he did not own.[4] Where the erection of a railroad bridge across a river in a city causes permanent injury or depreciation in the value of a lot in the immediate vicinity which is used for dock purposes, such injury is an element of damages in a suit by the owner, and it is proper to allow him to show such damages by proving the value of his property before the erection of the bridge and its value afterwards; or, in other words, to prove how much less the property would sell for in consequence of building the bridge.[5] Where the taking is for a canal, its leakage may be considered on the question of damages;[6] and also the increased danger of overflowing lands not taken.[7] Aggravations connected with the entry and use of land for public purposes are not to be considered with a view to damages beyond just compensation.[8] If the condemning party has changed its

[1] Finn v. Providence Gas & W. Co., 99 Pa. St. 631.

[2] Lafayette, etc. R. Co. v. Winslow, 66 Ill. 219.

[3] Boston & M. R. v. Montgomery, 119 Mass. 114.

[4] Marsden v. Cambridge, 114 Mass. 490.

[5] Chicago, etc. R. Co. v. Stein, 75 Ill. 41; Durham & N. R. v. Trustees of Bullock Church, 104 N. C. 525, applying the rule to depreciation of church property for religious uses.

[6] James River Co. v. Turner, 9 Leigh, 313; Van Schoick v. Delaware & R. Canal Co., 20 N. J. L. 249; Denver City I. & W. Co. v. Middaugh, 12 Colo. 434.

[7] Chesapeake & O. Canal Co. v. Grove, 11 Gill & J. 398.

[8] Lafayette, etc. R. Co. v. Winslow, 66 Ill. 219; King v. Iowa, etc. R. Co., 34 Iowa, 458; Cummins v. Des Moines, etc. Ry. Co., 63 id. 397; Fremont, etc. R. Co. v. Whalen, 11 Neb. 585; Pittsburgh, etc. Ry. Co. v. Mc-

plan of constructing its works in accordance with the request of the property owner, he cannot recover for such damage as is sustained in consequence of the change over that which would have accrued but for it.[1]

§ 1071. Same subject; remote damages. The law does not afford indemnity for all losses occasioned by the laying and use of a railroad, or the making of any public improvement, especially for such as are remote and consequential, or imaginary or fanciful.[2] They are damages not caused by the taking of land, but by the change which the improvement introduces into the course of business. The law affords no protection against or compensation for new competitions;[3] nor against changes introduced by time and the progress of the age.[4] Nor does it afford relief against such inconveniences as the whole community suffer alike, in a greater or less degree, and which are to be borne in consideration of the greater general good to be acquired.[5] A party, a part of whose lands has been taken for public use, cannot have his damages increased on account of the loss of a gratuitous privilege which he has been enjoying by the sufferance of another.[6] It has been held in Illinois that the probability of damages from crossing a railroad, which runs through a farm, to teams and members of the owner's family is so uncertain as not to form a proper basis for consideration.[7] There are, however, cases in other states, and also in Illinois, which recognize such danger as an

Closkey, 110 Pa. St. 436, 443; Wabash, etc. Ry. Co. v. McDougall, 126 Ill. 111.

[1] Kansas City, etc. R. Co. v. Farrell, 76 Mo. 183.

[2] Minnesota, etc. R. Co. v. Doran, 17 Minn. 188; First Parish v. Middlesex, 7 Gray, 106; Troy, etc. R. Co. v. Northern T. Co., 16 Barb. 100; Green v. State, 73 Cal. 29; Detroit v. Beecher, 75 Mich. 454, 467; Commissioners v. Harkleroads, 62 Miss. 807; San Diego Land & T. Co. v. Neale, 78 Cal. 63.

[3] Fuller v. Edings, 11 Rich. 239; Cincinnati, etc. R. Co. v. Zinn, 18 Ohio St. 417; Adden v. White M. R., 55 N. H. 415; Petition of Mount W. Road Co., 35 N. H. 146; Edmands v. Boston, 108 Mass. 535; Schuylkill Co. v. Freedley, 6 Whart. 109; Organ v. Memphis, etc. R. Co., 51 Ark. 235; Moses v. Sanford, 11 Lea, 731; Shenandoah V. R. Co. v. Shepherd, 26 W. Va. 672; Caledonian Ry. Co. v. Walker's Trustees, 7 App. Cas. 259. See Patterson v. Boston, 23 Pick. 425.

[4] Id.

[5] Id.

[6] Hatch v. Cincinnati & I. R. Co., 18 Ohio St. 93; Ranlet v. Concord R. Corp., 62 N. H. 561; Clapp v. Boston, 133 Mass. 367.

[7] McReynolds v. Burlington, etc. Ry. Co., 106 Ill. 152.

element of depreciation in the value of a farm.[1] The expense and inconvenience of removing personal property from land taken are not to be considered if there is no interference with business.[2] But it is otherwise where there is liability for property damaged.[3] The increased exposure of property to injury from evil-disposed persons is not to be regarded,[4] nor the loss of a mere privilege granted by the railroad company, but not secured by contract.[5]

§ **1072. Same subject; expenditures to lessen loss.** Where part of a tract of land is taken for public use, and its severance and the public use of it necessitates any new expenditure to protect or maintain the ordinary use of the residue, such expenditures or the necessity therefor is an element of damage. The owner has a right to recover the amount so [**443**] expended or required to be expended on the ground that the value of his premises is diminished accordingly.[6] Thus, the necessity of maintaining fences along the line of a railroad is a recognized item of damage.[7] The recovery, however, will be limited to such fences,[8] and such amounts therefor as are reasonably necessary. The amount expended to

[1] *Ante*, § 1066 *et seq.*

[2] Ranlet v. Concord R. Corp., 62 N. H. 561; Central P. R. Co. v. Pearson, 35 Cal. 247; In re New York, etc. R. Co., 35 Hun, 306; S. C., id. 633; Edmands v. Boston, 108 Mass. 535.

[3] Getz v. Philadelphia & R. R. Co., 105 Pa. St. 547.

[4] Kansas City & E. R. Co. v. Kregelo, 32 Kan. 608.

[5] Wabash, etc. Ry. Co. v. McDougall, 126 Ill. 111.

[6] Commissioners v. Harkleroads, 62 Miss. 807.

[7] St. Louis, etc. R. Co. v. Anderson, 39 Ark. 167; Butte Co. v. Boydston, 64 Cal. 110; Stone v. Heath, 135 Mass. 561; White v. Foxborough, 151 id. 28; Baltimore, etc. R. Co. v. Lansing, 52 Ind. 229; Montmorency Road v. Rock, 41 Ind. 264; White Valley, etc. R. Co. v. McClure, 29 Ind. 536; Tonica, etc. R. Co. v. Unsicker, 22 Ill. 221; Rock Island, etc. R. Co. v. Lynch, 23 Ill. 645; Bland v. Hixenbaugh, 39 Iowa, 532; Jones v. Chicago, etc. R. Co., 68 Ill. 380; Winona, etc. R. Co. v. Waldron, 11 Minn. 515; Louisville, etc. R. Co. v. Glazebrook, 1 Bush, 325.

In Pennsylvania the cost of fencing is not recoverable as a distinct item, but it may be considered in so far as the necessity of it detracts from the value of the land. Curtin v. Mittany V. R. Co., 135 Pa. St. 20; Pittsburgh, etc. Ry. Co. v. McCloskey, 110 id. 436; Pennsylvania R. Co. v. Bunnell, 81 id. 427.

[8] Detroit v. Beecher, 75 Mich. 454, 466.

It is for the jury to say whether land is adapted to any purpose which makes the fencing of it profitable. Colusa Co. v. Hudson, 85 Cal. 633.

erect them is not the measure of damages.[1] But where [444] a railroad company taking lands for its road is required by law to fence it, or has already done so, nothing will be allowed as damages against it for building a fence;[2] for in the assessment of damages for property taken for public use it is always assumed that the appropriation will be made according to law; that the property so appropriated will be used in a legal manner, and that all legal obligations connected with such use will be fulfilled; and if the fact is or turns out otherwise another remedy is available and must be resorted to.[3] If, however, the fencing is not required to be done until a certain time after the road is completed, a jury may consider the damage to a farm which will probably result from the absence of fences.[4] The probable injury to animals or damage which may otherwise result are not to be conjectured; but if, as the result of the appropriation of land, other land remains unfenced, and its value either in the market, or for the use to which it is devoted by the owner or to which it is adapted, is depreciated, such depreciation is an element of damage in determining the compensation to be paid for land not taken.[5] If farm crossings will be necessary on a railroad, and the law does not impose upon the company the duty of their construction or maintenance, the want thereof, or any expense necessary to be incurred by the owner to secure such a [445]

[1] Newgass v. Railway Co., 54 Ark. 140; Bland v. Hixenbaugh, 39 Iowa, 532; Milwaukee, etc. R. Co. v. Eble, 3 Pin. 334; Louisville, etc. R. Co. v. Glazebrook, 1 Bush, 325. But see North E. R. Co. v. Smeath, 8 Rich. 185, in which it appeared that a railroad had been laid through a large tract of land, to run partly through cultivated and partly through wood land; that on the latter cattle were kept. No allowance for fencing was made, though it was held that the railroad company was not bound to fence its road; and though it was shown that its trains had been very destructive of cattle, and the company had latterly refused to pay for them.

[2] Id.; March v. Portsmouth, etc. R. Co., 19 N. H. 372; California S. R. Co. v. Southern P. R. Co., 67 Cal. 59.

[3] Bangor, etc. R. Co. v. McComb, 60 Me. 290; Fleming v. Chicago, etc. R. Co., 34 Iowa, 353; Troy, etc. R. Co. v. Northern T. Co., 16 Barb. 100; Chicago, etc. R. Co. v. Springfield, etc. R. Co., 67 Ill. 142; Colcough v. Nashville, etc. R. Co., 2 Head, 171; Lyon v. Green Bay, etc. R. Co., 42 Wis. 543; Southside R. Co. v. Daniel, 20 Gratt. 344; St. Louis, etc. Ry. Co. v. North, 31 Mo. App. 345.

[4] St. Louis, etc. R. Co. v. Kirby, 104 Ill. 345; Centralia & C. R. Co. v. Rixman, 121 id. 214.

[5] Centralia & C. R. Co. v. Brake, 125 Ill. 393.

convenience, or to lessen the injury from its absence, may be considered on the question of damages.[1] The expense of erecting and maintaining a retaining wall for the protection of property adjacent to railroad excavations may be allowed in addition to other damages. And this allowance will not be prevented by tender of a stipulation of the condemning party to erect and keep up such a wall.[2] But if the liability of the property owner for subsequent expense is conditional, as where it depends upon the action of the public authorities in the exercise of their power to require sidewalks to be laid on a newly-opened street, one-half of the cost of which he is chargeable with, such expense is not an element of damage.[3] It is all the owner has a right to do to prove the cost of making the walk and "recover any damages for the diminished value of the remaining land which might have been shown to have been occasioned by the probability that a sidewalk would afterwards be built, involving expense to the owner in the erection or care of it. . . . If the liability thereafter to build and keep clean a sidewalk in the street as laid out did not depreciate the value of his remaining land, there is no reason why he should recover, as an independent element of damages when his land was taken, the amount subsequently assessed upon him for the cost of such sidewalk, or the expense he might incur in its care."[4] It is presumed that, as a general rule, the condemning party is not liable for the counsel fees of the other.[5] But if condemnation proceedings have been abandoned, on their reinstatement such fees, incurred in the original proceeding, have been held an element of the damages.[6] In Pennsylvania all such matters as the foregoing

[1] Peoria, etc. R. Co. v. Sawyer, 71 Ill. 361; Atchison & N. R. Co. v. Gough, 29 Kan. 94.

If such crossings are voluntarily constructed or are part of the plan of a railroad as shown on the map and profile thereof, and are considered by the commissioners in making their award, the court and jury on appeal therefrom should assess the damages with reference to the plan because the company is bound by it to construct such crossings. Kansas City & E. R. Co. v. Kregelo, 32 Kan. 608.

[2] Thompson v. Milwaukee, etc. R. Co., 27 Wis. 93; Commonwealth v. Boston, etc. R. Co., 3 Cush. 25. *Contra*, Laflin v. Chicago, etc. R. Co., 33 Fed. Rep. 415.

[3] Cushing v. Boston, 144 Mass. 317; Detroit v. Beecher, 75 Mich. 454, 466.

[4] Cushing v. Boston, *supra*.

[5] San Jose & A. R. Co. v. Mayne, 83 Cal. 566.

[6] Gibbons v. Missouri P. Ry. Co.,

may be considered for the sole purpose of ascertaining the market value of the property before it was taken and unaffected by the taking and such value as affected by it.[1]

§ 1073. Same subject. Where one railroad company acquired by legal condemnation the right to run its road through a high embankment of another, and on a grade twenty feet below its track, it was held under no legal obligation to erect or maintain a bridge to support the track of such other company; and, therefore, proof of what it would cost to build such bridge and keep the same in repair was not deemed proper in the assessment of damages. The company whose property was thus invaded was entitled to have such sum for damages as would enable it to construct and keep in repair all such works as should be necessary to maintain its track in a safe and secure condition, and also for all resulting incidental loss and inconvenience.[2] If a building must be removed in consequence of the taking of the land on which it stands, the expense of the removal will be included in the damages, and also the value of the right, if any exists, to have the house remain on the land until such right would expire.[3] And expenditures necessary to restore structures upon adjacent premises to their former condition relatively may also be considered,[4] as well as loss of time in such removal.[5] In the assessment of damages allowed by law for laying out a highway at a grade below an adjoining house and land the cost of cutting down the land and of building a basement under the house, with a door and interior ascent to the house, is an admissible element if such alterations are found to be the most reasonable and economical means of restoring the estate to its former value. The damages in such a case are not confined to the injury caused to the right of lateral support of [**446**]

40 Mo. App. 146. See Minneapolis & N. R. Co. v. Woodworth, 32 Minn. 452.

[1] Chambers v. South Chester, 140 Pa. St. 510.

[2] Chicago, etc. R. Co. v. Springfield, etc. R. Co., 67 Ill. 142; S. C., 96 id. 274.

[3] Tufts v. Charlestown, 4 Gray, 537; White v. Foxborough, 151 Mass. 28; Benton v. Brookline, id. 250.

[4] Chase v. Worcester, 108 Mass. 60; Hyde v. Middlesex, 2 Gray, 267; White v. Foxborough, 151 Mass. 28; Cummins v. Des Moines, etc. Ry. Co., 63 Iowa, 397.

[5] Hannibal B. Co. v. Schaubacher, 57 Mo. 582.

the soil exclusive of the building, but include all the damage to the property.[1]

§ 1074. Basis for estimating value of land. In ascertaining the damages to an owner for taking his land or a part of it for a railroad or other public use its value should not be limited by estimates exclusively for any particular purpose. The jury are to consider its market value before and after the alleged injury, and in doing this everything which gives it intrinsic value is to be taken into consideration, and its capabilities for any particular use to which it may be put.[2] If land taken for a right of way has a mine under its surface that fact may be considered if it adds to the market value of the land, even though the mine has never been worked; so of a water-power which has remained unutilized.[3] The owner may have damages for being prevented from removing minerals under the right of way.[4] The jury, however, is not at liberty to make a special allowance for the value of unopened mines. Their existence is only material so far as they affect the market price of the property.[5] The rule may be expressed

[1] Hartshorn v. Worcester, 113 Mass. 111.

[2] Young v. Harrison, 17 Ga. 30; Shenango, etc. R. Co. v. Braham, 79 Pa. St. 447; Dwight v. Hampden, 11 Cush. 201; Dickenson v. Fitchburg, 13 Gray, 546; Colvill v. St. Paul, etc. R. Co., 19 Minn. 283; Carter v. Same, 22 Minn. 342; White v. Charlotte, etc. R. Co., 6 Rich. 47; Mississippi B. Co. v. Ring, 58 Mo. 491; Matter of Furman St., 17 Wend. 649; Burt v. Wigglesworth, 117 Mass. 302; Somerville, etc. R. Co. v. Doughty, 22 N. J. L. 495; Regina v. Brown, 36 L. J. (Q. B.) 322; Little Rock, etc. Ry. v. McGehee, 41 Ark. 202; L. R. Junction Ry. v. Woodruff, 49 id. 381; Muller v. Southern, etc. Ry. Co., 83 Cal. 240; Johnson v. Freeport, etc. Ry. Co., 111 Ill. 413; Chicago & E. R. Co. v. Blake, 116 id. 163; Hyde Park v. Washington Ice Co., 117 id. 233; Calumet River Ry. Co. v. Moore, 124 id. 329; Moulton v. Newburyport Water Co., 137 Mass. 163; Cedar Rapids, etc. Ry. Co. v. Ryan, 37 Minn. 38; Montana Ry. Co. v. Warren, 6 Mont. 275; Pittsburgh & W. R. Co. v. Patterson, 107 Pa. St. 461; Alloway v. Nashville, 88 Tenn. 511; Stinson v. Chicago, etc. Ry. Co., 27 Minn. 284; Shenandoah V. R. Co. v. Shepherd, 26 W. Va. 672; Watson v. Milwaukee & M. Ry. Co., 57 Wis. 332; Laflin v. Chicago, etc. R. Co., 33 Fed. Rep. 415; Great Falls Manuf. Co. v. United States, 18 Ct. of Cls. 160, 198; Harris v. Schuylkill, etc. R. Co., 141 Pa. St. 242.

[3] Haslam v. Galena R. Co., 64 Ill. 353; Montana Ry. Co. v. Warren, 6 Mont. 275; Louisville, etc. R. Co. v. Ryan, 64 Miss. 399; Chicago, etc. R. Co. v. Catholic Bishop, 119 Ill. 525; Railway v. Woodruff, 49 Ark. 381.

[4] Barnsley Canal Co. v. Turbill, 13 L. J. (Ch.) 406; Proud v. Bates, 34 L. J. (Ch.) 406; Fletcher v. Great Western R. Co., 29 L. J. (Exch.) 253.

[5] Searle v. Lackawanna, etc. R. Co., 33 Pa. St. 57.

in various ways. Thus it has been said that any existing facts which enter into the value of land in the public and general estimation, and tend to influence the minds of sellers and buyers, may be considered.[1] Compensation may be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future.[2] It is estimated upon a fair consideration of the land, the extent and condition of its improvements, its quantity and productive qualities, and the uses to which it may reasonably be applied, taken with the general selling price of lands in the neighborhood. The price which, upon full consideration of the matters stated, the judgment of well-informed and reasonable men will approve may be regarded as the market value of the land.[3] If the owner has adopted a peculiar mode of using the land taken or injured by which he derives profit from it, he must be compensated for its loss or damage on the basis of its value for such use. "It is the value which he has," said the court, where a training-track was crossed by a railroad, "and of which he is deprived, which must be made good by compensation."[4] Where land taken had been used for market gardening it was held proper to show the value of the fertilizers put upon it.[5] If grading has been done on land which is desired by a railroad company and abandoned by the party who did it the land-owner may show its value.[6] But the cost of making such a grade or the benefit which it may be to the railroad company is not the proper measure of com-

[1] Russell v. St. Paul, etc. Ry. Co., 33 Minn. 210.

[2] Boom Co. v. Patterson, 98 U. S. 403; Amoskeag Manuf. Co. v. Worcester, 60 N. H. 522; Portland & R. R. Co. v. Deering, 78 Me. 61; Ohio Valley Ry. & T. Co. v. Kerth (Ind.), 39 N. E. Rep. 298.

[3] Clark, J., in Pittsburgh, etc. Ry. Co. v. Vance, 115 Pa. St. 325, 331.

[4] St. Louis, etc. R. Co. v. Kirby, 104 Ill. 345. In such a case it is erroneous to assess damages on the theory that the destruction of the track involves the loss of business of raising stock on the farm and of the stock already there. The correct basis is said to be the cost of making another track on the premises which are not affected by the road. In re New York, etc. R. Co., 29 Hun, 1. If land is damaged for church uses the compensation should be measured accordingly. Durham & N. R. v. Trustees of Bullock Church, 104 N. C. 525.

[5] Chicago & E. R. Co. v. Jacobs, 110 Ill. 414.

[6] De Boul v. Freeport, etc. R. Co., 111 Ill. 499.

pensation. The consideration is the exact market value of the land upon which the grading has been done for whatever purpose the land might or could be used. If the grade can be used for railroad purposes and the land is more valuable for such purposes than for any other, its enhanced value to a railroad company should be regarded.[1] If the owner is restricted by statute or the conveyance under which he holds, or in any other binding way, to a particular use of his land, the compensation due him will be measured by its value for any use to which he might apply it.[2] If a future possible use depends upon the volition of a third person over whose action the land-owner has no control, such use must not enter into the estimate.[3] It has been ruled in Iowa, in a case in which evidence was offered to show how many residence lots are ordinarily contained in an acre of land and what such lots would probably sell for on the land in question, that such evidence was improper. "The question was what was" the land "worth in the condition it then was, and not what its prospective value was, or what it would be if it had been laid out into city lots."[4]

In Maine it is provided by statute that "when buildings or fences have existed more than twenty years fronting upon any way, street, lane or land appropriated for public use, the bounds of which cannot be made certain by any records or monuments, such buildings or fences shall be deemed the true bounds thereof." In ascertaining the quantity of land taken by a city when it orders such a building moved back from its location the measurement will be commenced on a line with the side of the main building, and not on a line with the cornice on its gable end.[5] But in Massachusetts it has been held

[1] Cohen v. St. Louis, etc. R. Co., 34 Kan. 158.

[2] In re Albany Street, 11 Wend. 149; Stebbing v. Metropolitan Board, 6 Q. B. 37; Allen v. Boston, 137 Mass. 319.

[3] Munkwitz v. Chicago, etc. Ry. Co., 64 Wis. 403.

[4] Everett v. Union P. R. Co., 59 Iowa, 243.

The mere hopes of a land-owner that his field may one day be built upon as city lots are not to be considered unless the probability of such an event, in the public mind, has in fact affected the fair marketable value of the land at the time of the proceeding. New York, etc. R. Co. v. Arnot, 27 Hun, 151. See Ohio Valley Ry. & T. Co. v. Kerth (Ind.), 30 N. E. Rep. 298.

[5] Farnsworth v. Rockland, 83 Me. 508.

where a deed described one of the boundaries of land as four feet from the side of a building, the extremest part, the edge of the eaves, was meant.[1]

§ 1075. Same subject; value for special purpose. The general rule that the value of property taken is not to be based upon its adaptability for a special purpose is not uniformly adhered to, and has recently been departed from in California, notwithstanding earlier cases to the contrary.[2] The property in question had no general market value, but was valuable in connection with the adjoining land of the condemning party for reservoir purposes. Its worth for such purpose was held to be the measure of its value.[3] In a subsequent case a highway was laid through land on which the owner had constructed a private road. The trial court excluded all evidence concerning the value of such road, and directed the jury to appraise the land as though no road was upon it. This was properly enough held erroneous. But the appellate court went so far as to make the value of the road to the condemning party the measure of compensation. "If a man had constructed a bridge across a stream on his own land, and for his private use, and if the county should lay out a highway to cross on that bridge, it would scarcely be contended that the county could condemn the bridge for the public use without paying its reasonable value. We do not see that there is any distinction in principle between the bridge in the case supposed and the defendant's graded road in this case. The grade is there. It must have cost something and is no doubt of some value. The county proposed to take it and use it as a part of the highway. If its existence will make the construction of the highway any less expensive, the county will get the benefit and ought to pay the value. The fact that defendant will have a public way in place of his private road is no answer to this proposition. In so far as the highway is a benefit to him he is chargeable, and has been charged, with the value of the benefit. If he contributed to the construction of the road an improvement in the shape of a mile or more of grading he is entitled to the value of that

[1] Millett v. Fowle, 8 Cush. 150.

[2] Gilmer v. Lime Point, 19 Cal. 47; Central P. R. Co. v. Pearson, 35 id. 247.

[3] San Diego Land & T. Co. v. Neale, 78 Cal. 63.

improvement."[1] It has been ruled by the New York supreme court that if land is peculiarly adapted for a certain purpose its owner may show that he has held it for that purpose, and its market value therefor is the measure of his right.[2] The view of the California court in the reservoir case is in direct issue with a recent Tennessee ruling. The latter court holds the general rule, and both on reason and authority occupies the stronger position.[3]

§ 1076. Compensation for wrong-doer's improvements. The numerous exceptions to the common-law rule that everything attached to the realty by one who had no right to the latter became part of it have been extended in recent times upon grounds of public policy so far as railroad companies are concerned. An entry by them in advance of the acquirement of the right to make it is not unlawful in the same sense as such an entry by an individual or a corporation which is not invested with the power of eminent domain.[4] Hence if such a company enters upon land with the consent of the life tenant or the person who appears to own it and erects a depot or other structures thereon without injuring the inheritance, the remainder-man or legal owner cannot, in a subsequently instituted proceeding for the condemnation of the property, recover the value of such improvements.[5] This is the rule where the entry is made without license.[6] If the land-owner

[1] Colusa Co. v. Hudson, 85 Cal. 633.

[2] In re New York, etc. Ry. Co., 27 Hun, 116. The general rule as stated in the preceding section is applied in other cases in New York. Black River & M. R. Co. v. Barnard, 9 id. 104; In re Boston, etc. Ry. Co., 22 id. 176.

[3] Alloway v. Nashville, 88 Tenn. 510. See Watson v. Milwaukee & M. Ry. Co., 57 Wis. 332, 355; Laflin v. Chicago, etc. Ry. Co., 33 Fed. Rep. 415.

[4] Jones v. New Orleans & S. R. Co., 70 Ala. 227; Justice v. Nesquehoning V. R. Co., 87 Pa. St. 28; Oregon Ry. & N. Co. v. Mosier, 14 Ore. 519.

[5] Chicago & A. R. Co. v. Goodwin, 111 Ill. 273; St. Johnsbury, etc. R. Co. v. Willard, 61 Vt. 134; Ellis v. Rock Island, etc. Ry. Co., 125 Ill. 82; Cohen v. St. Louis, etc. R. Co., 34 Kan. 158.

[6] Id.; Newgass v. Railway Co., 54 Ark. 140; Searl v. School District, 133 U. S. 553; Jacksonville, etc. Ry. Co. v. Adams, 28 Fla. 631; 10 South. Rep. 465; Greve v. First Division St. Paul & P. Ry. Co., 26 Minn. 66; Morgan's Appeal, 39 Mich. 675; Toledo, etc. R. Co. v. Dunlap, 47 id. 456; Lyon v. Green Bay Ry. Co., 42 Wis. 538; Justice v. Nesquehoning V. R. Co., 87 Pa. St. 28; California & P. R. Co. v. Armstrong, 46 Cal. 85; Louisville, etc. R. Co. v. Dickson, 63 Miss. 380; Jones v. New Orleans & S. R. Co., 70 Ala. 227; Oregon Ry. & N. Co. v.

is authorized to institute proceedings, by doing so he ratifies the selection made by the company and elects to take pay for the land used and for the damage done to that not taken. The value and damages are assessable as of the time possession was first taken.[1] These principles have no application where there is no authority to condemn the lands entered upon and improved;[2] and are not recognized in New York.[3]

§ 1077. Compensation affected by title and nature of interest taken. If land is held under restrictions in the deed as to the use which may be made of it, or the character of the improvements which may be put upon it, such restrictions affect the measure of recovery.[4] A railroad company is not obliged to take the entire width called for by its petition, and may ask for the adjustment of damages on a narrower strip than that therein described, if the whole width is not needed for its purposes.[5] Property already taken for public use is subject to be again condemned for a different one. A railroad may be crossed by a highway, and the easement for such crossing may be condemned by proceedings against the railway company, and the latter is entitled in some states to recover damages for such taking, subject, however, to its use for a railroad; for the expense of erecting and maintaining signs required by law at the crossing; for making and maintaining cattle-guards if necessary, and for flooring the crossing and keeping the planks in repair;[6] and also for any depreciation of the value of the company's land for the use to which it had been put.[7] In Minnesota, Ohio and Illinois the view

Mosier, 14 Ore. 519; Daniels v. C. I. & N. R. Co., 41 Iowa, 52. *Contra*, United States v. Land in Monterey Co., 47 Cal. 515.

[1] Cohen v. St. Louis, etc. R. Co., 34 Kan. 158.

[2] Price v. Weehawken Ferry Co., 31 N. J. Eq. 31.

[3] In re New York, etc. Ry. Co., 37 Hun, 317, and cases cited.

[4] Allen v. Boston, 137 Mass. 319; *ante*, § 1074.

[5] Peoria, etc. R. Co. v. Bryant, 57 Ill. 473.

[6] Old Colony, etc. R. Co. v. Plymouth, 14 Gray, 155; Commissioners v. Michigan C. R. Co., — Mich. —; 51 N. W. Rep. 447; Commissioners v. Detroit, etc. R. Co., id. 934; Grand Rapids v. Grand Rapids & I. R. Co., 58 Mich. 641; Chicago, etc. Ry. Co. v. Hough, 61 id. 507; Central R. Co. v. Bayonne, 51 N. J. L. 428; Kansas C. R. Co. v. Commissioners, 45 Kan. 716. See Kansas City v. Kansas City B. Ry. Co., 102 Mo. 633; 14 S. W. Rep. 808; Crossley v. O'Brien, 24 Ind. 325.

[7] Commissioners v. Detroit, etc. R. Co. (Mich.), 51 N. W. Rep. 934.

taken is that there can be no recovery of compensation for providing and maintaining cattle-guards and sign-boards at a crossing made by laying out a new street. The duty of making and maintaining crossings is devolved upon railroad companies for the protection of the public in the exercise of the police power, and it is competent to extend it to crossings which may become necessary by events occurring after a railroad is built. It is otherwise as to the planking of the roadway between the tracks; that is an incident of the new highway, and, independently of statute, the municipality laying it would find it necessary to make that convenience for travelers.[1] The railroad company's right to this compensation is not affected by the fact that its business will be increased by the opening of the new highway.[2] Where a highway is laid across a railroad the compensation for the land taken is to be awarded in view of the use which the company may be reasonably expected to make of it in the near future.[3] Where a common highway is laid over a turnpike road the owner of the latter will be entitled to recover damages. In apportioning them to the turnpike corporation against several towns the appraisers may take into consideration, along with the distance in each town, the value of the existing road with reference to the cost of construction and state of repair; but they cannot consider the greater ability of one town to pay, or the greater advantage which its inhabitants would receive from the free highway, and make these matters in part the basis of their apportionment.[4]

The condemnation will include everything on the land adapted to the proposed public use; thus, if land is taken for a way, and has already been used as such, the condemnation includes all things placed, fixed or existing upon it, adapted [447] to its use as a public way, such as gravel, stone or wood paving, plank, flag stones, bridges, culverts or lamp posts, and all works erected on or connected with it for use, or render-

[1] State v. District Court, 42 Minn. 247; State v. Shardlow, 43 id. 524; Railway Co. v. Sharpe, 38 Ohio St. 150; Chicago & N. Ry. Co. v. Chicago, 29 N. E. Rep. (Ill.) 1109. See Boston & A. R. Co. v. Greenbush, 5 Lans. 461; Portland & R. R. Co. v. Deering, 78 Me. 61.

[2] State v. Shardlow, 43 Minn. 524.

[3] Portland & R. R. Co. v. Deering, 78 Me. 61.

[4] Reed's Petition, 13 N. H. 381. See Troy v. Cheshire R. Co., 23 N. H. 83.

ing its use more safe and beneficial as a way.[1] Even in the ordinary cases of taking land for the first time for a public way, the proprietors have only the right to remove buildings, trees and fences, and generally things not adapted to its use as a way, or not required for the supply of materials necessary or useful in making or repairing the way.[2] If erections upon the land taken are of such a character as to become so incorporated therewith as to be regarded as part of it, they should be included in the appraisal.[3] Steps projecting from the door of a house over land taken for a highway are obstructions thereto, and must be removed by the owner of the land, and the expenses are to be included in the assessment of damages occasioned by such taking; so with the eave-spouts and bay-windows if they interfere with the public use of the entire limits of the highway.[4] Where the abutting owner takes title in fee to the center of a street and acquired it without reference to any original dedication which contemplated the future adoption of the street and the vesting of the fee thereof in the public, or in the absence of legislation in force when conveyances were made by former proprietors affecting their rights therein, he has property of value in the street in the degree of control resting in him as to the uses to which the street shall be put, and is entitled to substantial damages for the loss of the fee thereof, which are to be measured by its effect upon the value of his remaining property.[5]

§ 1078. Same subject; condemnation of railroad property. There is, as appears in the preceding section, some conflict of authority as to the right of a railroad company whose track is crossed by a highway subsequently laid out to recover the expense it necessarily incurs on that account. We will now consider the elements entering into the compensation due a company whose road is crossed at grade by the road of another company. The rule in Massachusetts is thus stated by Gray, C. J.: "A railroad corporation, across whose road another railroad or a highway is laid out, has the like right as individuals or bodies politic and corporate, owning lands or

[1] Central Bridge Co. v. Lowell, 15 Gray, 111.

[2] Id.; Brown v. Worcester, 13 Gray, 31.

[3] Id.

[4] Id.

[5] Buffalo v. Pratt, 131 N. Y. 293.

easements, to recover damages for the injury occasioned to its title or right in the land occupied by its road, taking into consideration any fences or structures upon the land, or changes in its surface absolutely required by law, or in fact necessary to be made by the corporation injured in order to accommodate its own land to the new condition.[1] But it is not entitled to damages for the interruption and inconvenience occasioned to its business, nor for the increased liability to damages from accidents, nor for increased expense for ringing the bell, nor for the risk of being ordered by the county commissioners, when in their judgment the safety and convenience of the public may require it, to provide additional safeguards for travelers crossing its railroad."[2] In Illinois compensation is due for property "injured" as well as that which is "taken." Hence, if land used for a right of way for a railroad is taken, and it has no market value, compensation for it is to be made with reference to the use to which it is put.[3] In such a case the damages may extend beyond the area of the land taken; the obstructions which would thereby be placed in the way of prosecuting the business of the company whose road is crossed in reaching the different parts of its line and its capacity for doing business are elements of damage.[4] In a subsequent case the doctrine that direct and immediate damages only are recoverable was applied. "It is," said the court, "that injury which depreciates the value of the property, whether by taking a portion of it or rendering the portion left less useful or, in case of a railroad company or other corporate body, less capable of transacting its business — such a hindrance and inconvenience as to occasion loss, or diminish and limit its capacity to transact its business by decreasing the power to transact as much or necessarily increasing the

[1] Commonwealth v. Boston & M. R., 3 Cush. 25, 53; Old Colony R. v. Plymouth, 14 Gray, 155; Grand Junction R. & D. Co. v. County Com'rs, id. 553.

[2] Massachusetts, etc. R. Co. v. Boston, etc. R. Co., 121 Mass. 124, citing Proprietors of Locks & Canals v. Nashua & L. R., 10 Cush. 385, 392; Boston & W. R. v. Old Colony R., 12 id. 605, 611; S. C., 2 Allen, 142; Old Colony R. v. Plymouth, 14 Gray, 155.

[3] Lake Shore, etc. Ry. Co. v. Chicago, 100 Ill. 21.

[4] Lake Shore, etc. Ry. Co. v. Chicago, etc. R. Co., 100 Ill. 21; Chicago, etc. R. Co. v. Englewood C. Ry. Co., 115 id. 375.

expense of what may be done, although not diminished. And this hindrance or obstruction must produce immediate or future loss. But when the new structure is made, if it does not necessarily abridge the owner's capacity without increased expense to transact an equal volume of business, then, although there may be inconvenience and annoyance, unless the property is depreciated in value, these are not elements of damage."[1] In Michigan "any additional expense created in the ordinary use" of the pre-existing road,[2] "or any other injury or damage to its track, right of way or franchise, occasioned by the crossing, and which may properly be considered as the natural, necessary and approximate cause thereof," is recoverable.[3] In New Jersey the condemning company may specify in its petition for condemnation the mode in which it proposes to cross the track of the other, and compensation will be awarded for damage which results from that mode. If a material change is thereafter made from the method indicated and additional damage results, compensation therefor must be made. If, however, the petition does not define how the crossing will be made the assessment of damages will be upon the same basis as where the land of individuals is condemned for railroad purposes — any manner of crossing at present lawful and necessary will be considered, and also all lawful changes which may be made in it in the future.[4]

§ 1079. Same subject; injury to franchise. So long as the exercise of rights under a franchise are not interfered with there is no liability for damages because competition which results from a public improvement makes the right valueless, although some of the land owned by the holder of the franchise may be taken.[5] But if property, as a bridge

[1] Peoria, etc. Ry. Co. v. Peoria & F. Ry. Co., 105 Ill. 110, 118. Hence it was ruled that damages cannot be recovered because of the delay, inconvenience or expense which may result in the operation of a railroad because of its compliance with a statutory police regulation requiring trains to stop at all points where the road is crossed by other tracks. Id.; Flint, etc. R. Co. v. Detroit, 64 Mich. 350. Nor for the increased danger of crossing the projected road at grade. Peoria, etc. Ry. Co. v. Peoria & F. Ry. Co., *supra*.

[2] Flint, etc. R. Co. v. Detroit, etc. R. Co., 64 Mich. 350.

[3] Toledo, etc. Ry. Co. v. Detroit, etc. R. Co., 62 Mich. 564; Chicago, etc. R. Co. v. Springfield, etc. R. Co., 67 Ill. 142; S. C., 96 id. 274.

[4] National Docks, etc. Co. v. United Cos., 53 N. J. L. 217.

[5] Moses v. Sanford, 11 Lea, 731.

and the corporate right to maintain it and collect tolls, is taken, the general rule that the market value governs the compensation does not apply, for the reason that such property cannot be said to have such value. Its cost is not the standard, because the value of it depends upon its earnings. The damages must be measured by the value of the use, if the market value of the stock is not proven. The value of the use depends upon facts existing and shown at and about the time of the taking, unless they are proven to be exceptional.[1] Where the owner of a ferry franchise held a lease of the land used for a landing, which land was taken by a railroad company with the result of a material interference with the landing of boats, the damages were measured by the difference between the value of the leasehold for the purpose to which it was put until the end of the lease and its value for that period as so affected. The damages for the depreciation in the value of the franchise were only ascertainable in connection with the compensation for injury to the right in the land.[2] Damages for the loss of a privilege granted by law include the enhancement of its value resulting from legislation subsequent to the grant, but not increased value following acts done under color of license or under a revocable license.[3] In awarding damages for injury to a franchise the possibility of the repeal of the statute which gave it is not to be considered.[4]

§ 1080. Same subject; New York elevated road cases. Under the constitution of New York the liability of corporations exercising the power of eminent domain does not extend beyond making compensation for property taken. The cases which impose a larger responsibility are based upon statutes. This taking need not be of real property. Owners of land which abuts upon public streets in New York city have easements therein for ingress and egress to and from their premises, and for the free circulation of light and air to their property,

[1] Mason v. Harper's Ferry Bridge Co., 20 W. Va. 223; Montgomery Co. v. Schuylkill Bridge Co., 110 Pa. St. 54. In Georgia the cost of the bridge, the income derived from it, and all other facts and circumstances showing its value, are proper. Dougherty Co. v. Tift, 75 Ga. 815.

[2] Pittsburgh, etc. R. Co. v. Jones, 111 Pa. St. 204.

[3] Kingsland v. Mayor, etc., 110 N. Y. 569; 45 Hun, 198. See In re Commissioners of State Reservation at Niagara, 37 Hun, 537.

[4] Mason v. Harper's Ferry Bridge Co., 20 W. Va. 223.

which easements are interests in real estate, and constitute property. In estimating their value they are not considered as property, separate and distinct from the land to which they are appurtenant. Hence the property owner's right to compensation is measured, not by the value of the easements in the street separate from his abutting property, but by the damages which such property sustains as a result or consequence of the loss of the easements. This involves an inquiry into the effect of the improvement upon the whole property and a consideration of all its advantages and disadvantages. If the rental or market value of the whole building affected is diminished there may be a recovery; but in the case of an elevated railroad which causes a diminution in the rental value of the upper floors, if there is an increase in the rental value of it as a whole to the same or a greater extent, there is no injury.[1] The effect of the road upon business in the particular street generally may be considered in assessing damages.[2] Where the action is brought to recover damages such evidence is not improper because it appears that the diminution in business is in part attributable to other causes.[3]

If the occupation of the property has preceded the institution of condemnation proceedings the value of the easements affected is to be measured as of the time of the trial, and by the difference between the value of the property to which they are appurtenant with the easements unimpaired and its value with them in the condition they are left by the road.[4] As we have seen, the damages are measured by the decreased value of the whole property; this rule applies as well where the action is brought by lessees and occupants as where the owner is the complainant.[5] Damages for loss of business are too remote.[6] If the recovery of permanent damages is sought

[1] Newman v. Metropolitan E. R. Co., 118 N. Y. 618, summarizing the result of Story v. New York E. R. Co., 90 id. 122; Lahr v. Metropolitan E. R. Co., 104 id. 268. The whole subject is re-discussed in Bohm v. Same, 129 id. 576.

[2] Newman v. Metropolitan E. R. Co., 118 N. Y. 618; Drucher v. Manhattan Ry. Co., 106 id. 157.

[3] Drucher v. Manhattan Ry. Co., 106 N. Y. 157.

[4] Kenkele v. Manhattan Ry. Co., 55 Hun, 398; In re Brooklyn E. R. Co., id. 165; Odell v. New York E. R. Co., 130 N. Y. 690.

[5] Taylor v. Metropolitan E. Ry. Co., 50 N. Y. Super. Ct. 311; Kearney v. Same, 129 N. Y. 76.

[6] Id.

and a tender made of a deed of the premises, the railroad company is not subjected to increased liability because it appropriated the premises without right;[1] nor for specific items of damage during particular periods of time, nor for loss of rents in addition to compensation for the property or the diminution in its value.[2] The adaptability of the premises to a particular business, and the effect of the impairment of the easement upon that business, are to be considered.[3] If the easement lost was used for business purposes and its loss prevents access to a river the compensation is measurable by the cost of restoring the lost communication, if that is practicable, with an additional allowance for the increased expense attendant upon the use of the new means of communication.[4]

In considering the damages sustained by the operation of an elevated railroad the noise, smoke, cinders, invasion of privacy, etc., attendant upon it are to be regarded[5] (except where damages are sought to be recovered for injury to the fee),[6] and in an action to recover for the unlawful use and operation of a road it is not a partial justification that some of the consequences endured would have followed a lawful exercise of authority, and that no action therefor could have been maintained.[7] Exemplary damages have been denied where there was a failure to institute condemnation proceedings before operating the road on the ground that liability for compensatory damages had not then been established.[8] As appears elsewhere[9] the rule in New York is that permanent damages cannot be recovered in an action of trespass upon the assumption that the wrong done is permanent and irremediable. This rule applies to common-law actions against ele-

[1] Id.; Ireland v. Metropolitan E. R. Co., 52 N. Y. Super. Ct. 448.

[2] Ireland v. Metropolitan E. R. Co., *supra.*

[3] In re Elevated Union R. Co., 55 Hun, 163.

[4] In re New York, etc. R. Co., 29 Hun, 646.

[5] Lahr v. Metropolitan E. Ry. Co., 104 N. Y. 268; Ireland v. Metropolitan E. R. Co., 52 N. Y. Super. Ct. 450; Ode v. Manhattan Ry. Co., 56 Hun, 199; Kane v. New York E. R. Co., 125 N. Y. 164; Messenger v. Manhattan Ry. Co., 129 id. 502; Moore v. New York E. R. Co., 130 id. 523.

[6] American Bank N. Co. v. New York E. R. Co., 129 N. Y. 252.

[7] Lahr v. Metropolitan E. Ry. Co., *supra.*

[8] Powers v. Manhattan Ry. Co., 120 N. Y. 178.

[9] *Ante,* § 1016.

vated railroad companies.[1] It has been departed from in one case where the parties agreed upon the rule of damages.[2]

§ 1081. Same subject; injuries to various interests. Just compensation is not limited to and assessable only in favor of the owner in fee. A life interest or a term of years may be carved out of the fee. In such case the tenant for life or lessee, as well as the remainder-man or lessor, is equally entitled to compensation for injury to his interest.[3] Every person having any interest, partial or temporary, or permanent and absolute, is entitled to damages proportioned to the injury to that interest.[4] It is strongly intimated in Minnesota that a homesteader on government land whose patent thereto is not earned is entitled to practically the same damages as if he owned the fee.[5] But the better rule is that he is entitled to recover for the same causes that the absolute owner may recover for, the extent of his recovery depending upon the improvements, the length of time he has been in possession and other facts which may affect his right to obtain a patent.[6] If actual entry upon land cannot be made until compensation is paid or secured the owner may remain in possession of it after a railroad has been located and until entry, and may recover for the loss of crops planted before security or notice of intent to enter for the purpose of construction is given. A tenant of the owner has the same right under like circumstances although he became such with knowledge of the location of the road.[7] In states where it is held that the condemnation of a portion of the demised premises operates as

[1] Pond v. Metropolitan E. Ry. Co., 112 N. Y. 186.

[2] Lahr v. Metropolitan E. Ry. Co., 104 N. Y. 268.

[3] Colcough v. Nashville, etc. R. Co., 2 Head, 171; Getz v. Philadelphia & R. R. Co., 105 Pa. St. 547; Philadelphia, etc. R. Co. v. Getz, 113 id. 214.

[4] Parks v. Boston, 15 Pick. 198; Lawrence v. Boston, 119 Mass. 126; Biddle v. Hussman, 23 Mo. 597; Breed v. Eastern R. Co., 5 Gray, 470; Platt v. Bright, 29 N. J. Eq. 128; Dows v. Congdon, 16 How. Pr. 571; State v. Hulick, 33 N. J. L. 307; First Parish v. Middlesex, 6 Gray, 106; Miller v. Newark, 35 N. J. L. 460; Chicago v. Garrity, 7 Ill. App. 474; Marin v. St. Paul, etc. Ry. Co., 30 Minn. 100.

[5] Red River, etc. R. Co. v. Sture, 35 Minn. 95. Compare Flint, etc. Ry. Co. v. Gordon, 41 Mich. 420.

[6] Burlington, etc. R. Co. v. Johnson, 38 Kan. 142; Ellsworth, etc. R. Co. v. Gates, 41 id. 574.

[7] Laffery v. Railroad Co., 124 Pa. St. 297; Gilmore v. Pittsburgh, etc. Ry. Co., 104 id. 275.

an apportionment of the rent *pro tanto* between the landlord and tenant, the damages are apportioned by giving the former the value of his reversion and the rents reserved during the term, less an abatement for immediate payment, and the latter the value of the term less the rent he has agreed to pay.[1] The damages to a life estate may be measured by the net annual value of the premises multiplied by the tenant's expectancy of life and reduced to its present cash value.[2] The division of ownership, however, cannot operate to subject the condemning party to payment of greater damages than if one person had a complete and perfect title.[3] If a lessee shows no other damage he can only recover the amount due his landlord for rent.[4] But in a proper case he may be compensated for the loss of the landlord's covenant to renew his lease.[5] In addition to the recovery of the amount by which his interest is diminished a tenant may be compensated for the injury or destruction of growing crops and for the loss of buildings he erected for his own use or for the expense of their removal if that was made necessary; but not for injuries to the buildings, trees or other improvements on the land at the time he entered upon its possession.[6]

[448] § **1082. Same subject.** Payment to any other than the true owner will be of no avail, and constitutes no defense to the claim of such owner.[7] It cannot be made to one tenant in common so as to affect the right of other tenants to damages.[8] One having no title cannot claim damages,[9] unless he has been injured as an occupant,[10] and the title may be in-

[1] Commissioners v. Johnson, 66 Miss. 248; Biddle v. Hussman, 23 Mo. 597.

[2] Pittsburgh, etc. Ry. Co. v. Bentley, 88 Pa. St. 178.

[3] Booker v. Venice & C. Ry. Co., 101 Ill. 333.

[4] North P. R. Co. v. Davis, 26 Pa. St. 238.

[5] Seattle & M. R. Co. v. Scherke, 3 Wash. St. 625.

[6] Burt v. Wigglesworth, 117 Mass. 302; Burt v. Merchants' Ins. Co., id. 1; Edmands v. Boston, 108 id. 535; Matter of New Reservoir, 1 Sheldon (Buffalo Super. Ct.), 408; Ross v. Elizabethtown R. Co., 20 N. J. L. 230.

[7] Sherwood v. Lafayette, 109 Ind. 411; Lafferty v. Railroad Co., 124 Pa. St. 297; Tanner v. Kellogg, 49 Mo. 118; Missouri R. Co. v. Owen, 8 Kan. 409; Hood v. Finch, 8 Wis. 381.

[8] Brinckerhoff v. Wemple, 1 Wend. 470.

[9] Allyn v. Providence R., 4 R. I. 457; Rooney v. Sacramento R. Co., 6 Cal. 638; Robbins v. Milwaukee, etc. R. Co., 6 Wis. 636; Menot v. Cumberland Co. Com., 28 Me. 125.

[10] Costello v. Burke, 63 Iowa, 361.

cidentally investigated with a view to awarding the damages to the proper persons.[1] But the condemning party may by his proceedings recognize title in a person proceeded against so as to preclude any question.[2] In one case it was held that where a railroad company applies for the appointment of a commission to ascertain the value of and condemn land needed by it for a right of way, and makes the parties in possession defendants, the latter are entitled to have the value of the land, as determined by the commission, paid to them, although third parties have given notice of their ownership of it.[3] Where the claimant is plaintiff he must show his title.[4] Railroad companies, by virtue of their compulsory power, do not acquire absolute fee-simple title to land, but only the right to use it for their purposes; and compensation must be allowed for the value of the use so appropriated. What, if anything, would be left to the land-owner of value, consistent with the enjoyment of the easement by the company, should also be considered.[5] If, however, there is no evidence of the existence either upon or beneath the surface of the land condemned of any surplus earth, stone, coal or mineral which the owner of the fee may remove, the fact that his ownership thereof is not divested is of no practical importance as affecting his damages.[6] Where a claim has accrued for damages to an entire tract of land by reason of the actual construction of a railroad [**449**] over a part of it, and before the damages have been assessed or paid the land is sold without any provision in respect to

[1] Thurston v. Portland, 63 Me. 149; Brisbine v. St. Paul, etc. R. Co., 23 Minn. 114.

[2] Rippe v. Chicago, etc. R. Co., 23 Minn. 18; Sacramento, etc. R. Co. v. Moffatt, 7 Cal. 577.

[3] See St. Paul, etc. R. Co. v. Matthews, 16 Minn. 341; Norristown T. Co. v. Burket, 26 Ind. 53; Auditor v. Crise, 20 Ark. 540; Crise v. Auditor, 17 Ark. 572; Selma R. v. Camp, 45 Ga. 180; Mt. Sterling v. Givens, 17 Ill. 255; Peoria, etc. R. Co. v. Laurie, 63 Ill. 264; Same v. Bryant, 57 Ill. 473; St. Louis, etc. R. Co. v. Teters, 68 Ill. 144; Wright v. Wisconsin R. Co., 29 Wis. 341; Chandler v. Jamaica P. Aqueduct. 125 Mass. 544.

[4] Peoria, etc. R. Co. v. Bryant, 57 Ill. 473; Robbins v. Milwaukee, etc. R. Co., 6 Wis. 636.

[5] Alabama, etc. R. Co. v. Burkett, 42 Ala. 83; Neville Road Case, 8 Watts, 172; Philadelphia v. Linnard, 97 Pa. St. 242. See Lake Superior, etc. R. Co. v. Greve, 17 Minn. 322.

[6] Cummins v. Des Moines, etc. Ry. Co., 63 Iowa, 397.

them, the right to such damages remains in the vendor.[1] They belong to the owner at the time of the injury, and do not pass to a subsequent vendee,[2] or to such owner's heirs.[3] It is otherwise if the claim for compensation is not ripe at the time the conveyance is made.[4] A lessor may show, on the assessment of damages, a surrender of a lease after the land demised had been taken for a highway, with a release of the lessee's claim for damages.[5]

If land sought to be condemned for an easement is already burdened with one public servitude or private easement in a third party the imposition of another servitude of the same kind gives no right to damages;[6] but it is otherwise if there is a subsequent condemnation for a different purpose, inconsistent with or subversive of the first;[7] and in such case damages are recoverable in Maryland as though the former had not existed.[8] But the rule is otherwise in some states.[9] A plank-road laid by a company over a highway is not a different public use which will give abutting owners a right to compensation as for an additional servitude; but such company will be liable if by excavations it endangers the stability of houses on the line.[10]

§ 1083. Assessment of damages and benefits, time of. As the value of real estate is liable to be much affected generally and specially by the improvement for which it may be

[1] Pomeroy v. Chicago, etc. R. Co., 25 Wis. 641. See Pick v. Rubicon Hydraulic Co., 27 Wis. 433.

[2] Sargent v. Machias, 65 Me. 591; Tenbrooke v. Jahke, 77 Pa. St. 392; Chicago, etc. R. Co. v. Loeb, 118 Ill. 203; Wabash, etc. Ry. Co. v. McDougall, id. 229; Indiana, etc. Ry. Co. v. Allen, 100 Ind. 409; Campbell v. Philadelphia, 108 Pa. St. 300; Lasch's Appeal, 109 id. 72; Smith v. Railway Co., 88 Tenn. 611. But see Caldwell v. Bank, 20 Ind. 294.

[3] Neal v. Knox, etc. R. Co., 61 Me. 298.

[4] New Brighton v. Peirsol, 107 Pa. St. 280.

[5] Dickenson v. Fitchburg, 13 Gray, 546.

[6] In re Olean, 17 L. R. A. 640; — N. Y. —.

[7] Story v. New York E. R. Co., 90 N. Y. 122; Lahr v. Metropolitan E. Ry. Co., 104 id. 268; Street Ry. Co. v. Doyle, 88 Tenn. 747.

[8] Moale v. Baltimore, 5 Md. 314. See Pinkerton v. Boston, etc. R. Co., 109 Mass. 527.

[9] Muller v. Southern, etc. Ry. Co., 83 Cal. 240; Central Branch Union R. Co. v. Andrews, 30 Kan. 590; Adams v. Chicago, etc. R. Co., 39 Minn. 286.

[10] Williams v. Natural Bridge P. R. Co., 21 Mo. 580.

taken, the inquiry at what time in the proceeding practically or legally to appropriate it are the damages to be ascertained for the purpose of just compensation is important. Possession for public use cannot be taken, nor is the title of the owner divested until payment is made, or at least adequately provided for.[1] The time of the taking is that at which [450] the value is fixed, but the cases do not agree as to what is to be deemed the taking — whether the actual appropriation or the condemnation.[2] In Pennsylvania it has been held that the jury should consider the matter as if they were called upon to estimate the injury at the moment when compensation could first be demanded,[3] that is at the date of the filing of the bond.[4] This is the difference in the value of the land before the improvement is made and after its completion;[5] that it is a proper instruction to tell the jury the market value should be ascertained before the road or the prospect of it had produced any effect upon the land, then the value immediately after the completion should be ascertained, and the difference would settle the question of damages.[6] But a late case fixes the time for awarding compensation in the case of taking by municipal corporations as of the time the improvement is made, not at the date of the passage of an ordinance for making it.[7] If the original entry upon the land was without right,

[1] Daniels v. Chicago, etc. R. Co., 35 Iowa, 129; Henry v. Dubuque, etc. R. Co., 10 Iowa, 540; Bensley v. Mountain L. W. Co., 13 Cal. 306; Rider v. Stryker, 63 N. Y. 136; Cook v. South Park Com., 61 Ill. 115; People v. Williams, 51 Ill. 63.

[2] Milwaukee, etc. R. Co. v. Eble, 3 Pin. 334; Montclair R. Co. v. Benson, 36 N. J. L. 557; Miller v. Easton, etc. R. Co., 37 id. 222; Stafford v. Providence, 10 R. I. 567; Patterson v. Boom Co., 3 Dill. 465; St. Joe, etc. R. Co. v. Orr, 8 Kan. 419; Virginia, etc. R. Co. v. Lovejoy, 8 Nev. 100; Daniels v. C. I. & N. R. Co., 41 Iowa, 52; San Francisco, etc. R. Co. v. Mahoney, 29 Cal. 112; Hosher v. Kansas City, etc. R. Co., 60 Mo. 329; Arnold v. Covington Bridge, 1 Duv. 372.

[3] Schuylkill Nav. Co. v. Thoburn, 7 S. & R. 411; Shenango, etc. R. Co. v. Braham, 79 Pa. St. 447; Penn. etc. R. Co. v. Bunnell, 81 id. 426; Philadelphia v. Linnard, 97 id. 242.

[4] Graham v. Pittsburgh, etc. R. Co., 145 Pa. St. 504.

[5] Hornstein v. Atlantic, etc. R. Co., 51 Pa. St. 87; Delaware, etc. R. Co. v. Burson, 61 Pa. St. 369.

[6] Id.; Long v. Harrisburg, etc. R. Co., 126 Pa. St. 143.

When the action is for consequential damages, no part of the land being taken, the right thereto accrues when the improvement is completed. Pennsylvania, etc. R. Co. v. Ziemer, 124 id. 560.

[7] Whitaker v. Phœnixville, 141 Pa. St. 327.

the rule which requires that the damages shall be computed as of the time the owner's title was divested does not preclude a knowledge and consideration of the condition of the land before the entry was made. The owner has a right to have his damages assessed with reference to the condition of his property before the trespass was committed.[1] In Wisconsin a statute provided that land taken for a railroad should be appraised at its value at the time the company acquired title.[2] Under it the owner was held to be entitled to be paid the value of the property at the time of the taking; that is the just compensation of the constitution. A company having previously built its road, it was held that the improvements were to be excluded from the estimate. If the market value is enhanced at the time of the condemnation, however, the land is to be estimated at such enhanced value.[3] In Minnesota the value is required by statute to be assessed at the time of the taking, and that is construed to mean at the time of [451] making the award.[4] Compensation is given with reference to the value and condition of the premises at the time of the award. The same time is adopted in Kansas,[5] and formerly in California,[6] and in Wisconsin.[7] In Kansas if the entry is made without consent and condemnation proceedings are not instituted until afterward the assessment will be made as of the time possession was first taken.[8] And so in Alabama.[9] For convincing reasons it is otherwise in Texas.[10] In California the assessment, by virtue of statute, is to be made as of the date of the summons.[11] And in Illinois as of the

[1] Graham v. Pittsburgh, etc. R. Co., 145 Pa. St. 504.

[2] Laws of 1872, ch. 119, sec. 21.

[3] Aspinwall v. Chicago, etc. R. Co., 41 Wis. 474; Driver v. Western U. R. Co., 32 Wis. 569; West v. Milwaukee, etc. Ry. Co., 56 id. 318.

[4] Warren v. St. Paul, etc. R. Co., 21 Minn. 424; Sherwood v. Same, id. 122; Winona, etc. R. Co. v. Denman, 10 Minn. 267; Same v. Waldron, 11 Minn. 515; St. Paul, etc. R. Co. v. Murphy, 16 Minn. 500; Hursh v. St. Paul, etc. R. Co., 17 Minn. 439; Warren v. St. Paul, etc. R. Co., 18 Minn. 384; Morin v. Same, 30 id. 100.

[5] St. Joe, etc. R. Co. v. Orr, 8 Kan. 419.

[6] San Francisco, etc. R. Co. v. Mahoney, 29 Cal. 112; Stockton, etc. R. Co. v. Galgiani, 49 Cal. 139.

[7] Lyon v. Green Bay, etc. R. Co., 42 Wis. 543.

[8] Wier v. St. Louis, etc. R. Co., 40 Kan. 130.

[9] Jones v. New Orleans & S. R. Co., 70 Ala. 227.

[10] Texas W. Ry. Co. v. Cave, 80 Texas, 137.

[11] San Jose & A. R. Co. v. Mayne, 83 Cal. 566.

time the petition for condemnation is filed.[1] In Nebraska, Indiana and Tennessee the time when proceedings are instituted governs the parties' rights.[2] This is the rule in Arkansas.[3] It was formerly held there that "where the assessment of the damages precedes the building of" a railroad "the presumption is that it will be built with skill and proper precautions. But if the road has been completed through the land at the date of trial, the jury may consider the state of facts then existing, and, with the light afforded by the actual construction, determine what the damage has been."[4] The time of taking in Massachusetts is the time fixed by statute for estimating the value and damages; that time is when the land is actually appropriated to public use, not when the damages are assessed.[5] Under a statute providing that damages resulting from a street improvement shall be fixed at the value of the property before the laying out, alteration or widening of the street, the assessment must be made without allowing anything for the increase in the value of the land which arose from the expectation that it would be taken.[6] Where the government, by its agents, entered wrongfully on a tract of land and erected a building which became part of the realty, and then took proceedings to condemn the land for public use, it was held that the owner had a right to have the value of the structure allowed him in the estimate of the damages.[7] This rule is not generally recognized.[8]

[1] South Park Comm'rs v. Dunlevy, 91 Ill. 49; Dupuis v. Chicago, etc. Ry. Co., 115 id. 97. If the petition is amended solely for the purpose of making the description of the property more exact, the assessment should be made as of the time the original petition was filed. Lieberman v. Chicago, etc. R. Co. (Ill.), 30 N. E. Rep. 544.

[2] Missouri P. Ry. Co. v. Hays, 15 Neb. 224; Logansport, etc. R. Co. v. Buchanan, 52 Ind. 163; Lafayette, etc. R. Co. v. Murdock, 68 id. 137; Alloway v. Nashville, 88 Tenn. 510.

[3] Newgass v. Railway Co., 54 Ark. 140.

[4] Springfield & M. Ry. v. Rhea, 44 Ark. 258.

[5] Dickenson v. Fitchburg, 13 Gray, 546; Reed v. Hanover B. R. Co., 105 Mass. 303.

[6] Benton v. Brookline, 151 Mass. 250.

[7] United States v. Land in Monterey Co., 47 Cal. 515. But see California P. R. Co. v. Armstrong, 46 Cal. 85; Emerson v. Western U. R. Co., 75 Ill. 176; Graham v. Connersville, etc. R. Co., 36 Md. 463; Aspinwall v. Chicago, etc. R. Co., 41 Wis. 474; Justice v. Nesquehoning P. R. Co., 87 Pa. St. 28.

[8] *Ante*, § 1076.

[452] § 1084. **Deduction for benefits.** By measuring the damages according to the depreciation in market value the condemning party will get the benefit of any advance in the price of the land as a whole produced by the improvement at the time the inquiry as to value is made. The value taken before the appropriation is supposed to be uninfluenced by the projected improvement. The value after it is completed is the value as affected by it; if enhanced, the increase cancels the damage *pro tanto;* if it has the contrary effect the diminution adds to the special damage for taking a part and inconveniencing the owner as to the residue. Where damages are assessed for anticipated depreciation, by proof of particular facts, no account is taken of the general benefits of the improvement; on the contrary, they are purposely excluded.[1] And so of any common injury which affects the community or public at large.[2] Only those benefits are considered which are special and affect particularly the land in question,[3] and which result from the improvement for which the land is taken.[4] [453] These benefits are estimated like the damages.[5] It is the business of the tribunal to which the ascertainment of just compensation is confided to balance the advantages that are

[1] Meacham v. Fitchburg R. Co., 4 Cush. 291.

[2] Petition of Mount W. Road Co., 35 N. H. 146; Adden v. Railroad Co., 55 N. H. 415.

[3] Weir v. St. Paul, etc. R. Co., 18 Minn. 155; Wood v. Hudson, 114 Mass. 513; Symonds v. Cincinnati, 14 Ohio, 148; Paine v. Woods, 108 Mass. 168; Palmer Co. v. Ferrill, 17 Pick. 58; Green v. Fall River, 113 Mass. 262; Dwight v. Hampden, 11 Cush. 201; Meacham v. Fitchburg R. Co., 4 Cush. 291; Young v. Harrison, 17 Ga. 30; Trinity College v. Hartford, 32 Conn. 452; Hilbourne v. Suffolk, 120 Mass. 393; Hyde Park v. Washington Ice Co., 117 Ill. 233; Whitely v. Mississippi, etc. Co., 38 Minn. 523; Omaha v. Schaller, 26 Neb. 522; Newman v. Metropolitan E. R. Co., 118 N. Y. 618; Pittsburgh, etc. Ry. Co. v. McCloskey, 110 Pa. St. 436; G., C. & S. F. Ry. v. Fuller, 63 Texas, 467; Childs v. New Haven & N. Co., 133 Mass. 253.

[4] In re New York, etc. Ry. Co., 49 Hun, 539.

[5] Trinity College v. Hartford, 32 Conn. 452; Railroad Co. v. Tyree, 7 W. Va. 693; St. Louis, etc. R. Co. v. Richardson, 45 Mo. 466; Winona, etc. R. Co. v. Waldron, 11 Minn. 515; Weir v. St. Paul, etc. R. Co., 18 Minn. 155; Mitchell v. Thornton, 21 Gratt. 164; Hosher v. Kansas City, etc. R. Co., 60 Mo. 329; Quincy R. Co. v. Ridge, 57 Mo. 599; Lee v. Tebo R. Co., 53 Mo. 178; Mississippi River B. Co. v. Ring, 58 Mo. 491; Pacific R. v. Chrystal, 25 Mo. 544; Freedel v. North Carolina R. Co., 4 Jones' L. 89; James River Co. v. Turner, 9 Leigh, 313.

special against the disadvantages that are actual, and with the aid of whatever testimony is laid before it, to find out, as well as practicable, how much less the land would fetch in the market by reason of the improvement in question, and that sum will represent what has been really taken away from the owner, and should be given back in damages.[1] If this special benefit is equal to the compensation that the owner should otherwise receive he will be entitled to nothing else.[2] The assessment for benefits must be limited to the damages awarded for the property taken or injured.[3] In estimating benefits the test applied is not the number of lots or tracts benefited, but the relation of the lands to the improvement and its specific effect upon their value.[4]

§ 1085. Same subject. Where an assessment was made for damages for flowing lands by means of a dam it was held that the benefit resulting to the lot flowed and the adjoining land, from the formation of ice on it in the ordinary use of the dam, where such ice might be cut and sold as merchandise without appreciably diminishing the water-power for which the dam was erected, might be considered; and also benefits resulting to the same land by reason of the greater convenience afforded the owner by means of the flowing, and through the use of his land to exercise his right in common with the public to take ice from a natural pond by which the overflowed land was bounded.[5] But where the establishment of a road rendered the building of fences necessary, the damages allowed for the appropriation of the land, it was held, should not be diminished by the value of any advantages which might accrue to the adjacent property from the erection of the fences.[6] Benefits of two kinds may accrue to lands bounding on a way laid out, altered or widened: First, the special and di-

[1] Hornstein v. Atlantic, etc. R. Co., 51 Pa. St. 87; Boston, etc. R. Co. v. Old Colony R. Corp., 12 Cush. 605; Hagaman v. Moore, 84 Ind. 496; Atlanta v. Green, 67 Ga. 386; Monroe v. Atlanta, 70 id. 611; Pittsburgh, etc. R. Co. v. Robinson, 95 Pa. St. 426.

[2] Whitman v. Boston, etc. R. Co., 3 Allen, 133; Trinity College v. Hartford, 32 Conn. 452.

[3] Wilmington & W. R. Co. v. Smith, 99 N. C. 131.

[4] Rich v. New York E. R. Co., 16 Daly, 518; Gray v. Manhattan Ry. Co., id. 510.

[5] Paine v. Woods, 108 Mass. 160.

[6] Bland v. Hixenbaugh, 39 Iowa, 532.

[454] rect benefit arising from its own position upon the way itself; and second, the general benefit, not arising from such location, but from the facilities and advantages caused by the way which affect all the estates in the neighborhood equally, and which are shared in common with such estates. The direct and peculiar benefit may be set off against the damages. The general benefit cannot.[1] The advantages that an abutter may receive from his location on a highway laid out, altered or widened are none the less peculiar and special to him because other estates on the street receive special and peculiar benefits of the same kind.[2] If a lot is drained or fertilized by

[1] Hilbourne v. Suffolk, 120 Mass. 393; Carpenter v. Landaff, 42 N. H. 218; Shawneetown v. Mason, 82 Ill. 337; Commissioners v. Johnston, 71 N. C. 398.

In Greenville & C. R. Co. v. Partlow, 5 Rich. 436, the charter of the company directed that the commissioners or jury, "in making the valuation, shall take into consideration the loss or damage which may occur to the owner in consequence of the land or right of way being taken; and also the benefit or advantage he may receive from the establishment or erection of the railroad or works, and shall state particularly the nature and amount of each; and the excess of loss or damage, over and above the benefit and advantage, shall form the measure of valuation of said land or right of way." This was held to include general as well as special benefits.

[2] Hagaman v. Moore, 84 Ind. 496; Trosper v. Commissioners, 27 Kan. 391; Hilbourne v. Suffolk, *supra;* Allen v. Charlestown, 109 Mass. 243. But see Whitcher v. Benton, 50 N. H. 25.

In Trinity College v. Hartford, 32 Conn. 476, Park, J., said: "There are obviously three classes of benefits that may result from the opening of highways: one, the general benefit which the public, as such, receives from the opening of a new avenue of travel; another, the special benefits which those receive who reside or own land upon the new highway, in the more convenient access that is given to their lands; and another, the strictly local benefit which land, as such, may receive from the opening and construction of the road, an illustration of which would be drainage, if it should happen to be drained by the road and its ditches; or the filling up of low ground by surplus earth that is to be disposed of in lowering some neighboring hill. As to the character of these classes of benefits, and as to their general relation to the road, with reference to questions of assessment and damage, there seems to be no serious difference between the claims of parties. The mere public benefit cannot be assessed at all, and is only to be considered with reference to the question how much of the expense of the road shall be paid by general taxation. The merely local benefit is clearly to be deducted from the damage that would be allowed the owner for the part of his land taken for the road, and it goes so far to reduce the actual damage done to him in taking his land. The special

a public improvement the benefit is direct and special;[1] [455] so if it discontinues a portion of an old highway, the part vacated thereby inuring to the person to be compensated.[2]

§ 1086. Same subject. In New Hampshire it is held that in estimating damages from the opening of a highway nothing can be deducted on account of benefits not special to the particular owner to be compensated; and where he obtained access to his land, he not having access otherwise, except across land which he did not own, such benefit is not special. The court said this was not a benefit for which he should pay, but a general improvement in which many would share.[3] In Illinois, as a set-off against consequential damages arising from a railroad crossing a farm, it was held proper to take into consideration the facilities afforded by the road, and a convenient depot for getting the products of the farm to

benefits, within the limits fixed by the law, are clearly to be considered in assessing benefits; and if nothing was to be done except to assess benefits, there would probably be no difference of opinion as to the rule to be adopted in determining the proportions in which the burden of the road should be laid upon the benefits. The sole question is in the case where the same person has received benefits and has also a claim for damages. We will suppose his claim for damages is $1,000, that he gets no local benefit, and that his special benefit is exactly $1,000. Now, if he had received only the benefit, and was assessed for that benefit, with all the other persons enjoying special benefits, he would probably be assessed only a moderate percentage upon it. We will suppose that assessment would be ten per cent., so that he would be called upon to pay $100 on account of his having received $1,000 of benefit. Now the counsel for the petitioners contend that, where the same person has a claim for $1,000 damage, he should not have the whole benefit he has received applied to the damage, satisfying it in full and leaving him nothing, but that only the ten per cent. which he would have been assessed for his benefit, if the benefit had been independently assessed, should be so applied, and the balance, $900, should be paid him for his damage. There is much that is plausible in this claim, and it is not altogether unreasonable; but the rule has long been settled in this state, not only in practice, but by repeated decisions of this court, that where the land-owner has a claim for damage for land taken, and has received local and special benefits equal to the damage, the value of the benefits shall be set off against the damage, and he shall be allowed nothing."

[1] Washburn v. Milwaukee, etc. R. Co., 59 Wis. 364, 376; Milwaukee R. Co. v. Eble, 3 Pin. 334.

[2] Tingley v. Providence, 8 R. I. 493.

[3] Carpenter v. Landaff, 42 N. H. 218; Whitcher v. Benton, 50 N. H. 25; Adden v. Railroad, 55 N. H. 413. See Virginia, etc. R. Co. v. Lynch, 13 Nev. 92.

market, as also the actual increase in the market value of the farm occasioned by the road.[1] In Wisconsin the benefit which may be allowed must enhance the value of the land affected by improving its physical condition and adaptability for use.[2] In the case in which this was held the question was as to the advantage of the location of a railroad depot. In Massachusetts such a benefit has sometimes been considered special;[3] and so in Pennsylvania,[4] though the question is for the jury.[5] Where compensation was claimed for the location and construction of a railroad between coal mines and a navigable river on the land-owner's premises, whereby the conveniences of river transportation for getting the coal to mar-
[456] ket were injured or cut off, it was held competent for the railroad company to show, for the purpose of reducing the damages,[6] that the river transportation, in connection with the coal banks, had ceased to be valuable, or become of less value by means of the facilities for coal transportation afforded by the railroad. In case of a railroad appropriation for a right of way through a tract of land, causing incidental and local injury to the residue of the tract, although general resulting benefits from the railroad to the value of such residue of the land is prohibited from being taken into account in estimating the amount of compensation to be paid the owner, yet where a local incidental benefit to the residue of the land is blended or connected either in locality or subject-matter with the local incidental injury to such residue, the benefit may be considered in fixing the compensation to be paid the owner, not by way of deduction from the compensation, but of showing the extent of the injury done to the value of the residue of the land.[7] There must be a reasonable degree of certainty that benefit will result from the public improvement. Hence the mere possibility that other streets may be laid through or near the property in question by the public

[1] Wilson v. Rockford, etc. R. Co., 59 Ill. 273; Hayes v. Ottawa, etc. R. Co., 54 id. 373.

[2] Washburn v. Milwaukee, etc. R. Co., 59 Wis. 364, 376.

[3] Shattuck v. Stoneham Branch R., 6 Allen, 115. See Childs v. New Haven & N. Co., 133 Mass. 253.

[4] Pittsburgh, etc. R. Co. v. Robinson, 95 Pa. St. 426.

[5] Gorgas v. Philadelphia, etc. R. Co., 144 Pa. St. 1.

[6] Cleveland & P. R. Co. v. Ball, 5 Ohio St. 569.

[7] Id.

authorities, and it thereby be rendered more valuable, is not to be considered because such streets may never be opened, and if they are, the land-owner is liable to have his property assessed for the benefits which accrue to him.[1] But if the opening of a particular street enables the owner of land to lay out another street or streets upon it, thereby increasing his available frontage and the market value of his property, it will be assumed that he will do so, and the resulting benefit may be considered.[2] If the property taken or injured is held in different interests the parties can be charged with the benefit resulting only in proportion to their interests.[3]

§ 1087. Same subject. In many states benefits are excluded by constitution or statute from consideration in determining what shall be paid for the *value* of property taken for public use; but the inhibition in this form has not been deemed to exclude this consideration in reduction of consequential damages resulting from the appropriation. In other states the same restricted application of benefits is made on general principles as proper and necessary to give "just compensation."[4] In Kentucky the right to just compensation for property taken for public use is held to exclude all benefits in reduction of [457] the value of the property taken, and to limit their application to the reduction of damages resulting from such taking. In

[1] Allegheny v. Black, 99 Pa. St. 152.

[2] Id.

[3] Turnpike Road v. Brosi, 22 Pa. St. 29.

[4] Northern Pacific, etc. R. Co. v. Coleman, 3 Wash. St. 228; Todd v. Kankakee R. Co., 78 Ill. 530; Carpenter v. Jennings, 77 Ill. 250; Wilson v. Rockford, etc. R. Co., 59 Ill. 273; Hayes v. Ottawa, etc. R. Co., 54 Ill. 373; Raleigh R. Co. v. Wicker, 74 N. C. 220; Shipley v. Baltimore, etc. R. Co., 34 Md. 336; Railroad Co. v. Tyree, 7 W. Va. 693; Mitchell v. Thornton, 21 Gratt. 164; Augusta v. Marks, 50 Ga. 612; Atlanta v. Central R. Co., 53 Ga. 120; Vicksburg, etc. R. Co. v. Calderwood, 15 La. Ann. 481; Buffalo, etc. R. Co. v. Ferris, 26 Tex. 588; New Castle R. Co. v. Brumback, 5 Ind. 543; Memphis v. Bolton, 9 Heisk. 508; Giesy v. C., W. & Z. R. Co., 4 Ohio St. 330; Wagner v. Gage Co., 3 Neb. 237; Woodfolk v. Nashville, etc. R. Co., 2 Swan, 422; Chapman v. Oshkosh, etc. R. Co., 33 Wis. 629; Newby v. Platte Co., 25 Mo. 258; Commissioners v. O'Sullivan, 17 Kan. 58; Harwood v. Bloomington, 124 Ill. 152; Wichita & W. R. Co. v. Kuhn, 38 Kan. 104; Fremont, etc. R. Co. v. Whalen, 11 Neb. 585; St. Louis, etc. R. Co. v. Anderson, 39 Ark. 167.

In California, since the new constitution, benefits are not to be deducted except where the property is taken or injured by a municipal corporation. San Jose & A. R. Co. v. Mayne, 83 Cal. 566.

an early case the court said: "When the property of one citizen is taken without his consent for the use of the whole community of which he is a member the constitution imperiously requires, not that the public shall decide whether he is entitled to any compensation, but that the just compensation shall be paid or secured; and that compensation implies the value at least of the thing taken. No citizen can be compelled to give his land to the public without an equivalent; and what is that equivalent but the value in money of the land surrendered to public use? He may act unreasonably and unjustly in an imaginable case by insisting on pecuniary compensation, or in refusing to make a surrender without exacting the value of the property. But he has a right to insist on being paid the value of the thing taken from him, although he may be incidentally benefited with others in the appropriation of it to public use. If, however, claiming more than the value of the property taken, he seeks indemnity for consequential inconvenience or injury, then the true question will be whether, upon a survey of all advantages as well as disadvantages which will be likely to result to him, the balance will be for or against him; and if ascertained to be in his favor, then, of course, he will be entitled to nothing for alleged damages for such inconvenience or injury because, the whole case being properly considered in all its bearings, he will sustain no damage. Thus, and only thus, advantages and disadvantages may be compared and set off the one against the other."[1] This view has been adhered to.[2] The compensation guarantied by the constitution, it is there insisted, cannot consist of the mere estimate of a jury or appraisers of the prospective and speculative advantages which in their opinion will accrue to the owner from the proposed use of his land by the public, but must be a pecuniary compensation equivalent to the value of the land to be taken. These advantages may be set off against the consequential damages and inconven- [458] ience which the owner may sustain, but not against the value of the land itself. To that extent at least he is entitled, under all circumstances, to a specific compensation without deduction or set-off.[3] This mode of adjusting the compensa-

[1] Sutton's Heirs v. Louisville, 5 Dana, 33.

[2] Rice v. Turnpike Co., 7 Dana, 87.

[3] Id.; Elizabethtown, etc. R. Co. v.

tion is deemed to be the true and only effectual exposition of the constitution.[1] There is this other distinguishing feature of the law as held in that state: advantages which may offset the consequential damages are not confined to those which are special to the land from which a part is taken. The advantages which the owner may derive from the construction of a railroad, for instance, are not in the least diminished by the fact that they will be enjoyed by others, nor does that furnish any reason why they should be excluded from the estimate in comparing the advantages and disadvantages that will result to him from its establishment. Other persons, it is true, may enjoy the same advantages without being subjected to the same inconveniences; but this results from the nature of the improvement itself, and does not in any degree detract from the value of these advantages to the owner of the land through which the road passes.[2]

The value which the constitution of Kentucky guaranties is the value to the owner, where the property taken is a part of a greater tract; and it is to be estimated by considering its relative position to his other land, and the circumstances which may diminish or enhance that value; the real value of the land to the owner as it is actually situated, and not merely regarding it as a separate and independent piece of land, he has a right to demand. It is held that nothing else can secure him a just compensation. The inquiry should be, what is its value, situated as it is, if he were not the owner of it, but owned adjacent property on both sides of it, under precisely the same circumstances?[3] "This question of value," the court say, "can be most readily and fairly determined by ascertaining the value of the entire tract of land, exclud- [459] ing the enhancement resulting from the contemplated improvement; then,[4] what will be its value after the appropriation of a portion of such estate therein as may be proposed to be taken. The difference in value thus found is the true com-

Helm's Heirs, 8 Bush, 681; Asher v. L. & N. R. Co., 87 Ky. 391.

[1] Jacob v. Louisville, 9 Dana, 114; Henderson, etc. R. Co. v. Dickerson, 17 B. Mon. 178.

[2] Henderson, etc. R. Co. v. Dickerson, 17 B. Mon. 180; Louisville, etc. R. Co. v. Thompson, 18 id. 744-5; Same v. Glazebrook, 1 Bush, 325.

[3] Henderson, etc. R. Co. v. Dickerson, 17 B. Mon. 180.

[4] Still excluding this enhancement.

pensation to which the owner is entitled."[1] The particular facts and circumstances to be considered in adjusting the difference in the value of a tract of land before and after a portion of it has been taken or appropriated to public use cannot, from the nature of things, be set out in detail, or defined with any degree of precision; but every circumstance injuriously affecting the citizen in the enjoyment of his land not taken, which can be satisfactorily demonstrated to grow out of his being deprived of the use theretofore enjoyed by him of the portion taken, should receive due consideration and be allowed its proper weight. The appraisers or jury should disregard reasons which are purely personal to the owner, not affecting the market value of his remaining lands, and also such prospective damages as may follow the construction and operation of the proposed railway or other public work. These prospective damages are to be considered in the determination of the consequential damages, and the rule laid down in the case of Sutton's heirs controls the settlement of that question. A survey is taken of all the advantages and disadvantages which may be reasonably anticipated to result from the prudent construction and operation of the proposed railway, and if the balance be against the owner of the land, then to the extent that such balance diminishes its market value he should have a judgment on account of incidental damages; otherwise, of course, he is entitled to nothing.[2]

§ 1088. What lands considered in assessing benefits and [460] damages. The owner's lands taken into consideration in the estimate of damages and benefits are those adjoining [461] and connected with the land taken and forming a part of the same parcel.[3] The fact that the property consists of several lots, blocks, or legal subdivisions of sections, as sold by the government, will not prevent its being considered as one tract or parcel if it is occupied and used as such.[4] Nor will land so occupied be deemed separated by a highway or street run-

[1] Elizabethtown, etc. R. Co. v. Helm's Heirs, 8 Bush, 681.

[2] Id.

[3] Hilbourne v. Suffolk, 120 Mass. 393; Mix v. La Fayette, etc. R. Co., 67 Ill. 319; St. Louis, etc. R. Co. v. Brown, 58 Ill. 61; Todd v. Kankakee, etc. R. Co., 78 Ill. 530; Meacham v. Fitchburg R. Co., 4 Cush. 291.

[4] Stevens v. New York E. R. Co., 130 N. Y. 95; Driver v. Western U. R. Co., 32 Wis. 569; Welch v. Milwaukee, etc. R. Co., 27 Wis. 108; Ham v. Wisconsin, etc. Ry. Co., 61

ning through it,[1] or by county lines, although that condemned is wholly in one county.[2] If the condemning party originally entered upon the land wrongfully, and before the institution of proceedings the owner has conveyed in fee to another a strip of land adjoining that occupied by the wrong-doer, he is notwithstanding such conveyance entitled to be compensated for the injury done to his tract as a whole.[3] But unless the property claimed to be one tract is so used and occupied and is separated by streets, it will be regarded as consisting of separate parcels as so divided.[4] If city property in fact unoccupied is platted or divided into lots, nothing else being shown, it will be treated as lots intended for use as such, and not as an entire tract.[5] So agricultural land may be separated so as not to be treated as an entirety by an inter- [462] vening bluff.[6] Damages to separate tracts are to be separately assessed.[7] The questions which arise in this connection are so far influenced by the facts involved in them that the enunciation of a rule which will be applicable generally is impracticable. That announced by the Minnesota court is probably as good as any that has been formulated: "To constitute unity of property between two contiguous but *prima facie* distinct parcels of land, there must be such a connection or relation of adaptation, convenience and actual and permanent

Iowa, 716; Cummins v. Des Moines, etc. Ry. Co., 63 id. 397; Cox v. Mason City, etc. Ry. Co., 77 id. 20; Dudley v. Minnesota & N. Ry. Co., id. 408; Reisner v. Union Depot R. Co., 27 Kan. 382; Wilmes v. Minneapolis & N. Ry. Co., 29 Minn. 242; Springfield & S. Ry. Co. v. Calkins, 90 Mo. 538.

Where fourteen lots were occupied as an entirety, ten of them being owned by the occupant and the others held by him under a lease, the damages resulting from taking a portion of the leased lots were measured by the decrease in the market value of the whole tract during the time the lease was to run. Chicago & E. R. Co. v. Dresel, 110 Ill. 89.

[1] Id.; Hannibal Bridge Co. v. Schaubacher, 57 Mo. 582; Page v. Chicago, etc. R. Co., 70 Ill. 324: Chapman v. Oshkosh R. Co., 33 Wis. 629; Sherwood v. St. Paul, etc. R. Co., 21 Minn. 127; St. Paul, etc. R. Co. v. Murphy, 19 Minn. 500; Kansas City, etc. R. Co. v. Merrill, 25 Kan. 421.

[2] Atchison & N. R. Co. v. Gough, 29 Kan. 94.

[3] Graham v. Pittsburgh, etc. R. Co., 145 Pa. St. 504.

[4] In re New York C. R. Co., 6 Hun. 149.

[5] Wilcox v. St. Paul, etc. R. Co., 35 Minn. 439.

[6] Minnesota R. Co. v. Doran, 15 Minn. 230.

[7] St. Louis, etc. R. Co. v. Brown, 58 Ill. 61; Potts v. Railroad Co., 119 Pa. St. 278.

use between them as to make the enjoyment of the parcel taken reasonably and substantially necessary to the enjoyment of the parcel left, in the most advantageous and profitable manner in the business for which it is used."[1] If the land-owner answers and raises an issue as to the amount of damage resulting from the building of a railroad through the land described in the company's petition, and which is also described in the answer, in the absence of any claim made therein for injury to other land there cannot be a recovery for any depreciation in its value, though that undescribed was used with the other as a single farm tract.[2] If the owner of lands on the seashore has no property rights therein no recovery should be permitted for the loss of any that may thereafter accrue as the result of legislation, even if the condemning party would enjoy the benefit of the rights which might be granted. Such a contingency is too remote to be made the basis of judicial calculation.[3]

§ 1089. Proof of value and damages. These are not susceptible of precise proof and can only be approximately shown by the opinions of witnesses having the requisite information. If the true value of an estate immediately before and immediately after the location of a road over it could be accurately ascertained, such a discovery would afford the most exact means of determining the real pecuniary damage sustained by its owner. The market value is a near, and perhaps the closest, approximation to it; and, therefore, any evidence which is competent in its general character to prove that is apposite and admissible. In the very nature of things there can be no absolute standard by which the value of land or interests therein can be measured; and, of course, when it cannot be tested by the fact of a recent sale, the nearest approach to it which can be obtained is a knowledge of the opinion and judgment of intelligent, practical men who are acquainted with the property. Evidence of such opinion and judgment must of necessity often be all that can be resorted to, and it is always competent and admissible, leaving its

[1] Peck v. Superior, etc. Ry. Co., 36 Minn. 343.

[2] Northern Pacific, etc. R. Co. v. Coleman, 3 Wash. St. 228.

[3] Bellingham Bay, etc. R. Co. v. Strand, 30 Pac. Rep. 144 (Wash.).

weight in each particular case to be determined by the jury in connection with the circumstances under which it is offered.[1] Market value means the fair value of property as between one who wants to purchase and one who wants to sell; not what could be obtained for it under peculiar circumstances when a greater than its fair price could be realized, nor its speculative value; not a value received because of the necessities of another. Nor, on the other hand, is it to be limited to that price which the property would bring when forced off at auction. It is what it would bring at a fair public sale when one party wanted to sell and the other to buy.[2] The jury, in making an estimate upon the testimony of the opinions of witnesses, should not adopt those of men who are san- [463] guine in their estimate of value, nor of those who are over-cautious; but of prudent, practical men, men of experience, thought and consideration, who have had opportunity of forming correct opinions of the value of the lands and the damages sustained.[3]

The market value of land is not a question of science or skill upon which only an expert can give an opinion. Persons in the neighborhood are presumed to have sufficient knowledge of its value.[4] The opinions of witnesses founded upon a

[1] Dwight v. Hampden, 11 Cush. 203; Wyman v. Lexington, etc. R. Co., 13 Met. 316; Reynolds v. Burlington, etc. Ry. Co., 106 Ill. 152; Pittsburgh, etc. R. Co. v. Robinson, 95 Pa. St. 426; St. Louis, etc. R. v. Anderson, 39 Ark. 167; Leroy & N. Ry. Co. v. Hawk, 39 Kan. 638.

[2] Lawrence v. Boston, 119 Mass. 126; L. R. Junction Ry. v. Woodruff, 49 Ark. 381; Cohen v. St. Louis, etc. R. Co., 34 Kan. 158; Moulton v. Newburyport Water Co., 137 Mass. 163; Sullivan v. Lafayette Co., 61 Miss. 271; Brown v. Calumet River Ry. Co., 125 Ill. 600; Kiernan v. Chicago, etc. Ry. Co., 123 id. 188; Calumet River Ry. Co. v. Moore, 124 id. 329.

Evidence of the amount of business done on property and of the profits arising therefrom is too speculative and uncertain. De Boul v. Freeport, etc. Ry. Co., 111 Ill. 499. And evidence of the cost of buildings upon property is not an element of damages unless it is shown that they increase its value to the extent of their cost. Jacksonville & S. Ry. Co. v. Walsh, 106 Ill. 253.

[3] Somerville, etc. R. Co. v. Doughty, 22 N. J. L. 503.

[4] Shattuck v. Stoneham, etc. R. Co., 6 Allen, 115; Swan v. Middlesex, 101 Mass. 173; Pennsylvania, etc. R. Co. v. Bunnell, 81 Pa. St. 414; Montana Ry. Co. v. Warren, 6 Mont. 275; San Diego Land & T. Co. v. Neale, 78 Cal. 63, 78; Leroy & W. Ry. Co. v. Hawk, 39 Kan. 638; Springfield & S. Ry. Co. v. Calkins, 90 Mo. 538; Johnson v. Freeport, etc. Ry. Co., 111 Ill. 413.

knowledge of the location, productiveness or adaptation of the land to other uses, not speculative, or of the market or selling price of similar land in the vicinity, are legal evidence to prove its value.[1] But while such opinions are competent testimony, it has been generally held that witnesses cannot, upon direct examination, be allowed to testify as to particular transactions, such as sales of adjoining lands, how much has been offered and refused for such lands of like quality and location, or for the land in question, or any part thereof; or how much the company have been compelled to pay in other and like cases — notwithstanding those transactions may constitute the source of their knowledge. If this was allowed the other side would have the right to controvert each transaction instanced by the witnesses and investigate its merits, which would lead to as many side issues as transactions, and render the investigation interminable. Upon cross-examination, however, the knowledge of witnesses, and, therefore, the value of their opinions, may be tested in that mode if desired by the party in whose interest the examination is conducted.[2] In some states evidence of *bona fide* offers to sell or purchase the land in question is admissible.[3] In Wisconsin, Illinois and Massa-

[1] Snyder v. Western U. R. Co., 25 Wis. 60; Central P. R. Co. v. Pearson, 35 Cal. 261; Parks v. Wisconsin, etc. R. Co., 33 Wis. 413; Searle v. Lackawanna, etc. R. Co., 33 Pa. St. 57; Brown v. Corey, 43 id. 495; Snow v. Boston, etc. R. Co., 65 Me. 230; Grand Rapids, etc. R. Co. v. Horn, 41 Ind. 479; East Pennsylvania R. Co. v. Hiester, 40 Pa. St. 53; Whitman v. Boston, etc. R. Co., 7 Allen, 313; Pennsylvania, etc. R. Co. v. Bunnell, 81 Pa. St. 414; Pittsburgh, etc. R. Co. v. Rose, 74 id. 362; Curtin v. Nittany V. R. Co., 135 id. 20.

[2] Central P. R. Co. v. Pearson, 35 Cal. 261; Brunswick, etc. R. Co. v. McLaren, 47 Ga. 546; Dickenson v. Fitchburg, 13 Gray, 546; Tufts v. Charlestown, 4 Gray, 537; Pennsylvania, etc. R. Co. v. Bunnell, 81 Pa. St. 414; Pinkham v. Chelmsford, 109 Mass. 225; Davis v. Charles River B. Co., 11 Cush. 506; West Newbury v. Chase, 5 Gray, 421; Whitman v. Boston R. Co., 7 Allen, 313; Swan v. Middlesex, 101 Mass. 173; Shattuck v. Stoneham R. Co., 6 Allen, 115; Fall River Works v. Fall River, 110 Mass. 428; Cobb v. Boston, 112 id. 181; Lehmicke v. St. Paul, etc. R. Co., 19 Minn. 464; Rondout R. Co. v. Deyo, 5 Lans. 298; Stinson v. Chicago, etc. R. Co., 27 Minn. 284; Curtin v. Nittany V. R. Co., 135 Pa. St. 20; Kerr v. South Park Com'rs, 117 U. S. 379.

[3] East Brandywine & W. R. Co. v. Ranck, 78 Pa. St. 454; Springfield v. Schmook, 68 Mo. 394; Muller v. Southern, etc. Ry. Co., 83 Cal. 240; Johnson v. Freeport, etc. Ry. Co., 111 Ill. 413; Springer v. Chicago, 135 id. 552.

chusetts evidence of sales of similar lands in the vicinity, if made about or before the time of the taking, is received in the discretion of the trial court.[1] It is generally held that opinions of witnesses are not admissible as to the [464] amount of damages, nor as to the future effect of taking part of a tract of land for a public improvement.[2] In Massachusetts, Illinois, Arkansas, Missouri, South Carolina, Pennsylvania, and, it seems, Minnesota, a different rule prevails.[3]

§ 1090. Effect of judgment for compensation. Such a judgment is a bar only to an action for such injuries as could properly be included in the assessment.[4] These are damages resulting from making the appropriation in conformity to law, and proceeding with the construction of the public improvement and subsequent use of the property in a skilful and proper manner, observing all legal restrictions and fulfilling all legal obligations.[5] Just compensation does not extend to or embrace injuries to adjoining land not authorized to be taken; nor to damages resulting from carelessness or wilful

[1] Watson v. Milwaukee & M. Ry. Co., 57 Wis. 332, 350; Washburn v. Milwaukee, etc. R. Co., 59 id. 364, 377; Laflin v. Chicago, etc. R. Co., 33 Fed. Rep. 415, 423; Concordia Cemetery Ass'n v. Minnesota & N. R. Co., 121 Ill. 199, 212; Chandler v. Jamaica, etc. Corp., 122 Mass. 305, and cases cited.

[2] Atlantic, etc. R. Co. v. Campbell, 4 Ohio St. 583; Troy, etc. R. Co. v. Northern T. Co., 16 Barb. 100; Rockford, etc. R. Co. v. McKinley, 64 Ill. 338; Covill v. St. Paul, etc. R. Co., 19 Minn. 283; Curtis v. Same, 20 Minn. 28; Dalzell v. Davenport, 12 Iowa, 437, Hosher v. Kansas City, etc. R. Co., 60 Mo. 329; Tingley v. Providence, etc. R. Co., 8 R. I. 493; Hagaman v. Moore, 84 Ind. 496; Leroy & W. R. Co. v. Ross, 40 Kan. 598 (correcting former intimations to the contrary); Omaha v. Kramer, 25 Neb. 489.

[3] Swan v. Middlesex, 101 Mass. 173; Brainard v. Boston, etc. R. Co., 12 Gray, 407; Springfield & M. Ry. v. Rhea, 44 Ark. 285; L. R. Junction Ry. v. Woodruff, 49 id. 381; Springfield & S. Ry. Co. v. Calkins, 90 Mo. 538; Bowen v. Atlantic, etc. R. Co., 17 S. C. 574; Keithsburg, etc. R. Co. v. Henry, 79 Ill. 290; Beck v. Pennsylvania, etc. R. Co. (Pa.), 23 Atl. Rep. 900; Lehmicke v. St. Paul, etc. R. Co., 19 Minn. 464, 481. See vol. 1, § 444.

[4] Southside R. Co. v. Daniel, 20 Gratt. 344.

[5] *Ante*, § 1068; Dodge v. County Comm'rs, 3 Met. 380; Delaware Canal Co. v. Lee, 22 N. J. L. 243; McCormick v. Kansas City, etc. R. Co., 57 Mo. 433; Bailey v. Mayor, 3 Hill, 531; Lawrence v. Great Northern Ry. Co., 16 Q. B. 643; Mason v. Kennebec, etc. R. Co., 31 Me. 215; Chicago, etc. R. Co. v. Loeb, 118 Ill. 203; Same v. McAuley, 121 id. 160; Reisner v. Union Depot & R. Co., 27 Kan. 382; Leavenworth, etc. Ry. Co. v. Usher, 42 id. 637.

trespass in the execution of the work.[1] It is conclusively pre- [465] sumed after judgment that it embraced all damages of every kind naturally consequent to the taking; in judgment of law all such were foreseen and compensated,[2] and no others. But this does not preclude a fresh demand if the plan of the public work is changed after the assessment so as to make the effect of the appropriation more injurious.[3] The judgment is conclusive of the amount due to the person designated to receive it,[4] and vests a right to the money.[5] After damages have been ascertained and fixed for taking private property for a highway there can be no abatement of the amount for subsequently vacating a part of such highway,[6] or for entirely discontinuing it.[7]

§ **1091. Interest.** It being an accepted principle that land taken for public use should be valued and damages ascertained as of the date of the taking, payment is then legally due unless a statute designates some other time;[8] and on general principles interest should be given from the time when the principal should be paid;[9] or, in other words, from the time the land-owner was entitled to compensation;[10] unless the obligation to pay it then is qualified by some required preliminary act to liquidate the amount or a demand of payment.[11] In

[1] Colcough v. Nashville, etc. R. Co., 2 Head, 171.

[2] Furniss v. Hudson River R. Co., 5 Sandf. 551; Chicago, etc. R. Co. v. Springfield, etc. R. Co., 67 Ill. 142; Pusey v. Allegheny, 98 Pa. St. 522.

[3] Boyd v. Negley, 53 Pa. St. 387; Carpenter v Easton R. Co., 26 N. J. L. 168; Wabash, etc. Ry. Co. v. McDougall, 118 Ill. 229; S. C., 126 id. 111.

[4] Sparhawk v. Walpole, 20 N. H. 317.

[5] People v. Supervisors, 4 Barb. 64.

[6] Reed v. Wall, 34 N. J. L. 275.

[7] Clough v. Unity, 18 N. H. 75.

[8] Hamersley v. New York, 56 N. Y. 533; Phillips v. Pease, 39 Cal. 582; Cohen v. St. Louis, etc. R. Co., 34 Kan. 158, 168; Drury v. Midland R., 127 Mass. 571, 585.

[9] Norris v. Philadelphia, 70 Pa. St. 332; Getz v. Philadelphia & R. R. Co., 105 id. 547; Pennsylvania, etc. R. Co. v. Ziemer, 124 id. 560; Reed v. Chicago, etc. Ry. Co., 25 Fed. Rep. 886.

[10] Delaware, etc. R. Co. v. Burson, 61 Pa. St. 369; Alloway v. Nashville, 88 Tenn. 510; East Tennessee, etc. R. Co. v. Burnett's Ex'rs, 11 Lea, 525; Cincinnati v. Whetstone, 47 Ohio St. 196, quoting the three preceding propositions of the text.

[11] People v. Canal Commissioners, 5 Denio, 401.

In Clough v. Unity, 18 N. H. 75, it was considered that by the adjudication of damages on laying out a highway a right to the money is vested, and is not affected by a subsequent discontinuance of the highway. But after such adjudication

some states the taking is by legal proceedings to con- [466] demn: and there, as a general rule, interest is charged only from the date of award.[1] It is given not strictly as damages, but as an equitable mode of compensating the owner for the unnecessary delay in ultimately ascertaining the amount he is entitled to be paid when the final judgment is postponed for any re-examination by appeal or otherwise. The general rule, therefore, is liable to be controlled by the circumstances of the particular case. If the owner has had the profitable use of the premises, or received rents during such intermediate period, these circumstances are taken into account and the interest abated accordingly. Advantage should be taken of such facts on the trial finally had.[2] If the delay after the [467]

no duty is imposed on the town except to pay before making the road. If the owner sues for the money before the town proceeds to open the highway, he does so before there is any active duty to pay. The court say that the decree is "not like a judgment, the liquidation of a demand; it is of itself the inception of a demand; it rests on no promise; it is not in the nature of damages for a tort, nor money of . . (the owner) . . received by the town and misapplied. The award and consequent decree bear certain strong analogies to a judgment which carries interest. But a judgment is rather an act of the party himself, who procures it for the express purpose of enforcing an antecedent claim; while the award of land damages is a matter into which both parties have been brought *in invitum*, and affords no evidence whatever that the money is detained contrary to the wishes of the party entitled to it. There is no necessary presumption that he wishes to receive it until the time when the town would be required to pay it for the purpose of justifying their entry upon the land, unless he makes a demand, and so manifests his wishes; and, if the demand is not complied with, establishes the adverse relation between the parties that lays the foundation for demanding interest. Mohurin v. Bickford, 6 N. H. 567; Reid v. Rensselaer Glass Factory, 3 Cow. 436." In the earlier case of Fiske v. Chesterfield, 14 N. H. 240, it was held that the acceptance by the court of common pleas of the report of a committee laying out a road is not precisely a judgment that the town is indebted to the land-owner in the sum awarded to him as damages, but it furnishes record evidence that he is entitled to recover. "If he brings an action of debt on that judgment, without a demand, after the road is opened, he is entitled to recover interest on the sum awarded from the time of opening of the road, but not before that time, as until then the amount could not be considered as detained."

[1] Metler v. Easton, etc. R. Co., 37 N. J. L. 222; Warren v. First Division, etc. R. Co., 21 Minn. 424.

[2] Id.; West v. Milwaukee, etc. Ry. Co., 56 Wis. 318. But in Commonwealth v. Boston, etc. R. Co., 3 Cush. 57, the court by Shaw, C. J., said: "We consider it the plain dictate of

assessment by commissioners is by the unnecessary act or litigious conduct of the owner he will not be entitled to interest during such delay.[1] Thus, if he is the sole appellant, and the verdict should not be in excess of the appraisement of the commissioners, interest should be disallowed. In that event the postponement of the receipt of compensation adjudged by the commissioners, and decided by the judge to have been adequate, would be due to his own act. To allow him indemnity for such delay in the form of interest would be unreasonable and unjust.[2] But if the condemning party also appeal, interest will not be denied to the owner because he appealed.[3] In New Hampshire, where the amount of damages has been fixed by award of commissioners and the owner appeals, interest will be allowed unless the money has been tendered or deposited.[4] Then if he appeals and gets a larger sum allowed, he is entitled to interest only on such additional sum, for he could receive the tendered or deposited sum without prejudice to his right to appeal.[5] In Tennessee a tender of the amount originally awarded does not affect the plaintiff's right to interest on the whole sum finally assessed in his favor if the latter is larger than the former.[6] And in Nebraska a deposit made with an officer who holds the amount until the parties' rights are finally determined does not affect the land-owner's right to interest on the entire sum when the award is increased on his appeal.[7] But if the deposit is withdrawn by him pending an appeal and the final award is less than the sum of the deposit, the condemning party is entitled to interest on the difference between the two amounts.[8] In states

justice when money is due on a judgment, or on a verdict in the nature of a judgment, and payment is prevented by the necessary time taken for re-examining the case, if it result in confirming the former judgment and showing that the party was then entitled to his money, that interest should be allowed as a just compensation for the delay." See Detmold v. Drake, 46 N. Y. 318.

[1] Cook v. South Park Com., 61 Ill. 115.

[2] Reisner v. Union Depot & R. Co., 27 Kan. 382.

[3] Warren v. First Division, etc. R. Co., 21 Minn. 424.

[4] Concord R. v. Greeley, 23 N. H. 237.

[5] Shattuck v. Wilton R. Co., 23 N. H. 269; Wichita & W. R. Co. v. Kuhn, 38 Kan. 104.

[6] Alloway v. Nashville, 88 Tenn. 510, 530.

[7] Sioux City, etc. R. Co. v. Brown, 13 Neb. 317.

[8] Watson v. Milwaukee & M. Ry. Co., 57 Wis. 332, 348.

where the taking is the actual appropriation, interest is allowed from that time, and included in the award,[1] which bears interest after it is made.[2] Where the condemning party is required to procure condemnation of and pay for the property prior to actual appropriation or use of it, he is in fault and a trespasser if he takes possession without first acquiring the right. By such delay in instituting proceedings he incurs the hazard of paying an enhanced price as of the date of the assessment, in states where the value and damages are [468] fixed at that date, or interest from the time of taking possession where that fact fixes the date of taking. In case of appropriations of private property for public use by the state or some municipal division compensation is not unfrequently so provided for that the owner must be the actor to obtain it. Then he must take the necessary steps to entitle himself to the money, and to impose the immediate duty to pay it, and until that is done there can be no such default in making payment as will give him a right to interest.[3] But if the appropriating party takes unauthorized possession before payment, and the value and damages are fixed at the date of such appropriation, a right to interest arises from such actual taking.[4]

[1] Gay v. Gardiner, 54 Me. 447; Bangor, etc. R. Co. v. McComb, 60 Me. 290; Kidder v. Oxford, 116 Mass. 165; Reed v. Hanover B. R. Co., 105 Mass. 303; Whitman v. Boston, etc. R. Co., 7 Allen, 313; Atlantic, etc. R. Co. v. Koblentz, 21 Ohio St. 334. Where a jury returned a verdict in which they assessed the damages at a certain sum "with interest thereon from the time when the said railroad company took possession of the land," it was held void for uncertainty. Connecticut River, etc. R. Co. v. Clapp, 1 Cush. 559.

[2] West v. Milwaukee, etc. Ry. Co., 56 Wis. 318.

[3] People v. Canal Com'rs, 5 Denio, 401; Norris v. Philadelphia, 70 Pa. St. 334; Philadelphia v. Dyer, 41 id. 469, 470; In re Second Street, Harrisburg, 66 id. 132.

[4] Delaware, etc. R. Co. v. Burson, 61 Pa. St. 369; Fiske v. Chesterfield, 14 N. H. 240.

CHAPTER XXVII.

TRESPASS TO PERSONAL PROPERTY.

§ 1092. When damages may exceed compensation.
1093. Certainty of damages.
1094. Remedy more comprehensive than trover.
1095. Aggravations increase damages.
1096. Measure of damages for taking or destroying property.
1097. Same subject; quantity of interest.
1098. Same subject; market value.
1099. Same subject; non-marketable property.
1100–1102. Special and consequential damages.
1103. Expenses to recover or restore property.
1104. Mitigation of damages.
1105. Application of property to owner's benefit.
1106, 1107. Damages against trespasser from the beginning.

[469] § 1092. **When damages may exceed compensation.** The recovery for this wrong is limited to compensation in the absence of aggravations for which punitory damages are allowable. Whether, by the proof adduced, there are such aggravations shown as will justify the jury in considering a claim for such damages is for the court to decide. If there is testimony tending to show and warranting a finding that the trespass was wanton or malicious the court will submit the question of their allowance and the amount of them to the jury.[1] When their allowance has been so submitted the amount which the jury may think proper to award will be accepted by the court unless it is so exorbitant as to indicate that they have been influenced by passion, prejudice or a perverted judgment.[2] A corporation may recover exemplary damages for a malicious and oppressive trespass.[3] Statutes

[1] Selden v. Cushman, 20 Cal. 56; Ives v. Humphreys, 1 E. D. Smith, 196; Pacific Ins. Co. v. Conard, Baldw. 138; Moore v. Schultz, 31 Md. 423; Rose v. Story, 1 Pa. St. 190; Wylie v. Smitherman, 8 Ired. 236; Morris v. Shew, 29 Kan. 661; Wellman v. Dickey, 78 Me. 29; Willis v. Miller, 29 Fed. Rep. 238.

[2] Rogers v. Henry, 32 Wis. 327; Belknap v. Boston, etc. R. Co., 49 N. H. 358; McCarthy v. Niskern, 22 Minn. 90; McConnell v. Hampton, 12 Johns. 234. See Stilson v. Gibbs, 53 Mich. 280.

[3] International, etc. R. Co. v. Telephone & T. Co., 69 Texas, 277.

which impose treble damages for trespasses receive the strictest construction. Hence the imposition of that measure of liability for carrying off, using or destroying any wood, timber, lumber, hay, grass or other personal property applies only to things *ejusdem generis* with those enumerated — such as are produced and grown upon land; a yoke of oxen is not included.[1] Such a statute is not to be extended to a person who has not actually committed the trespass complained of.[2]

§ 1093. Certainty of damages. Trespass is a wrong committed with force, actual or constructive; it is more or less aggressive; therefore, the damages necessary to complete compensation usually include reparation for pecuniary items capable of clear proof and precise computation, and may include reparation for other injuries equally deserving recompense, and which cannot be proved with certainty, nor estimated by any precise standard, and possibly by no money standard. The former must be proved in actions for trespass as in [**470**] any other action, and if, when they are compensated, the plaintiff has adequate redress for the wrong suffered, they constitute the basis of his entire recovery and are the measure of damages; in other words, where from the nature and circumstances of the case a rule can be discovered by which adequate compensation can be accurately measured, such rule should be applied in actions of tort as well as in those upon contract.[3] If such rule exists as to a part of the damages only, it is available and obligatory to that extent. And if the wrong produce other injury also, not capable of such certain proof and pecuniary estimate, it is not necessarily excluded from the consideration of the jury. If the general facts can be proved they will be submitted to the jury for a finding of compensation according to their best judgment.[4] But they must tend to establish a damage in legal contemplation; that is to say, a recoverable damage according to the elementary requisites which have been considered at large in another place; a damage which is the natural and proximate consequence of the trespass; and of a nature susceptible of appre-

[1] Berg v. Baldwin, 31 Minn. 541.

[2] Potulni v. Saunders, 37 Minn. 517.

[3] Allison v. Chandler, 11 Mich. 542; Warren v. Cole, 15 Mich. 265; Gilbert v. Kennedy, 22 Mich. 117.

[4] Id.; Ogden v. Lucas, 48 Ill. 492; Dennison v. Hyde, 6 Conn. 507.

ciation upon practicable proof,— neither remote nor speculative. In this action as in all others where no proof laying ground for exemplary damages is given compensation to the plaintiff for his loss is the general rule.[1]

§ **1094. Remedy more comprehensive than trover.** In trespass the possessor of a chattel may recover in respect of the taking and its circumstances; not only for any actual loss or injury suffered therefrom, but also some damages, not necessarily nominal, even if no real injury ensued from the taking, and the property is not removed, nor the plaintiff's enjoyment materially interfered with. In this respect the action of trespass reaches an element of the wrong which would be waived in trover.[2] Where the taking was attended with injurious aggravations, it was held that a plea which alleged an assignment in bankruptcy after the commencement of the suit by [471] which the right to recover for the property taken passed to the assignee, was not an answer to the whole action; that the plaintiff still had a right to recover in respect of the taking.[3] Where the taking diminishes the value by severing fixtures, their value in place, rather than as chattels severed, may be recovered.[4] Where a plank sidewalk was wrongfully removed the owner was held entitled to recover not merely the value of the plank but their value laid in the walk.[5] In trover the plaintiff could recover only the value of fixtures as mere chattels.[6]

§ **1095. Aggravations increase damages.** In this action the plaintiff is entitled to give evidence, for the purpose of enhancing damages, of the circumstances which accompanied and gave character to the wrong, and to show any inconvenience, insult or injury attending it, or resulting therefrom.[7] Where the defendant, by artifice, obtained entrance into the plaintiff's dwelling-house, and thence removed furniture lately

[1] Hopple v. Higbee, 23 N. J. L. 342.

[2] Hite v. Long, 6 Rand. 457; Bayliss v. Fisher, 7 Bing. 153; Doss v. Doss, 14 W. R. 590; Chamberlain v. Shaw, 18 Pick. 219.

[3] Brewer v. Dew, 11 M. & W. 625. See Gregory v. Cotterell, 1 E. & B. 360.

[4] Moore v. Drinkwater, 1 Fost. & Fin. 144; Thompson v. Pettitt, 10 Q. B. 101.

[5] Rogers v. Randall, 29 Mich. 41.

[6] Clarke v. Halford, 2 C. & K. 540.

[7] Bracegirdle v. Orford, 2 M. & S. 77; Sniveley v. Fahnestock, 18 Md. 391; Brown v. Bridges, 70 Texas, 661.

sold and delivered because it had not been paid for, the court said the pecuniary loss to the plaintiff is not necessarily the rule of damages. The jury are to determine the extent of the injury and the equivalent damages in view of all the circumstances of injury, insult, invasion of the privacy and interference with the comfort of the plaintiff and his family.[1] In New Hampshire nothing but compensatory damages can be awarded in a civil action based on a tort. Where trespass was brought for beating and injuring a horse, the act being accompanied with malicious insults, substantial damages were sustained, though the animal was previously lame and of small value. The court said: "In some cases compensation for the actual material damage sustained will be full compensation. In other cases the material damage may be trivial, and the principal injury be to the wounded feelings from the insult, degradation and other aggravating circumstances attending the act. . . . The award, as we construe it, compensates the plaintiff for the damage he has sustained by the injury to his property, and for his mental damage by reason of the defendant's malice."[2] A more emphatic declaration of the right to recover for mental suffering is given in a late Minnesota case. The body of the plaintiff's deceased husband was unlawfully mutilated and dissected. It was ruled that the right to its possession for the purposes of preservation and burial, in the absence of any testamentary disposition of it, belonged to the wife, and that the law will protect such right; for an infraction of it there may be a recovery for injury to the feelings direct and proximately resulting, although no pecuniary loss was sustained.[3] The circumstances attending a trespass are thus allowed to be proved with a view to compensation for general as well as special damages; and also to show the evil motive, if such there be, with a view to exemplary damages. Where the trespass is committed in a wanton, rude and aggravating manner, indicating malice, or a desire to injure, "a jury," said Baldwin, J., in a charge afterwards approved by the federal court of last resort, "ought to be liberal in compensating the party injured for all he has lost in prop-

[1] Ives v. Humphreys, 1 E. D. Smith, 196.

[2] Kimball v. Holmes, 60 N. H. 163.

[3] Larson v. Chase, 47 Minn. 307; 50 N. W. Rep. 238.

erty, in expenses for the recovery of his rights, in feelings, or [472] in reputation; and even this may be extended by setting a public example to prevent a repetition of the act. In such cases there is no certain fixed standard, for the jury may not only take into view what is due to the party complaining, but to the public, inflicting what are called in law speculative, exemplary or vindictive damages."[1] The defendant, in the wrongful act of taking goods, used language which wounded the owner's feelings; it was allowed to be proved, and considered as one of the circumstances accompanying and giving character to the trespass for the purpose of increasing the damages for the malice and insult.[2] Exemplary damages are not allowable in an action based on a trespass, which, though unlawful, was not malicious; malice is not implied from the mere unlawfulness of the act.[3] But such damages may be imposed where a trespass is wantonly or recklessly committed, though there is no proof of actual malice toward the plaintiff;[4] and where it is accompanied by circumstances of aggravation,[5] or very gross and reprehensible negligence.[6] But in no case can they be recovered on anything less than gross negligence in the strictest definition of the term —"such entire want of care as to raise a presumption that the person in fault is conscious of the probable consequences of his carelessness, and indifferent or worse to the danger of injury to the persons or property of others."[7] A mere wrongful taking of property under circumstances showing a disregard of the rights of plaintiff does not warrant an award of exemplary damages.[8] It is said in Alabama that if an officer seizes exempt property knowing it to be such, the fact is indicative

[1] Pacific Ins. Co. v. Conard, Baldw. 138; affirmed, 6 Pet. 262. Johnson v. Camp, 51 Ill. 219, decides that where a party takes away a crop, raised and harvested by another, stacked upon premises the taker had bought at a foreclosure sale, he is a trespasser, and as he is chargeable with a knowledge in law that he did not acquire the crop by his purchase, he was liable to punitory damages. Robinson v. Goings, 63 Miss. 500.

[2] Treat v. Barber, 7 Conn. 279; Bracegirdle v. Orford, 2 M. & S. 77; Edwards v. Beach, 3 Day, 44; Nichols v. Bronson, 2 Day, 211; Linsley v. Bushnell, 15 Conn. 225.

[3] Brown v. Allen, 35 Iowa, 306; Heidenheimer v. Sides, 67 Texas, 32.

[4] Devaughn v. Heath, 37 Ala. 595; Kemmitt v. Adamson, 44 Minn. 121.

[5] Parker v. Mise, 27 Ala. 480.

[6] Rhodes v. Roberts, 1 Stew. 145.

[7] Lienkauf v. Morris, 66 Ala. 413.

[8] Wilkinson v. Searcy, 76 Ala. 176;

of malice or a degree of recklessness equivalent thereto, and authorizes the imposition of such damages. But if he proceeds under a statutory bond of indemnity, his discretion to execute the process is gone, and if he does execute it without improper conduct, the mere possession of such knowledge does not have that effect.[1] While the makers of such a bond given to induce an officer to levy on goods in the possession of one not a party to the process may be liable for compensatory damages as co-trespassers,[2] their liability does not extend beyond that unless they authorized him to act wantonly, recklessly or maliciously, or such acts on his part were probably consequent on the making of the levy or were ratified by them.[3] In Illinois it is held that the subsequent ratification of a trespass does not subject the ratifying party to vindictive damages;[4] but this is not the rule in Texas.[5] Where the plaintiff does not complain of injury to his person or his feelings, where no malice is shown, where no right is involved beyond a mere question of property, where there is a clear standard for the measure of damages, and no difficulty in applying it, the measure is a question of law and is necessarily under the control of the court.[6] Such damages are the same in all actions; they do not depend on the form of the action, and are not affected by it.[7] Where the trespass is not accompanied by any circumstances tending to aggravate the wrong, and sufficient to justify exemplary damages, the law applies in all cases the same uniform measure of relief for property taken or injured.[8]

§ 1096. Damages for taking or destroying property. For the asportation or destruction of personal property so that the owner is wholly deprived of it, he is entitled to recover [473] its value at the time of the trespass, and interest from that time. This is the minimum measure for an entire loss of the

Sullivan v. Dee, 8 Ill. App. 263. But compare Von Storch v. Winslow, 13 R. I. 23.

[1] Alley v. Daniel, 76 Ala. 403.

[2] Screws v. Watson, 48 Ala. 628; Lovejoy v. Murray, 3 Wall. 1.

[3] Lienkauf v. Morris, 66 Ala. 406.

[4] Grand v. Van Vleck, 60 Ill. 487; Pardridge v. Brady, 7 Ill. App. 639.

[5] Brown v. Bridges, 70 Texas, 661.

[6] Berry v. Vreeland, 21 N. J. L. 187.

[7] McInvoy v. Dyer, 47 Pa. St. 118; Parrott v. Housatonic R. Co., 47 Conn. 575.

[8] Dorsey v. Manlove, 14 Cal. 553; Kelly v. McDonald, 39 Ark. 387; Black v. Robinson, 61 Miss. 54.

property. For any injury to it there is a right to a proportional recovery.[1] Interest is not always mentioned in the cases as part of the rule, and is perhaps not always intended. In England, and to some extent in this country, it is left to the discretion of the jury; and they have been allowed to decide whether the value should be fixed at the date of the taking or conversion or at some later date before or at the time of the trial.[2]

§ 1097. Same subject; quantity of interest. The value a party is entitled to recover depends on the quantity of the interest he possesses or represents in the property which was the subject of the trespass. The plaintiff must have the actual possession, or a present right of possession when the trespass was committed in order to maintain this action.[3] The person in whom the general property is vested may maintain an ac-

[1] State v. Smith, 31 Mo. 566; Walker v. Borland, 21 Mo. 289; Gray v. Stevens, 28 Vt. 1; Clapp v. Thomas, 7 Allen, 188; Coolidge v. Choate, 11 Met. 79; Garretson v. Brown, 26 N. J. L. 425; Campbell v. Woodworth, 26 Barb. 648; Dorsey v. Manlove, 14 Cal. 553; Gilson v. Wood, 20 Ill. 37; Josey v. Wilmington, etc. R. Co., 11 Rich. 399; Thomas v. Isett, 1 G. Greene, 470; Scott v. Bryson, 74 Ill. 420; Brannim v Johnson, 19 Me. 361; Conard v. Pacific Ins. Co., 6 Pet. 262; Pacific Ins. Co. v. Conard, Baldw. 138; Kennedy v. Whitwell, 4 Pick. 466; Lillard v. Whittaker, 3 Bibb, 92; Watts v. Potter, 2 Mason, 77; Dillenback v. Jerome, 7 Cow. 294; Ingram v. Rankin, 47 Wis. 406; Baker v. Drake, 53 N. Y. 211; Briscoe v. McElween, 43 Miss. 556; Lienkauf v. Morris, 66 Ala. 406; Stix v. Keith, 85 id. 465; Kelly v. McDonald, 39 Ark. 387; Parrott v. Housatonic R. Co., 47 Conn. 575; Black v. Robinson, 61 Miss. 54; Block v. Sweeney, 63 Texas, 419; St. L., I. M. & S. Ry. v. Biggs, 50 Ark. 169; Smith v. Zent, 83 Ind. 86; Georgia P. R. Co. v. Fullerton, 79 Ala. 298; Harrison v. Missouri P. Ry. Co., 88 Mo. 625.

[2] Greening v. Wilkinson, 1 C. & P. 625. Toledo, etc. R. Co. v. Johnston, 74 Ill. 83, was for killing animals on a railroad. The trial court instructed the jury to add interest to the sum they should find as the value of the property from the date of the killing. This was held error, and the jury having found interest, the judgment was reversed. The court say, in such cases the damages must be compensatory only, unless circumstances of aggravation are shown.

If property held for sale is wrongfully seized under an attachment its owner is not entitled to interest on its value unless he shows some loss other than merely being deprived of its possession. Fullerton L. Co. v. Spencer, 81 Iowa, 549.

[3] Scott v. Bryson, 74 Ill. 420; Neely v. McCormick, 25 Pa. St. 255; Wilson v. Martin, 40 N. H. 88; Hume v. Tufts, 6 Blackf. 136; Weitzel v. Marr, 46 Pa. St. 463; Muggridge v. Eveleth, 9 Met. 233; Codman v. Freeman, 3 Cush. 306; Brown v. Thomas, 26 Miss. 335; Howe v. Farrar, 44 Me.

tion against a stranger, although he has never had the possession in fact, because the general property draws after it the right of possession.[1] One having the actual pos- [474] session, as by finding,[2] or for a temporary purpose, as bailee or mortgagee,[3] or any other special property with possession,[4] may not only bring this action against a stranger who has taken possession without color of right, but may recover the full value of the property. And though the plaintiff's possession be tortious as to the true owner, he may recover against a stranger who divests him of it.[5] Such persons being bound to restore the property to the general owner, or to stand responsible to him for its full value, have the right to recover by that measure from the stranger who has wrongfully deprived them of it.[6] But if a mortgagor has surrendered his interest in the property to the mortgagee for no other consideration than the original mortgage the amount due thereon will limit the latter's recovery if the property destroyed was worth it.[7] If the first mortgagee waives his priority and lets the holder of a second mortgage in on the same footing he has they become tenants in common of the mortgaged prop-

233; Aikin v. Buck, 1 Wend. 466; Luce v. Hoisington, 54 Vt. 428.

[1] Ullman v. Barnard, 7 Gray, 558; Beaty v. Gibbons, 16 East, 116; Bro. Abr., Trespass, pl. 303, 346; 1 Add. on Torts, ¶ 524.

[2] Amory v. Delamirie, 1 Str. 504.

[3] Browning v. Skillman, 24 N. J. L. 351; Swire v. Leach, 18 C. B. (N. S.) 479; Heydon and Smith's Case, 13 Coke, 69; Burton v. Hughes, 9 Moore, 339; Sutton v. Buck, 2 Taunt. 307; Lyle v. Barker, 5 Bin. 457; White v. Webb, 15 Conn. 302; Harker v. Dement, 9 Gill, 7; Faulkner v. Brown, 13 Wend. 63; Outcalt v. Durling, 25 N. J. L. 443; Ullman v. Barnard, 7 Gray, 554; Burke v. Savage, 13 Allen, 408; Adams v. O'Connor, 100 Mass. 515; Jones v. McNeil, 2 Bailey, 466; Alt v. Weidenberg, 6 Bosw. 176; Warren v. Kelley, 80 Me. 512, 532; Densmore v. Mathews, 58 Mich. 616; St. L., I. M. & S. Ry. v. Biggs, 50 Ark. 169; Laing v. Nelson, 41 Minn. 522.

[4] Luse v. Jones, 39 N. J. L. 707.

[5] Northern P. R. Co. v. Lewis, 51 Fed. Rep. 658; Scott v. Bryson, 74 Ill. 420; McClure v. Hill, 36 Ark. 268; Hoyt v. Gelston, 13 Johns. 141; Hendricks v. Decker, 35 Barb. 298; Brown v. Ware, 25 Me. 411; Potter v. Washburn, 13 Vt. 558; Carson v. Prater, 6 Cold. 565; Criner v. Pike, 2 Head, 398; Fletcher v. Cole, 26 Vt. 170.

[6] Harker v. Dement, 9 Gill, 7; Story on Bailm., § 280; Warren v. Kelley, 80 Me. 512, 532; Densmore v. Mathews, 58 Mich. 616; Hamilton v. Lau, 24 Neb. 59. It is held in England that a bailee who is under no liability to the bailor cannot recover for injury done to property while in his possession. Claridge v. South Staffordshire T. Co. [1892], 1 Q. B. 422.

[7] Warren v. Kelley, 80 Me. 512, 534.

erty, and can sue jointly for an interference therewith.[1] The satisfaction of a prior mortgage warrants a recovery by a second mortgagee of an amount equal at least to the extent that the trespass has diminished his security.[2] The general owner of property in the hands of a bailee at the time of the taking may also maintain trespass if he has a present right to resume possession by the terms of the bailment, or in consequence of the wrongful act of the bailee or of the defendant.[3] In either case only one recovery can be had; whether the action is brought by the special or general owner the recovery of full value by him ousts the other of his right of action; otherwise the trespasser would be liable to make a second satisfaction for the injury.[4] One tenant in common is not under such ulterior responsibility to his co-tenant as special owners are to the general owner, and therefore his recovery will be limited to his interest.[5] Where the action is between the general and special owner directly, or between others claim-
[475] ing under or in privity with them; between a plaintiff having a qualified interest and a defendant who owns the residue, or has an interest in or a charge upon it, the damages will be limited by the value of the plaintiff's interest.[6]

[1] Densmore v. Mathews, 58 Mich. 616.

[2] Taylor v. Hines, 31 Mo. App. 622.

[3] 1 Add. on Torts, ¶ 524; Scott v. Newington, 1 M. & Rob. 252.

[4] Luse v. Jones, 39 N. J. L. 707.

[5] Sedgworth v. Overend, 7 T. R. 279; Harker v. Dement, 9 Gill, 7.

[6] Street v. Sinclair, 71 Ala. 110; Brierly v. Kendall, 17 Q. B. 937; Huntley v. Bacon, 15 Conn. 267; Chamberlain v. Shaw, 18 Pick. 279; Schindel v. Schindel, 12 Md. 108; Goulet v. Asseler, 22 N. Y. 225; Parish v. Wheeler, id. 494; Davidson v. Gunsolly, 1 Mich. 388; Treadwell v. Davis, 34 Cal. 601; Spicer v. Waters, 65 Barb. 227; Ward v. Henry, 15 Wis. 239.

In Noble v. Kelly, 40 N. Y. 415, a sheriff with three executions of different dates in his hands against one K., levied on and seized at one time, and by a single act, certain gold coin of the value of $1.000, the property of N. N. brought suit against him, in the nature of trespass, naming him as sheriff, and alleging the wrongful seizure to have been by him claiming to act as sheriff, "and under color of several pretended executions." The sheriff justified under the executions against K., setting them forth particularly. Before the trial N. executed to the sheriff a release, under seal, reciting a consideration of $10, releasing him as sheriff from all manner of action and actions, causes of action, suits, sums of money, trespasses, damages, claims and demands, whatsoever, he ever had, then had, or might have, "by reason, on account, or in consequence of any, or all and every, of his acts and proceedings under and by virtue, or in consequence, of the

§ 1098. Same subject; market value. If the property of which the owner is deprived is a marketable commodity, its market price is the value he is entitled to recover.[1] And this will govern though it would have been worth more to the plaintiff by reason of a particular contract he had entered into.[2] It is held that the retail price is not the measure of value. Where a quantity of merchandise is sued for the retail price would be unjust; for the merchant in fixing that price takes into consideration not only the first cost of the goods, but store rent, clerk hire, insurance, and probable amount [476] of bad debts, and adds to all these a percentage of profit.[3] This must be understood of a considerable quantity, not of a single article. The owner must be entitled to recover at such rate as he would have to pay in the nearest market where a like quantity could be bought to replace the property taken.[4] Added to this, no doubt, should be the expense necessarily incurred in getting the property so purchased to the place where the trespass was committed. This would make the damages depend upon the value of the property taken at the place where the wrong was done. The rule is thus expressed in some cases with the addition that the estimate is to be made as of the time the right of action accrued,[5] and compensation for

issuance and delivery to him of an execution," describing one of the executions in the sheriff's hands at the time of the levy. This release being pleaded by supplemental answer as a bar to the action, and a release of the whole cause of action, the court held it was neither; that operated only as a release of the damages sustained by the plaintiff to the amount of the execution specified; and that the plaintiff was nevertheless entitled to recover as damages the value of the coin seized, after deducting the amount so covered by the release.

If an officer seizes mortgaged property without complying with a statute which requires him to pay or tender the mortgagee the amount of his debt and the interest thereon, he is liable for the total amount of those items. Wood v. Franks, 56 Cal. 217.

[1] Coolidge v. Choate, 11 Met. 79; Gardner v. Field, 1 Gray, 151; Brown v. Allen, 35 Iowa, 306; Suydam v. Jenkins, 3 Sandf. 620; State v. Smith, 31 Mo. 566.

[2] Brown v. Allen, 35 Iowa, 306; Gardner v. Field, 1 Gray, 151. But see France v. Gaudet, L. R. 6 Q. B. 199.

[3] State v. Smith, 31 Mo. 566; Butler v. Collins, 12 Cal. 457; Nightingale v. Scannell, 18 Cal. 315; Heidenheimer v. Schlett, 63 Texas, 394.

[4] Cassin v. Marshall, 18 Cal. 689; Waters v. Langdon, 16 Vt. 570; Starkey v. Kelley, 50 N. Y. 677.

[5] Heidenheimer v. Schlett, 63 Texas, 394; Block v. Sweeney, id. 419.

the time required to obtain other property to replace that destroyed.[1] The injury done by taking property may be enhanced by depriving the owner of the opportunity or ability to make profits; an established business may thus be destroyed. If he is able to show gains thus prevented with the requisite certainty he is entitled to compensation for them.[2]

§ **1099. Same subject; non-marketable property.** Where the property is not marketable its value must be ascertained by such proof as the nature of the case admits of. One criterion of damage may be its actual value to the owner, and this is the rule where it is chiefly or exclusively valuable to him. Such articles as family pictures, plate and heirlooms should be valued with reasonable consideration of and sympathy with the feelings of the owner.[3] Where the portrait of the owner's father was lost by the negligence of a carrier this rule was applied, the court adding that in its application the jury should take into account its cost, the practicability and expense of replacing it, and such other considerations as in the particular case affect its value to the owner.[4] The testi- [**477**] mony of the plaintiff that he had no other portrait of his father was held to bear on the question of the actual value to him and was competent. In an action for conversion of plates for printing labels and advertisements of great value to the owner, but of very trifling value to others, the measure of damages was held to be the value to him; and that in esti-

[1] Fernwood Masonic Hall Ass'n v. Jones, 102 Pa. St. 307.

[2] Id.; Atlanta v. Dooley, 74 Ga. 702; Halcomb v. Stubblefield, 76 Texas, 310; Albert v. Blecker Street, etc. R. Co., 2 Daly, 389; Thomas v. Isett, 1 G. Greene, 470; Freidenheit v. Edmundson, 36 Mo. 226; Allred v. Bray, 41 Mo. 484; Milburn v. Beach, 14 Mo. 104; Luse v. Jones, 39 N. J. L. 707; Strasberger v. Barber, 38 Md. 103; Davenport v. Ledger, 80 Ill. 574; Oviatt v. Pond, 29 Conn. 479.

In Wehle v. Butler, 61 N. Y. 245, on an irregular attachment, the party therein named as creditor caused a stock of goods to be seized; they were the stock of a retail merchant of fancy goods, and her business was thus entirely broken up. The attachment was set aside and trespass brought for the goods. It was held that the plaintiff was entitled "to recover as part of her damages the fair retail value of her goods unlawfully taken." Reynolds, C., for the court, remarked: "That was the nature of her business as a merchant, and the goods were, doubtless, purchased with reference to it." See Wehle v. Haviland, 69 N. Y. 448; § 1102, *infra*.

[3] Suydam v. Jenkins, 3 Sandf. 620; Spicer v. Waters, 65 Barb. 227.

[4] Green v. Boston, etc. R. Co., 128 Mass. 221. See *ante*, § 919.

mating this the cost of replacing the plates might be considered.[1] Where trespass was brought for destroying a picture on exhibition, and it appeared that it was libelous to the defendant and his sister, under the general issue the plaintiff was only allowed to recover for the canvas and paint. Lord Ellenborough held that because it was libelous it could not be valued as a work of art.[2] The recovery measured by the value and interest is not peculiar to trespass, and requires no further elucidation in this connection.[3] The devisees and legatees under a will wrongfully spoliated after the testator's death may recover as part of the damages the reasonable fees paid for attorneys' services in having it admitted to probate.[4]

§ 1100. Special and consequential damages. The value and interest are not always a compensation for the injury; as, if one takes from his neighbor the beasts of the plow in seed time, or the implements of husbandry in harvest, whereby he is prevented from sowing his seed or reaping his corn, it is obvious that the value of the thing taken may be the smallest part of the injury.[5] It is intimated in New Jersey that there may be liability for the loss of crops if a trespass prevents the sowing of seed or the reaping of grain.[6] But in Alabama and Vermont it is held that such damages are too remote when they result from the seizure of animals used for the purpose of husbandry.[7] Where a husband and wife sued for a wrongful attachment of merchandise it was held that she could not recover for loss caused him by being thrown out of employment.[8] Where a plaintiff owned a fishery and net on a river; had men employed to assist him in fishing; and while his net was in the river the defendant ran his vessel through and injured it so as to delay the use of it, it was held that in addition to the damage to the net he was entitled to show these facts, and also the facts concerning the running of shad and the number caught on the preceding day, with a view to compensation for the loss of the benefits of the use. "The whole loss sustained," said the court, "is to be taken into view; and

[1] Stickney v. Allen, 10 Gray, 352.

[2] Du Bost v. Beresford, 2 Camp. 511.

[3] See vol. 1, § 105.

[4] Taylor v. Bennett, 1 Ohio Ct. Ct. 95.

[5] Woolley v. Carter, 7 N. J. L. 85.

[6] Id.

[7] Street v. Sinclair, 71 Ala. 110; Luce v. Hoisington, 56 Vt. 436.

[8] Rains v. Herring, 68 Texas, 468.

this depends on its use, its profits, the particular season or time, or occasion of the injury done, and the benefits or advantages lost thereby. And if so, all these must necessarily be proved and submitted to the consideration of the jury."[1] The defendant stopped the plaintiff's team and took out one [478] horse, thereby not only depriving him of the service of that animal, but subjecting him to delay and trouble in respect to the others in the team and his journey. The court held that in this action he could recover not only for the force and breach of the peace, but for stopping his team in order to take the horse.[2] In estimating the damages for a wrongful seizure of the furniture of a boarding-house it has been held proper to prove that there were guests in the house, and that applicants for board had to be turned away before, with reasonable diligence, the house could be refurnished, with a view to showing annoyance and injury to business to increase damages.[3] If a place of business is closed the time during which it remained so pending a motion to quash the execution and levy may be considered in assessing damages.[4] And the rent for which the plaintiff is liable may be recovered.[5] Where property used by a railroad contractor for sheltering his men and horses was seized the loss of men for the want of a place to shelter them, the expense of providing another shelter and the protraction of the time required to perform the work contracted to be done were elements of damage.[6]

§ 1101. Same subject. The defendant will be liable for such consequential damages, resulting from his interference with the plaintiff's property, as might reasonably be expected in the usual and natural course of things to ensue from his act, whether his interference be to take and carry away or to injure or destroy it.[7] Where a horse was injured by a collis-

[1] Post v. Munn, 4 N. J. L. 61; Swiveley v. Fahnestock, 18 Md. 391. See Wright v. Mulvaney, 78 Wis. 89, denying recovery of profits under the testimony.

[2] Shafer v. Smith, 7 Har. & J. 67. Where animals are lost the loss of time resulting therefrom is not an element of damage. Churchman v. Kansas City, 44 Mo App. 665.

[3] Luse v. Jones, 39 N. J. L. 707; Davenport v. Ledger, 80 Ill. 574.

[4] MacVeagh v. Bailey, 29 Ill. App. 606.

[5] Hough v. Dickinson, 58 Mich. 89.

[6] Carlisle v. Callahan, 78 Ga. 320.

[7] See vol. 1, § 43; McAfee v. Crofford, 13 How. (U. S.) 447; Johnson v. Courts, 3 Har. & McHen. 510; Oleson v. Brown, 41 Wis. 413; Metallic,

ion the damage was held to include the diminution of his market value, sums paid, and the value of services performed in a reasonable attempt to cure him and the loss of his use while he was under treatment, up to the limit of his value.[1] But the hire of another horse in the meantime cannot be included.[2] Where four horses used for plantation purposes were injured, one to its full value and one but slightly, the others being harmed to an intermediate extent, it was held that the owner could not keep them grouped as a team and charge for the loss of their use, especially if he had other horses with which to supply their places. The cost of making a change in the constitution of the team would be a proper item of damages. As to the horse fatally injured, the loss of the use was not recoverable on any basis.[3] In Michigan the proper rule of damages where animals are injured is their reduced value. It is said: "There may be peculiar and exceptional circumstances which would possibly sometimes justify a different rule, but they must be very peculiar. But there is no difficulty in replacing beasts by others adapted to similar service, and the difference between the value before and after the accident will enable the owner to be fully indemnified."[4] The fact that the care and expense bestowed upon an injured animal proves ineffectual does not affect the right to recover therefor, it having been done in good faith.[5] Where the defendant's rams escaped from his premises and entered upon

etc. Co. v. Fitchburg R. Co., 109 Mass. 277; Bishop v. Williamson, 11 Me. 495; Atchison v. Steamboat, 14 Mo. 63.

[1] Gillett v. Western R. Co., 8 Allen, 560; Atlantic R. Co. v. Hudson, 62 Ga. 679; Johnson v. Holyoke, 105 Mass. 80; Keyes v. Minneapolis, etc. Ry. Co., 36 Minn. 290; Wheeler v. Townshend, 42 Vt. 15; Street v. Laumier, 34 Mo. 469; Shelbyville, etc. R. Co. v. Lewark, 4 Ind. 471; New Haven S. Co. v. Vanderbilt, 16 Conn. 420; Williamson v. Barrett, 13 How. (U. S.) 101; I. & G. N. R. Co. v. Cocke, 64 Texas, 151; Central R. & B. Co. v. Warren, 84 Ga. 329 (expense of feed and cure). *Contra*, McLaughlin v. Bangor, 58 Me. 398 (as to loss of use).

While the owner of property which is employed in an illegal business may recover its value, he is not entitled to special damages because the taking of it resulted in breaking up his business. Smith v. Dinkelspiel, 91 Ala. 528.

[2] Hughes v. Quentin, 8 C. & P. 703; Barrow v. Arnaud, 8 Q. B. 595; Edwards v. Beebe, 48 Barb. 106.

[3] Tift v. Towns, 63 Ga. 237.

[4] Davidson v. Michigan C. R. Co., 49 Mich. 428.

[5] Gulf, etc. Ry. Co. v. Keith, 74 Texas, 287.

those of the plaintiff and got his ewes with lamb out of season so that the lambs were dropped during cold weather, the damages were not measured by the value of the lambs which perished because of the inclemency of the season, but by the difference between the value of the ewes as they were at the time of the trespass and thereafter.[1] On principles which are elsewhere fully stated,[2] the owner of property which is damaged cannot, if it possesses elements of value which it is practicable for him to utilize, abandon it and claim its full value from the wrong-doer. He must use reasonable exertions to realize whatever of value it may have.[3] Generally no allowance can be made for the expenses of the litigation to procure redress for the injury by trespass beyond taxable costs; they are regarded as full compensation.[4] Such expenses have been dis- [479] allowed even in cases where exemplary damages may be assessed;[5] but it is otherwise in some states.[6] Injury done to

[1] Stearns v. McGinty, 55 Hun, 101.

[2] Vol. 1, § 157.

[3] Harrison v. Missouri P. Ry. Co., 88 Mo. 625; Illinois C. R. Co. v. Finnigan, 21 Ill. 646; Dean v. Chicago & N. Ry. Co., 43 Wis. 305; Georgia P. R. Co. v. Fullerton, 79 Ala. 298.

[4] Cottrell v. Russell, 21 Mo. App. 1; Mix v. Kepner, 81 Mo. 96; Jacobus v. Monongahela Nat. Bank, 35 Fed. Rep. 395; Greenfield Bank v. Leavitt, 17 Pick. 1; Falk v. Waterman, 49 Cal. 224; St. Peter's Church v. Beach, 26 Conn. 355; Fairbanks v. Witter, 18 Wis. 287; Park v. McDaniels, 37 Vt. 594; Barnard v. Poor, 21 Pick. 378; Rutland, etc. R. Co. v. Bank, 32 Vt. 639; Kelly v. Rogers, 21 Minn. 146; Harris v. Eldred, 42 Vt. 39; Earl v. Tupper, 45 Vt. 275; Good v. Mylin, 8 Pa. St. 51; Howell v. Scoggins, 48 Cal. 355; Stopp v. Smith, 71 Pa. St. 285; Hatch v. Hart, 2 Mich. 289; Warren v. Cole, 15 Mich. 265.

In Harris v. Eldred, 42 Vt. 39, the owner of property which had been wrongfully taken from him sought in an action for the tort to recover, among other damages, the expenses of a legal proceeding in New York, by which he regained possession. They were disallowed; not on the assumption that they were recovered or recoverable in the suit in New York. They were deemed not allowable equally whether the laws of New York provided for costs to the prevailing party in such proceedings or not; because the costs of another action are not allowable. It is difficult to reconcile the reasoning on which this conclusion was reached with the doctrine of Greenfield Bank v. Leavitt, 17 Pick. 1. That case recognizes the right of the injured party to employ judicious agencies to recover his property, and to recover the expenses in an action for the wrongful taking. The law is settled in favor of their allowance. Why discriminate against the expenses of a judicious and appropriate proceeding in court to obtain possession, if they are not measurable by taxation and to be collected as costs in that proceeding?

[5] Falk v. Waterman, 49 Cal. 224; Earl v. Tupper, 45 Vt. 275; Howell v. Scoggins, 48 Cal. 355.

[6] Anderson v. Sloane, 72 Wis. 566;

the plaintiff's credit by wrongfully suing out an attachment against his property is too remote to be a ground of damage.[1]

§ 1102. Same subject. In an early Connecticut case trespass was brought for carrying away a spar which the plaintiff had procured to be used as a mast for a vessel he was building. The fact of the taking having been established, the plaintiff offered to prove in aggravation of damages that he was building a cutter, and had procured the spar for her mast; that there was no other spar on the Connecticut river suitable for such purpose, and that these facts were known to the defendant; that the taking was malicious, and with intent to obstruct the plaintiff, and he was obstructed and delayed in the building for several months. The evidence was rejected, and this was held error. Smith, J., remarked, speaking for the court: "In actions founded on tort the first object of the jury should be to remunerate the injured party for all the real damage he has sustained. In doing this the value of the article taken or destroyed forms one item; there may be [**480**] others; and in this case I think there were others. The interruption and delay which occurred in the building of a cutter might be, and probably was, a serious injury; and to show that this interruption and delay was a necessary consequence of the trespass it was proper to prove that no other mast could be procured on the river; for if it had been an article easily to be obtained, and like many others could be procured at any time in the market, no such interruption or delay could be attributed to the taking of it. . . . I have no doubt that the damages claimed in this case were sufficiently immediate. If a man should with force take the horse of another while from home on a journey, the interruption of the journey and the delay occasioned by it would not be too re-

Dibble v. Morris, 26 Conn. 416; Seeman v. Feeney, 19 Minn. 79; Titus v. Corkins, 21 Kan. 722; Roberts v. Mason, 10 Ohio St. 277; Marshall v. Bitner, 17 Ala. 832; Bracken v. Neill, 15 Tex. 109; New Orleans, etc. R. Co. v. Allbritton, 38 Miss. 242; Thompson v. Powning, 15 Nev. 210.

The code of Georgia, § 2942, provides that the expenses of litigation are not generally allowed as part of the damages; but if the defendant has acted in bad faith or has been stubbornly litigious, or has caused the plaintiff unnecessary trouble and expense, the jury may allow them. Guernsey v. Shellman, 59 Ga. 797.

[1] Landes v. Eichelberger, 2 Texas Civ. Cas. 127.

mote to be assessed by way of damages. I can see no difference between that case and many others of the same sort which might be put, if further illustrations were necessary, and the present. The damage is the natural and necessary consequence of the trespass and cannot be attributed essentially to any other cause."[1] In a late Wisconsin case a stock of goods was seized under executions based upon invalid judgments by confession. The store was closed and the goods held therein for twenty-six days, after which they were delivered to the plaintiff's assignee, plaintiff in the meantime having made an assignment for the benefit of his creditors. The executions were levied in good faith. The trial court held that damages included: 1. The attorney's fees and commissions carried into the confessed judgments, and paid by the plaintiff in order to get possession of the property levied upon. 2. His expenditures for attorney's services in getting the judgments and executions set aside. 3. The whole expenses of the assignee under the assignment, including a sum claimed to have been paid by him in conducting and closing up the assignment for attorney's fees. 4. The probable profits the plaintiff would have made from the time of the seizure until the end of one year after the remnant of the goods were received by him from the assignee. 5. For loss because the assignee was forced to sell otherwise than in the usual course of trade. 6. For injury to feelings. The appellate court held that the value of the goods, they having been received by the plaintiff before the action for the trespass was begun, was immaterial except so far as it bore upon the other items which were elements of damage. These were: 1. Interest on that value from the time of the seizure until the goods were surrendered, or, at least, at the option of the plaintiff, in lieu of such interest, the value of his business during that time. 2. Any depreciation in the value of the goods during the same time. 3. The expenses incurred in obtaining a return of the goods, including the sum paid for the costs included in the judgments referred to, and fees for executing the executions, and any expenses by way of rent of the store and clerk hire while the defendant was in possession; also money nec-

[1] Churchill v. Watson, 5 Day, 140; McAfee v. Crofford, 13 How. (U. S.) 447.

essarily paid for legal services in proceedings to set aside the judgments and executions. There was no liability for lost profits.[1] The assignment made by the plaintiff was not the legal effect of the defendant's acts, and he was not chargeable with any losses resulting from it.[2] There being no proof of malice or insult, damages for injury to the feelings were not recoverable.[3]

§ **1103. Expenses to recover or restore property.** If the owner regains possession, or the property is restored to and accepted by him, it will go in mitigation; then his claim for damages will be for the taking and detention.[4] The owner may reasonably exert himself to recapture his property.[5] He is entitled to compensation for such exertions, and also for moneys expended for the same purpose in a judicious and reasonable manner — in necessary purchases of the property,[6] in satisfying charges thereon,[7] or in offering and paying a reasonable reward for its return.[8]

[1] The opinion, by Taylor, J., cites as adverse to the allowance of profits, Beveridge v. Welch, 7 Wis. 465; Bierbach v Goodyear Rubber Co., 54 id. 208; Blair v. Milwaukee, etc. R. Co., 20 id. 262; Masterson v. Mount Vernon, 58 N. Y. 391, 396; Higgins v. Mansfield, 62 Ala. 267; Holliday v. Cohen, 34 Ark. 707; Heath v. Lent, 1 Cal. 412; Tobin v. Post, 3 id. 373; Oviatt v. Pond, 29 Conn. 479; Water Lot Co. v. Leonard, 30 Ga. 560; Green v. Williams, 45 Ill. 206; Cilley v. Hawkins, 48 id. 308; Chicago, etc. R. Co. v. Howison, 86 Ill. 215; Glass v. Garber, 55 Ind. 336; Campbell v. Chamberlain, 10 Iowa, 337; Lowenstein v. Monroe, 55 id. 82; Washington Ice Co. v. Webster, 62 Me. 341; Boyd v. Brown, 17 Pick. 453; Brown v. Smith, 12 Cush. 366; Simmer v. St. Paul, 23 Minn. 408; Cincinnati v. Evans, 5 Ohio St. 594; Bates v. Clark, 95 U. S. 209; Smith v. Condry, 1 How. 28; Bazon v. Steamship Co., 3 Wall. Jr. 229; Wallace v. Finberg, 46 Texas, 36; Miller v. Jannett, 63 id. 82; Weeks v. Prescott, 53 Vt. 73; Dennis v. Stoughton, 55 Vt. 371. Wright v. Mulvaney, 78 Wis. 89, is to the same effect.

[2] Citing Walker v. Fuller, 29 Ark. 448, 458; Donnell v. Jones, 13 Ala. 490, 513.

[3] Anderson v. Sloane, 72 Wis. 566, citing Donnell v. Jones. *supra.*

[4] Anderson v. Sloane, 72 Wis. 566; Reynolds v. Shuler, 5 Cow. 326; Murray v. Burling, 10 Johns. 172; Walker v. Fuller, 29 Ark. 448; Jones v. McNeil, 2 Bailey, 466; Barrelett v. Billgard, 71 Ill. 280; Hanmer v. Wilsey, 17 Wend. 91; Coffin v. Field, 7 Cush. 355; Kaley v. Shed, 10 Met. 317; Clapp v. Thomas, 7 Allen, 188.

[5] Bennett v. Lockwood, 20 Wend. 223.

[6] Keene v. Dilke, 4 Exch. 388.

[7] Woodham v. Gelston, 1 Johns. 134; Beadle v. Whitlock, 64 Barb. 287.

[8] Greenfield Bank v. Leavitt, 17 Pick. 1. In this case it was held that if return of the property is obtained by the offer and payment of a reasonable reward, this amount, with inter-

[481] **§ 1104. Mitigation of damages.** Any appropriation of the property or its proceeds by the owner after the tortious taking is equivalent to a return to the extent that he thus gets the benefit of it. Whatever such benefit, it goes in mitigation. If returned at a different place, the loss in value on that account must be compensated.[1] So if in consequence of the defendant's wrong a sale must be made, the net proceeds are deducted by way of mitigation.[2] And if the owner purchase the property at a sale made by the defendant, or from his vendee at less than its value, the amount paid on such purchase, instead of the value, will be considered in the estimate of damages,[3] and the application of the amount paid by him on a judgment against him will make no difference with the measure of damages, for the seizure and sale being wrongful his purchase is not a consent to such application.[4] One whose property was wrongfully taken from him replevied it; but being nonsuited in the replevin suit the statutory judgment which the defendant in that action was entitled to claim was rendered against him for the value of the property. He thereupon sued in trespass for the taking of the property; and it was held that he was entitled to recover therein not only for its detention while the defendant had it, but also its value as assessed in favor of the defendant in the replevin suit.[5] After property has been removed from the owner's possession an

est from the time of payment, is to be deducted from the mitigating value of the property restored. And the court say: "It is well settled that if property for which an action is brought should be returned to and received by the plaintiff it shall go in mitigation of damages. But if it become subjected to a charge after the conversion, and before it was returned; if, for example, the conversion were of a watch, which the defendant threw into a well, and the plaintiff hired a man to descend into the well and get it, the expense of reclaiming it should be deducted from the value when returned. It is the charge which regulates the damage. Murray v. Burling, 10 Johns. 176. As where one takes another's horse and leaves him at an inn, and the owner reclaims him, subject to the charge for his keeping. The damages are for the injury suffered, notwithstanding the owner has regained his property."

[1] Bates v. Clark, 95 U. S. 204; Dennison v. Hyde, 6 Conn. 507.

[2] Pacific Ins. Co. v. Conard, Bald. 137; affirmed, 6 Pet. 262.

[3] Sprague v. Brown, 40 Wis. 612; Parkham v. McMurray, 32 Ark. 261; Baker v. Freeman, 9 Wend. 236; Hurlburt v. Green, 41 Vt. 490; Kline v. McCandless, 139 Pa. St. 223; Mitchell v. Corbin, 91 Ala. 599.

[4] Parkham v. McMurray, *supra.*

[5] Haviland v. Parker, 11 Mich. 103.

unaccepted offer to return it in the condition in which it was when taken does not limit the recovery to nominal damages. The owner waives nothing by standing on his legal rights.[1] This is the rule though the property has not been removed. In a recent case an attachment was levied upon goods while the owner was temporarily absent. On his return the officer in charge refused to allow him to exercise any control over them. The following day a tender of the property was made to the owner, who refused to accept it. He was held to be entitled to recover its full value at the time the attachment was made.[2] A wrong-doer cannot lessen his liability on account of any expense he has incurred in selling the property of another or in connection with it.[3] Where the prop- [482] erty is valuable for use while in the defendant's possession interest is not necessarily the compensation for the detention; the owner may recover what the use was worth; he is entitled to compensation for the value of such use.[4] If the defendant has made a profitable use of it he should not have any benefit from his own wrong, but that profit should inure to the owner.[5] The return of property, in whatever way it occurs, only goes in mitigation, and no further than it operates to place the injured party in as good condition as before the trespass was committed. If the property has been injured in the taking, or while in the defendant's possession, or its market value has declined, the loss falls on him.[6]

§ **1105. Application of property to owner's benefit.** The wrong-doer is entitled to no deduction from the damages for applying the property or its proceeds to the owner's benefit without his consent, unless by execution of valid legal process or authority, which process must be executed in a legal manner.[7] In that case it is said his consent is implied. It would

[1] Kelly v. McDonald, 39 Ark. 387.

[2] Carpenter v. Dresser, 72 Me. 377.

[3] Lienkauf v. Morris, 66 Ala. 406; Dallam v. Fitler, 6 W. & S. 323.

In Luce v. Hoisington, 56 Vt. 436, an ox unlawfully taken was returned. The value of its use, less the expense of keeping it, measured the owner's damages.

[4] Ewing v. Blount, 20 Ala. 694; Post v. Munn, 4 N. J. L. 61; Farrell v. Colwell, 30 id. 123; Fields v. Williams, 91 Ala. 502.

[5] Suydam v. Jenkins, 3 Sandf. 620; Beadle v. Whitlock, 64 Barb. 287.

[6] Lucas v. Trumbull, 15 Gray, 306; Ewing v. Blount, 20 Ala. 694; Perham v. Coney, 117 Mass. 102; Barrelett v. Bellgard, 71 Ill. 280; McInvoy v. Dyer, 47 Pa. St. 118.

[7] Welsh v. Wilson, 34 Minn. 92.

probably be quite as correct to say that in that instance his consent is unnecessary. The law has intervened and disposed of the property; and having rightfully appropriated it to pay a debt of the owner, he has recovered satisfaction for its value, and ought not again to recover the same value.[1] If after the wrongful taking the property be seized to pay the owner's tax or debt and is so applied, that application of it will inure to the benefit of the tortious taker in mitigation of [483] damages.[2] This is the general doctrine, and applies whether the process on which the property is disposed of is for the satisfaction of a debt due the wrong-doer himself or a third person. It also applies where the taking is wrongful but becomes void because of irregularity in the subsequent proceedings.[3] An important exception is made in New York, Michigan, and perhaps in Maryland. The wrong-doer cannot there, as the law is also in England, avail himself by way of mitigation of damages of any appropriation to the owner's benefit by seizure under legal process or otherwise without his consent, where the process or appropriation is procured for the wrong-doer's benefit or for his debt, or by his agency or procurement for the debt of any other person.[4]

§ 1106. Damages against trespasser from the beginning. Void process or any legal authority abused in the taking or

[1] Street v. Sinclair, 71 Ala. 110; Bates v. Courtwright, 86 Ill. 518.

[2] Dailey v. Crowley, 5 Lans. 301; Pierce v. Benjamin, 14 Pick. 356; Lucas v. Trumbull, 15 Gray, 306; Delano v. Curtis, 7 Allen, 470; Perham v. Coney, 117 Mass. 102; Perkins v. Freeman, 26 Ill. 477; Hallett v. Novion, 14 Johns. 273; Cook v. Hartle, 8 C. & P. 568; Curtis v. Ward, 20 Conn. 204; Burn v. Morris, 2 Cr. & M. 579; Hepburn v. Sewell, 5 Har. & J. 211; Doolittle v. McCullough, 7 Ohio St. 299; Cook v. Loomis, 26 Conn. 483; Sprague v. Brown, 40 Wis. 612; Johannesson v. Borschsenius, 35 Wis. 131; Cooper v. Newman, 45 N. H. 339; Stewart v. Martin, 16 Vt. 397; Montgomery v. Wilson, 48 Vt. 616; Clark v. Bates, 1 Dak. 40; Block v. Sweeney, 63 Tex. 419; Mississippi Mills v. Meyer, 83 Tex. 433; 18 S. W. Rep. 748, quoting the text.

[3] Cressey v. Parks, 76 Me. 532; Pierce v. Benjamin, 14 Pick. 356. But it is held otherwise in Vermont. Hall v. Ray, 40 Vt. 576.

[4] Wehle v. Butler, 61 N. Y. 245; Ball v. Liney, 48 id. 6; Otis v. Jones, 21 Wend. 394; Lyon v. Yates, 52 Barb. 237; Peak v. Lemon, 1 Lans. 295; Sherry v. Schuyler, 2 Hill, 204; Higgins v. Whitney, 24 Wend. 379; Ward v. Benson, 31 How. Pr. 411; Wehle v. Haviland, 42 id. 399; Wanamaker v. Bowes, 36 Md. 42. See Edmondson v. Nuttall, 17 C. B. (N. S.) 280; Swire v. Leach, 18 id. 479; *post*, §§ 1138–1141.

subsequent treatment of property will not only afford no justification to the party acting under it, but he will be precluded by his wrongful action from setting up any application of the property or money so obtained to the owner's benefit, without his consent, by way of mitigation of damages. Thus, in trespass for taking goods under process upon a regular judgment, but in a place to which the process did not run, the owner was permitted to recover the whole value, and not merely the damage sustained by the taking in a wrong place.[1] In another case the defendant, who was landlord to the plaintiff, had, in order to make a distress, forcibly and illegally entered the demised premises and there seized the latter's goods. It was held that the plaintiff was entitled to recover the full value, and not that value minus the rent.[2] Cockburn, C. J., said: "It must be taken that if a man under color of legal authority, as in the case of distress for rent, does that which makes him a trespasser *ab initio*, he is in the same position as a stranger who without any legal authority whatever [484] breaks into a house and seizes the goods of another. . . . The defendant has taken the plaintiff's goods, it may be under color of legal authority, but in point of law he has taken them, not under a distress, but under a trespass, and it does not lie in his mouth to say that by taking them and appropriating a part of them in satisfaction of his rent he has *pro tanto* done good to the plaintiff. The man whose premises are broken into and whose goods have been seized has a right to say, 'Let me be put into the position in which I stood before your illegal act. I will not accept at your hands the benefit you say you have done me by it.'" Crompton, J., was of the same opinion, and thus declared his view of the law: "A landlord has by law the special privilege of paying himself his rent by seizing his tenant's goods; and where he takes that proceeding in a way not authorized he becomes a trespasser from the beginning; all the acts he does are trespasses; he is a trespasser, not only in entering, but in seizing and disposing of the goods taken, and the ordinary rule is that the injured party shall recover the full value. . . . This case is a bare tort, under color of which the defendant has helped himself

[1] Sowell v. Champion, 6 A. & El. 407.

[2] Attack v. Bramwell, 3 B. & S. 520.

to the plaintiff's goods, and he has no more right to put against their value the rent due to him than he would to put any other debt. The interest of the tenant was the real value of the goods; the plaintiff had no real charge or lien upon them; and therefore that value was the measure of damages."[1]

§ **1107. Same subject.** If a defendant is a trespasser from the beginning his defense wholly fails, and he is liable for the same sum in damages which he would be compelled to pay if he had gone on without any precept or pretense of authority and done all the acts proved upon him.[2] But an abuse of process only subjects to a loss of the protection of that particular process, and of the rights depending on it. If property is [485] lawfully attached no abuse of execution will make the officer chargable as a trespasser in making the attachment; and hence the damages would be assessed on the basis of the attached property being subject to the lien.[3] So when a landlord who had a right to distrain growing crops made such a distraint, but subsequently illegally sold them, and they were harvested and taken away by the purchaser, his illegal act of sale did not affect his lien, and as no actual damage resulted from the sale and harvesting, the tenant was only entitled to nominal damages.[4] If the abuse of authority or process is only an excess as to a separable part of the action under it, the person who so acts will be a trespasser from the beginning only as to that part. Where the defendant drew beer out of one of several barrels that he had taken, he was a trespasser only as to that barrel.[5] And where six looms were invento-

[1] White v. Binstead, 76 E. C. L. 303; Gillard v. Brittan, 8 M. & W. 575. Compare Chinnery v. Viall, 5 H. & N. 288; Mickles v. Miles, 1 Grant (Pa.), 320. As to what is such an abuse of process as will make one a trespasser from the beginning, see note to Barrett v. White, 11 Am. Dec. 365.

An officer who has acted under regular process in seizing property will not by reason of his disposition or management of it before sale become a trespasser from the beginning unless he commits a substantial violation of the legal rights of a party, in such a way as to show a gross or wanton disregard of duty. Ladd v. Newell, 34 Minn. 107; Paul v. Slason, 22 Vt. 231; Barrett v. White, 3 N. H. 610.

[2] Per Green, J., Barrett v. White, 3 N. H. 210.

[3] Heald v. Sargeant, 15 Vt. 506. See Van Brunt v. Schenck, 11 Johns. 377; Osgood v. Carver, 43 Conn. 24.

[4] Proudlove v. Twemlow, 1 Cr. & M. 326.

[5] Dod v. Monger, 6 Mod. 215.

ried with other property in a distress for rent, and the defendant had no authority to take them, it was held that taking them did not affect his authority in respect to the other property.[1]

A trespasser may also show in mitigation of the damages that the plaintiff was not the owner of the property taken, and that after the taking it was reclaimed by the true owner or has been taken on legal process against him;[2] also that since the taking the right of the plaintiff in the property has ceased.[3] The facts and circumstances attending the trespass, as has already been stated, may always be proved, that the jury may understand its intrinsic character; to enable the plaintiff to show aggravations and bad motive; and to enable the defendant to controvert these; but the defendant, if guilty of the trespass, is bound to make reparation for the actual injury. Absence of bad motive and of all aggravations cannot relieve him from making full compensation for property taken, destroyed or injured.[4] An admission of counsel on the [486] trial of an action of trespass that the defendant acted without malice will preclude the plaintiff from claiming vindictive damages; and therefore evidence on the part of the defendant in the nature of justification of his tortious act is inadmissible by way of mitigation.[5] Evidence in respect to the motive by which the defendant was influenced is only material on his part when it is introduced to repel an attempt by the plaintiff to recover exemplary damages.[6]

[1] Harvey v. Pocock, 11 M. & W. 740; Keen v. Priest, 4 H. & N. 236; Rowley v. Rice, 11 Met. 337.

[2] Squire v. Hollenbeck, 9 Pick. 551; Hanson v. Herrick, 100 Mass. 323.

[3] Id.; Perry v. Chandler, 2 Cush. 237; Borlander v. Gentry, 36 Cal. 110; Wanamaker v. Bowes, 36 Md. 42; Brewer v. Dew, 11 M. & W. 625; Criner v. Pike, 2 Head, 398.

[4] Harker v. Dement, 9 Gill, 7.

[5] Hoyt v. Gelston, 13 Johns. 141, 561.

[6] McCombie v. Davies, 6 East, 538.

CHAPTER XXVIII.

CONVERSION.

§ 1108. The action of trover.
1109, 1110. The general rule of damages.
1111. Other rules of damages.
1112. Time of conversion.
1113. Proof of value.
1114. Same subject; fixtures.
1115. Interest.
1116. Recovery for property subject to sale.
1117. Damages if property without market value.
1118. Damages if property of fluctuating value.
1119. Same subject; criticism and modification of the rule.
1120. Same subject; conflict in New York cases.
1121. Same subject; Pennsylvania rule.
1122. Same subject; Massachusetts rule.
1123. Same subject; English cases.
1124. Same subject; rule in North Carolina.
1125. Departure from the general rule sometimes justifiable.
1126–1128. Recovery where value of property enhanced by defendant.
1129. Special or consequential damages.
1130. Attorney's fees.
1131. Exemplary damages.
1132. Conversion of money securities.
1133. Conversion of insurance policies.
1134. Conversion of deeds, etc.
1135. Conversion of shares of stock.
1136, 1137. Recovery limited to plaintiff's interest.
1138–1141. Mitigation of damages.
1142. Plaintiff's duty to mitigate damages.

[487] § **1108. The action of trover.** The common-law action of trover may be brought against any person who has had in his possession, by any means whatever, the personal property of another, and sold or used the same without the consent of the owner; or refused to deliver it when demanded. The injury is done by the conversion and by depriving the plaintiff of his property; that is the gist of the action; the statement of the finding or trover is now immaterial, and not traversable; the fact of conversion does not necessarily import an acquisition of property by the defendant.[1] Lord Mansfield

[1] 1 Chitty, Pl. 146.

thus defined the action: "In *form* it (i. e., the trover) is a fiction; in *substance* it is a remedy to recover the value of personal chattels wrongfully converted by another to his own use; the form supposes that the defendant might have come lawfully by it; and if he did not, yet by bringing this action the plaintiff waives the trespass; no damages are recoverable for the act of taking; all must be for the act of converting. This is the tort or *malificium*, and to entitle the plaintiff to recover two things are necessary: first, property in the plaintiff; secondly, a wrongful conversion by the defendant."[1] The action lies only for property of a personal nature; not only that which is tangible, but all property of that nature which may be converted; as for paper representatives of value, choses in action and corporate stock.[2] It is based upon [488] title; the plaintiff must be the general owner, or have some special property in the subject of the action; he must have also the actual, or a right to its present, possession at the time of the conversion.[3] By recovery of the value and satisfaction of

[1] Id.; Cooper v. Chitty, 1 Burr. 31.

[2] Ayres v. French, 41 Conn. 151; Payne v. Elliot, 54 Cal. 341; McAllister v. Kuhn, 96 U. S. 87; S. C., 1 Utah, 273.

The propriety of this form of action for the conversion of shares of stock is denied only in Pennsylvania. Cook on Stock, etc. (2d ed.), § 576. And there it lies for the conversion of certificates of stock. Sewall v. Lancaster Bank, 17 S. & R. 285; Neiler v. Kelley, 69 Pa. St. 403.

[3] Smith v. Plomer, 15 East, 607; Fairbank v. Phelps, 22 Pick. 535; Burton v. Tannehill, 6 Blackf. 470; Caldwell v. Cowan, 9 Yerg. 262; Lewis v. Mobley, 4 Dev. & Batt. 323; Grant v. King, 14 Vt. 367; Ames v. Palmer, 42 Me. 197; Curd v. Wunder, 5 Ohio St. 92; Thayer v. Hutchinson, 13 Vt. 507; 2 Greenlf. Ev., § 640.

This rule may be varied by an admitted usage among men engaged in a certain occupation. Thus Judge Lowell held that where a boat's crew from a whale ship pursued and struck a whale in the Arctic ocean, and the harpoon, with the line attached to it, remained in the whale, but became disconnected from the boat, that title to the whale vested in such crew, though the crew from another ship pursued and captured the whale. The rights of the first-mentioned crew were promptly asserted. Swift v. Gifford, 2 Low. 100; Ghen v. Rich, 8 Fed. Rep. 159 (sustaining a custom prevailing in the eastern part of Massachusetts Bay). If a whale is killed and left with unequivocal marks of appropriation, and all is done that is practicable under the circumstances, the possession is sufficient. Taber v. Jenny, 1 Sprague, 315.

The brood of all tame and domestic animals belongs to the owner of the dam; hence where cattle are converted their owner may recover the value of their increase in existence at the time of the demand and con-

the judgment the title is transferred to the defendant as of the date of the conversion.[1]

§ 1109. The general rule of damages. The general rule of damages in England and in this country is the value of the property at the time and place of conversion; and in America, at least, interest is generally added as matter of law.[2]

version. Arkansas Cattle Co. v. Mann, 130 U. S. 69; 24 Fed. Rep. 261.

[1] Morris v. Robinson, 3 B. & C. 196; Hepburn v. Sewell, 5 Har. & J. 211; Arnold v. Kelly, 4 W. Va. 642; Osterhout v. Roberts, 8 Cow. 43; Stirling v. Garritee, 18 Md. 468; Wright v. Walker, Mart. & Hayw. 167; Brinsmead v. Harrison, L. R. 6 C. P. 584. Settling a trespass, by cutting down trees, does not transfer the title to the trees cut. Betts v. Church, 5 Johns. 348.

[2] Robinson v. Hartridge, 13 Fla. 501; Spencer v. Vance, 57 Mo. 427; Cole v. Ross, 9 B. Mon. 393; Spicer v. Waters, 65 Barb. 227; Briscoe v. McElween, 43 Miss. 556; Dixon v. Caldwell, 15 Ohio St. 412; New York Guaranty, etc. Co. v. Flynn, 65 Barb. 365; Fowler v. Merrill, 11 How. (U. S.) 375; Watt v. Potter, 2 Mason, 77; Bourne v. Ashley, 1 Low. 27; Jones v. Allen, 1 Head, 626; Allen v. Dykers, 3 Hill, 593; Lee v. Mathews, 10 Ala. 682; Moore v. Aldrich, 25 Tex. Sup. 276; Ripley v. Davis, 15 Mich. 75; Final v. Backus, 18 id. 218; Barry v. Bennett, 7 Met. 354; Falk v. Fletcher, 18 C. B. (N. S.) 403; Taylor v. Ketchum, 5 Robt. 507; Selkirk v. Cobb, 13 Gray, 313; Agnew v. Johnson, 22 Pa. St. 471; Phillips v. Speyers, 49 N. Y. 653; Tyng v. Commercial Warehouse Co., 58 id. 308; Andrews v. Durant, 18 id. 496; Ormsby v. Vermont C. M. Co., 56 id. 623; Douglass v. Kraft, 9 Cal. 562; Yater v. Mullen, 24 Ind. 277; Dillenback v. Jerome, 7 Cow. 298; Rensselaer Glass Factory Co. v. Reid, 5 Cow. 587; Dennis v. Barber, 6 S. & R. 420; Hurd v. Hubbell, 26 Conn. 389; Cook v. Loomis, id. 483; Lyon v. Gormly, 53 Pa. St. 261; Stirling v. Garritee, 18 Md. 468; O'Meara v. North Am. M. Co., 2 Nev. 112; Carlyon v. Lannan, 4 Nev. 156; Boylan v. Huguet, 8 Nev. 345; Homer v. Hathaway, 33 Cal. 117; Page v. Fowler, 39 id. 412; Riley v. Martin, 35 Ga. 136; Grant v. King, 14 Vt. 367; Crumb v. Oaks, 38 id. 566; Kennedy v. Strong, 14 Johns. 128; Ryburn v. Pryor, 14 Ark. 505; Hatcher v. Pelham, 31 Tex. 201; Jenkins v. McConico, 26 Ala. 213; Robinson v. Barrows, 48 Me. 186; Sanders v. Vance, 7 T. B. Mon. 209; Clark v. Whitaker, 19 Conn. 319; Linville v. Black, 5 Dana, 177; Commercial Bank v. Jones, 18 Tex. 811; Davis v. Fairclough, 63 Mo. 61; Daniel v. Holland, 4 J. J. Marsh. 26; King v. Ham, 6 Allen, 298; Lillard v. Whitaker, 3 Bibb, 92; Scull v. Briddle, 2 Wash. C. C. 150; Williams v. Crum, 27 Ala. 468; Kennedy v. Whitwell, 4 Pick. 466; Linam v. Reeves, 68 Ala. 89; Jones v. Horn, 51 Ark. 19; Brasher v. Holtz, 12 Colo. 201; Ford v. Roberts, 14 id. 291; Skinner v. Pinney 19 Fla. 42; Brewster v. Van Liew, 119 Ill. 554; First Nat. Bank v. Strong, 28 Ill. App. 325, 338; Vancleave v. Beach, 110 Ind. 269; Thew v. Miller, 73 Iowa, 742; Simpson v. Alexander, 35 Kan. 225; Chamberlain v. Worrell, 38 La. Ann. 347; First Nat. Bank v. Boyce, 78 Ky. 42; Hopper v. Haines, 71 Md. 64; Forbes v. Boston & L. R., 133 Mass. 154; Brown v. Murdock, 140 id. 314; Jellett v. St. Paul.

This rule is based on the assumption that such value is beneficially equal to the property itself; and that interest compensates for the delay in payment of that value.[1] This [489] assumption is more particularly true where the property converted is marketable goods and commodities which can be readily bought and sold at prices that are easily ascertained, and subject to but slight fluctuations.[2] If there were no fluctuations it would be immaterial to the equivalence of compensation when the value is taken except as to interest. But there is a logical as well as a legal relation between the conversion and the assessment of value to require them to be coincident; a natural connection between the wrong done and the retributive or compensatory assessment of damages; therefore the value should be ascertained at the time of the conversion. This rule was applied where coin was converted at a time when legal tender notes were far below par; the wrongdoer was answerable in damages for the amount he realized by its sale.[3] The plaintiff's recovery was thus larger than it would have been in an action for money had and received, because if the coin had been regarded as merchandise such an action could not be maintained; if as money, it was so many dollars and no more.[4]

§ **1110. Same subject.** The conversion may occur, first, by a wrongful taking; second, by a wrongful use or appropriation after obtaining possession lawfully; and third, by a wrongful detention. To be a certain legal measure of damages it should be applied inflexibly to the first act of conversion, especially if there be no subsequent pursuit of the property

etc. Ry. Co., 30 Minn. 265; Black v. Robinson, 62 Miss. 68; Nance v. Metcalf, 19 Mo. App. 183; Barlass v. Braash, 27 Neb. 212; Beede v. Lamprey, 64 N. H. 510; Railroad Co. v. Hutchins, 37 Ohio St. 282; Blum v. Merchant, 58 Texas, 400; Miller v. Jannett, 63 id. 82; Crampton v. Valdo Marble Co., 60 Vt. 291; Arkansas Cattle Co. v. Mann, 130 U. S. 69; Ghen v. Rich, 8 Fed. Rep. 159; Neiswanger v. Squier, 73 Mo. 192; Ingram v. Rankin, 47 Wis. 406; Perkins v. Marrs, 15 Colo. 262. See § 1115 as to interest.

[1] Ewing v. Blount, 20 Ala. 694; Simpson v. Alexander, 35 Kan. 225; Cutler v. James Goold Co., 43 Hun, 516. See Shepard v. Pratt, 30 Kan. 209, as to the rule of pleading which warrants the recovery of interest.

[2] Bank of Montgomery v. Reese, 26 Pa. St. 143.

[3] Bank v. Burton, 27 Ind. 426; Coffey v. National Bank, 46 Mo. 140.

[4] Frothingham v. Morse, 45 N. H. 545.

or assertion of right to it in specie. No change of the property by the wrong-doer should suffice to give the owner a new cause of action, or a new date for the valuation of the prop- [490] erty.[1] After conversion a sale by the defendant at a price greater than the value at the time thereof should not change the rule; and it has been held that it does not.[2] And it is equally the rule to take the price at the time of the conversion when there is a subsequent decline in the value.[3] The value of the property is the measure of damages though the owner becomes its purchaser at a sale made subsequently to the conversion.[4] In some cases the measure of the owner's recovery against an innocent purchaser from a wilful wrong-doer is the value of the property at the time and place it came into the defendant's possession, and not its value where it was at the time he contracted for it.[5] The supreme court of the United States holds that where timber is cut and removed from government land the damages are to be assessed as against a wilful trespasser at the full value of the property at

[1] See Baltimore M. Ins. Co. v. Dalrymple, 25 Md. 269; Dows v. National Bank, 91 U. S. 618; Tome v. Dubois, 6 Wall. 548; Newman v. Kane, 9 Nev. 234; Foote v. Merrill, 54 N. H. 490; O'Meara v. North Am. M. Co., 2 Nev. 112; Robinson v. Barrows, 48 Me. 186. A departure from this rule has been coincident with or the occasion of the conflict of decision relative to the measure of damages. See Ellis v. Wire, 33 Ind. 127; Final v. Backus, 18 Mich. 218. In the latter case trover was brought for saw logs cut from timber on the plaintiff's land, and transported to another county where they were sawed into lumber. Cooley, C. J., said: "The actual change in the character of the property appears to have taken place when they were manufactured into lumber there; and although the owner of the land from which they were taken might have treated their removal from the land as a conversion, he was not compellable to do so; but might have followed the logs and reclaimed them at Saginaw. This being so, the plaintiff had a right to treat the time of the manufacture of the logs into lumber as the period of conversion, and to recover their value accordingly." This reasoning favors the recovery of an intermediate value, and without restriction of time, if the wrong-doer changes the property or from time to time exercises some new dominion over it which alone would suffice to constitute a conversion.

[2] Kennedy v. Whitwell, 4 Pick. 466; Baker v. Wheeler, 8 Wend. 508; Whitehouse v. Atkinson, 3 C. & P. 344.

[3] Devlin v. Pike, 5 Daly, 85.

[4] Hart v. Blum, 76 Tex. 113.

[5] Hoxsie v. Empire Lumber Co., 41 Minn. 548; Glaspy v. Cabot, 135 Mass. 435. *Contra*, Railroad Co. v. Hutchins, 37 Ohio St. 282.

the time and place of demand, or of suit brought, with no deduction for his labor or expense; as against an unintentional or mistaken wrong-doer, or his innocent vendee, the value at the time of the conversion, less the value added to the property; as against a purchaser without notice of wrong from an intentional trespasser, the value at the time he purchased.[1] A landlord who converts a building erected on his premises by a tenant by refusing to permit him to remove it in accordance with a covenant to that effect is liable for its value to the extent that it enhances the worth of the land on which it stands.[2] If part of an article is converted the owner is not entitled to recover its entire value because the abstraction of the part renders the article useless for the purpose for which it was intended. In order that there may be such a measure of recovery the part left must be rendered valueless for any purpose whatever.[3]

§ 1111. Other rules of damages. As we shall presently see, the principle stated in the preceding sections is not always applied, the main exceptions being as to property which fluctuates more than property usually does in its value. There are a few cases which allow a more flexible standard of compensation than the value of property at the time of its conversion, and this without apparent reference to the nature of the property. Thus in South Carolina the jury may give the highest value of the property up to the time of trial[4] with interest, or allow for its hire from the time of the conversion as may be most beneficial to the plaintiff.[5] The allowance of this measure is discretionary with the jury.[6] A comparatively recent Wisconsin case disapproved an instruction which allowed the recovery of the highest market price intermediate the conversion and the trial. The court said it would adhere to the general rule it had laid down, and hold that, in all actions, either upon contract for the non-delivery of goods, or for their tortious taking or conversion, unless the plaintiff is deprived of some

[1] Wooden-ware Co. v. United States, 106 U. S. 432.

[2] Neiswanger v. Squier, 73 Mo. 192; Deisher v. Gehre, 45 Kan. 583.

[3] Walker v. Johnson, 28 Minn. 147. See Northern T. Co. v. Sellick, 52 Ill. 249, 252.

[4] Kid v. Mitchell, 1 Nott & McC. 334; Carter v. Du Pre, 18 S. C. 179.

[5] Burney v. Pledger, 3 Rich. 191.

[6] Harley v. Platts, 6 Rich. 318.

special use of the property anticipated by the wrong-doer, or the facts warrant the imposition of exemplary damages, that the recovery must be measured by the value of the property at the time and place when and where it should have been delivered, or of the wrongful taking or conversion, with interest on that sum to the date of the trial; but if it appears that the defendant in either such case has sold the property, the plaintiff may elect to recover the amount for which the sale was made, with interest thereon for such time, and if it appears that the property is in the possession of the defendant at the time of the trial, the plaintiff may elect to recover its present value at the place where it was taken or converted in the form it was then in.[1]

§ 1112. Time of conversion. The general rule is that a conversion occurs when a rightful demand for the possession of property is made and not complied with.[2] If it has been borrowed the borrower is in default after his failure to return it at the agreed time.[3] If a bailee becomes dispossessed of property through negligence his liability attaches as of the time it is lost, and not at the time of demand.[4] Where a broker failed to deliver stocks which his principal had paid for and which were charged against him as delivered on specified dates the conversion was held to have occurred at such dates.[5] If property is seized on judicial process and subsequently sold the sale constitutes the time of the conversion.[6] If possession is not disturbed when process is served the rights of the parties are determined as of the time the owner is dispossessed.[7] A corporation which converts shares of stock issued by it during the existence of a life estate therein is liable to the person who owns the reversion for its value at the time his right accrues.[8]

§ 1113. Proof of value. The same rules govern as in other actions in which the question of value is involved.[9] Some

[1] Ingram v. Rankin, 47 Wis. 406, 420. See *infra*, §§ 1118–1125.

[2] Fisher v. Brown, 104 Mass. 259; Sturges v. Keith, 57 Ill. 451; Hendricks v. Evans, 46 Mo. App. 313.

[3] McKenney v. Haines, 63 Me. 74; Fosdick v. Greene, 27 Ohio St. 484.

[4] Third Nat. Bank v. Boyd, 44 Md. 47; Preston v. Prather, 137 U. S. 604.

[5] Andrews v. Clark, 72 Md. 396, 440.

[6] Pond v. Baker, 58 Vt. 293; Patterson v. Gresham, 25 Ark. 380.

[7] Henshaw v. Bank, 10 Gray, 568.

[8] Caulkins v. Gaslight Co., 85 Tenn. 683.

[9] Vol. 1, §§ 445, 446.

value must be proved or the recovery cannot exceed a nominal sum, as where the only evidence on the subject is the cost of the property.[1] In ascertaining the value of shares of stock the inquiry may be extended to a reasonable time before or after their conversion. But in order that their intrinsic value may be proven it must appear that there has been no market price within such time.[2] If a bailee's promise is to deliver property valued in his receipt for it at a specified sum he is bound thereby;[3] and if a portion of it is taken from him by process of law he must account for the difference between the value of the whole and of the remainder, regardless of the actual worth of the latter.[4] The finder of a jewel took it to a goldsmith to learn what it was; the latter returned the socket, but retained and refused to deliver the jewel. In trover by the finder, after evidence of the value of the finest jewel which would fit the socket, the court directed the jury that unless the defendant produced the jewel, and showed that it was not of the finest water, they should presume the strongest against him, and make the value of the best jewel that would fit the socket the measure of damages.[5] This was by application of the maxim *omnia præsumuntur contra spoliatorem*.[6] Where foreign goods which have passed through a custom-house are in question it has been held in New York that the custom-house valuation may be introduced as evidence of value.[7] If there is only a distant market to which the goods are destined the value there may be taken [**491**] with proper deductions of expenses which must be incurred

[1] Whitmark v. Lorton, 15 Daly, 548. See Mortimer v. Marder, 93 Cal. 172.

[2] Douglas v. Merceles, 25 N. J. Eq. 144.

[3] Healy v. Hutchinson, — N. H. —; 20 Atl. Rep. 332; Wakefield v. Stedman, 12 Pick. 562.

[4] Healy v. Hutchinson, *supra*.

[5] Armory v. Delamirie, 1 Str. 505.

[6] Hargreaves v. Hutchinson, 2 A. & E. 12; Curry v. Wilson, 48 Ala. 638; Kavanaugh v. Taylor, 2 Ind. App. 502.

[7] Caffe v. Bertrand, How. App. Cas. 224.

If a creditor having an absolute deed of land from his debtor as security convey the land to a *bona fide* purchaser, he is liable to the debtor for the proceeds of the sale or the value of the land, at the latter's election, less the amount of the debt. Meehan v. Forrester, 52 N. Y. 277. Land sold under a judgment in fraud of the bankrupt law, the assignee may recover for at its value, and he is not limited in his recovery to what it sold for. Clarion Bank v. Jones, 21 Wall. 325. See Norman v. Cunningham, 5 Gratt. 63.

and are usually incident to make that market available. Thus in a proceeding in the nature of trover for the conversion of a whale in Okholsk sea, the value was determined by the market at New Bedford, which was the home port of both vessels involved, by deducting the expense of cutting in, boiling, freight and insurance.[1] So in trover for the capture on the high seas of a cargo bound for New York, the value at the time and place of the capture was arrived at by adopting New York prices, with deduction of a reasonable premium for insurance, and also adding damages equal to interest.[2] Where a schooner was converted while lying on a beach where there was no market for her, the court ruled that the damages were measurable by her value there, which was ascertainable by her value at some port where such vessels are sold, less the probable cost of getting her off the beach, repairing and getting her to market, less, also, a reasonable allowance for diminution in her value on account of her getting ashore, and an allowance for the fair value of the risks in taking her to market. This last item might be measured by the charge for a fair salvage service.[3] The value of a canal boat may be determined by evidence of its worth at various ports on the canals which it navigates.[4] An intermediate consignee who converts the property consigned is liable for its value at the place of destination.[5]

The market value will govern rather than any special value to the owner arising from his having contracted it or otherwise, the defendant not being apprised of such special value.[6] If there is a market value at the place of converison it will be adopted, though the property is intended to be shipped for sale to another place.[7] The master of a ship which became disabled on the voyage made an unauthorized sale of his cargo at an intermediate port and it sold low; in trover the jury were directed to give as damages the invoice price and the amount paid for freight.[8] Where the property converted

[1] Bourne v. Ashley, 1 Low. 27; Saunders v. Clark, 106 Mass. 331. See Cockburn v. Ashland L. Co., 54 Wis. 619.

[2] Hallett v. Novion, 14 Johns. 273.

[3] Glaspy v. Cabot, 135 Mass. 435.

[4] Keller v. Paine, 34 Hun, 167, 177.

[5] Farwell v. Price, 30 Mo. 587.

[6] Brown v. Allen, 35 Iowa, 306; Gardner v. Field, 1 Gray, 151; Watt v. Potter, 2 Mason, 77. But see France v. Gaudet, L. R. 6 Q. B. 199; *infra*, § 1117.

[7] Spicer v. Waters, 65 Barb. 227.

[8] Ewbank v. Nutting, 7 C. B. 797.

was of a peculiar kind, manufactured for a special market, and there was substantially no demand for it where the conversion occurred, its value at the place where it was to be sold, less the cost of transportation and sale, was considered in ascertaining its value where it was. The defendant's ignorance of the market for which it was designed was immaterial; he was liable for all the direct injury resulting from his act though he did not or could not have contemplated all its results.[1] The market price for like property, bought and sold in similar quantity, should be given. Stocks of goods cannot be recovered for at retail prices.[2] Neither is their value to be fixed by what a purchaser would give if obliged to take them as a whole. The most just test is the value of the goods in the packages they were in when the conversion took place, the value of all being aggregated.[3] In trover for a quantity of tallow in Vermont, there being evidence that it was merchantable, it was held admissible to show its retail price at the time and place of the conversion.[4] Where books were converted and the plaintiff showed that copies had been sold to the trade and the price at which the sales were made, the defendant was not permitted to prove that the books were of but little value, nor what it would cost to reproduce the number he was charged with taking.[5] A purchaser who refuses to abide by a conditional contract of sale and does not return the property as he agreed to do cannot limit the recovery below its market value by proving the price fixed by him and the vendor.[6]

§ 1114. Same subject; fixtures. If fixtures are sev- [492] ered from the freehold, and trover is brought for them, their value as chattels only, and not as fixtures, can be recovered.[7] In the comprehensive code action the technical impediments

[1] Lathers v. Wyman, 76 Wis. 616.

[2] Wehle v. Haviland, 69 N. Y. 448 (overruling on this point Wehle v. Butler, 61 N. Y. 245); State v. Smith, 31 Mo. 566; Butler v. Collins, 12 Cal. 457; Nightingale v. Scannell, 18 Cal. 315; Miller v. Jannett, 63 Texas, 82. See Haskell v. Hunter, 23 Mich. 305.

[3] Miller v. Jannett, 63 Texas, 82.

[4] Waters v. Langdon, 16 Vt. 570.

[5] Gunn v. Burghart, 47 N. Y. Super. Ct. 370.

[6] Fox v. Jones, 39 La. Ann. 929.

[7] Clarke v. Holford, 2 C. & K. 540. See Ayer v. Bartlett, 9 Pick. 156. The rule is otherwise when the property converted is lawfully attached to realty and the conversion is by the owner of the latter. *Ante*, § 1110.

sometimes encountered in the prosecution of common-law actions, in the way of embracing in one suit all the injurious elements of a wrong, do not exist.[1] Accordingly, facts connected with a wrongful taking which would be admissible and relevant in an action of trespass and tend to increase damages may be alleged and proved in an action for the taking and conversion. Thus in an action for the unlawful taking and conversion of a quantity of household goods, including carpets, upon the question of damages as to the latter, a charge to the jury was approved which directed them to inquire what would be the value to a party who wanted to get the same articles again; that it was proper to include not only their worth in the market, but also the value of the labor in cutting, making and putting them down.[2] But when the property so in place can no longer be there used by the owner, and he is subject to summary removal, its value will be estimated in case of conversion with reference to these facts; it will be estimated with reference to the condition in which the property will be when removed, or as subject to the obligation or necessity of removal.[3]

§ **1115. Interest.** In England the allowance of interest under the operation of the statute of 3 and 4 William IV.[4] is a matter of discretion with the jury. With us it is generally held to be matter of right from the time of the valuation; it is considered a constituent part of the indemnity which a party entitled to recover the value may claim; and it is the duty of the court to direct the jury to allow it from the date of conversion.[5] In Colorado interest is allowed as damages.[6] In North Carolina and Indiana the awarding of interest is [493] discretionary with the jury.[7] The plaintiff should not

[1] Clark v. Bates, 1 Dak. 42; Rhoda v. Alameda Co., 58 Cal. 357.

[2] Starkey v. Kelly, 50 N. Y. 677.

[3] Moore v. Wood, 12 Abb. 393.

[4] Ch. 42, § 29.

[5] Suydam v. Jenkins, 3 Sandf. 620 *et seq.;* Wilson v. Conine, 2 Johns. 280; Bissell v. Hopkins, 4 Cow. 53; Hyde v. Stone, 7 Wend. 354; Baker v. Wheeler, 8 id. 505; Dillenback v. Jerome, 7 Cow. 294; Stevens v. Low, 2 Hill, 132; Chauncey v. Yeaton, 1 N. H. 151; McCormick v. Pennsylvania C. R. Co., 49 N. Y. 303; Hamer v. Hathaway, 33 Cal. 117; Northern T. Co. v. Sellick, 52 Ill. 249; Tarpley v. Wilson, 33 Miss. 467.

[6] Omaha, etc. R. Co. v. Tabor, 13 Colo. 41, 58.

[7] Stephens v. Koonce, 103 N. C. 266; Kavanaugh v. Taylor, 2 Ind. App. 502.

be permitted to recover, besides the value of animals or slaves and interest, their hire, or the value of their services or use, nor in lieu of interest.[1] In some cases this has been allowed.[2] If damages are recovered for lost profits interest is not to be allowed.[3]

§ 1116. Recovery for property subject to sale. Where the plaintiff held the property as sheriff or assignee, and would have been obliged to sell it at auction if the defendant had not taken it, and the conversion was followed by a sale, there does not appear to be any reason or precedent for adopting any different measure of damages or rule of proof on that account, if the plaintiff is not restricted to some special value or mode of proof. It was remarked in one such case[4] that it often happens that a jury considers the sum at which the goods were actually sold at auction as a fair measure of damages. The owner was entitled to remove buildings standing upon ground condemned for a street; he neglected to do so, and the public authorities, desiring to use the ground, disposed of them by a public sale. It was held that the plaintiff, by his neglect to remove the buildings, consented to the mode adopted to dispose of them; therefore, in an action for their conversion his recovery was limited to the net proceeds of that sale.[5] In an English *nisi prius* case a distinction appears to have been recognized in the case of property which had to be sold. Goods were sold by a sheriff after bankruptcy, but in good faith. The assignees were held to be entitled only to an amount equal to the proceeds, less the expenses of selling. As the assignees would be bound to sell the jury were allowed a discretion to deduct the expenses.[6] But in a later case the court considered that if the trustee in bankruptcy elected to treat the sale as a tort, he was entitled to the full value of the goods, and any damages resulting to the estate from the sale; that he was not confined to the proceeds except upon a ratification of the sale.[7]

[1] Polk v. Allen, 19 Mo. 467; Fail v. Presley, 50 Ala. 342; Frey v. Drahos, 7 Neb. 194.

[2] Dealy v. Lance, 2 Spears, 487; Schley v. Lyon, 6 Ga. 530; Banks v. Hatton, 1 Nott & McC. 221. See Hair v. Little, 28 Ala. 236.

[3] McGuire v. Galligan, 53 Mich. 453.

[4] Whitehouse v. Atkinson, 3 C. & P. 344.

[5] Peters v. Mayor, 8 Hun, 405.

[6] Clark v. Nicholson, 6 C. & P. 712.

[7] Smith v. Baker, L. R. 8 C. P.

[494] **§ 1117. Damages if property without market value.** This subject has been considered in other parts of this work, and it is not necessary now to enter upon it at large.[1] If the property has no market value at the time and place of conversion, either because of its limited production, or because it is of such a nature that there can be no general demand for it, and it is more particularly valuable to the owner than any other, it may be estimated with reference to its value to him.[2] A wine merchant having obtained from a broker samples of wine then lying at a wharf, which the broker had agreed to sell at 14*s.* per dozen, sold it to the captain of a ship about to sail at 24*s.* per dozen, to be delivered on board the next day. The merchant obtained the delivery warrants from the broker and claimed the wine from the wharfinger, but he refused to deliver it. No other wine of the same brand and quality was to be had in the market, and the merchant was held entitled to recover in trover the actual value of the wine to him, which at the time of the conversion was 24*s.* per dozen, he having made a *bona fide* sale of it at that price.[3] Mellor, J., said: "Under ordinary circumstances the direction to the jury would simply be to ascertain the value of the goods at the time of the conversion; and in case the plaintiff could by go-

350; Clarion Bank v. Jones, 21 Wall. 328.

[1] *Ante*, § 1099; vol. 2, §§ 652, 655.

If the market value of ordinary second-hand household goods is testified to by a competent witness and there are dealers in that kind of property in the city in which the conversion took place, it must not be assumed that such goods have no market value; nor must the jury be allowed to give their fair value to the owner in the absence of testimony showing what it is. Iler v. Baker, 82 Mich. 226.

[2] Suydam v. Jenkins, 3 Sandf. 620; Spicer v. Waters, 65 Barb. 227; Green v. Boston, etc. R. Co., 128 Mass. 221; Stickney v. Allen, 10 Gray, 352; Sturges v. Keith, 57 Ill. 463.

It was said in a case where electrotype plates were converted that "the actual value to one who owns and has use for them is the just rule of damages." Heald v. Macgowan, 15 Daly, 233; affirmed without opinion, 117 N. Y. 643. It is said, *arguendo*, in Freon v. Carriage Co., 42 Ohio St. 30, 38, where it was claimed that stock had no market value, that the damages were not limited to that value; its actual value was determinable under all the circumstances, such as the dividend-making capacity, good-will, etc., of the corporation. If music books are annotated by the owner so as to give them a special value for him he is entitled to compensation for such value. Leoncini v. Post, 37 N. Y. St. Rep. 255.

[3] France v. Gaudet, L. R. 6 Q. B. 199.

ing into the market have purchased other goods of like quality and description, the price at which that could have been done would be the measure of damages. It was, however, admitted on the trial, in the present case, that course could not have been pursued, inasmuch as champagne of the like quality and description could not have been purchased in the market so as to enable the plaintiff to fulfill his contract with Captain H. We are of opinion that the true rule is to ascertain the actual value of the goods at the time of the conversion; and that a *bona fide* sale having been made to a solvent customer at 24*s.* per dozen, which would have been realized had the plaintiff been able to obtain delivery from the defendants, the champagne had, owing to these circumstances, acquired the actual value of 24*s.* per dozen; and we think that, in [**495**] the present case, that ought to be the measure applied; and that a jury would not only have been justified in ascertaining that to be the value, but ought, where the transaction was *bona fide*, to have taken that as a measure of damages, and . . . we think we ought to say that such is the proper measure of damages. . . . We are not prepared to say that there is any analogy between the case of contract . . in which two parties making a contract for the sale and delivery of a specific chattel, the vendee gives notice to the vendor of the precise object of the purchase, and a case like the present. In the case of contract special damages, reasonably resulting from the breach of it, may be considered within the contemplation of the parties. In case of trover it is not in general special damages which can be recovered, but a special value attached by special circumstances to the article converted; the conversion consists in withholding from another property to the possession of which he is *immediately* entitled, and the circumstances which affix the value are then determined; no notice to the wrong-doer could then *affect the value*, although it might affect his conduct; but upon what principle is notice necessary to a man who *ex hypothesei* is a wrong-doer? In such a case as the present the actual value is fixed by circumstances at the time of the demand, and no notice of the special circumstances could then affect the actual value of the goods withheld from the rightful owner, who thereby sustains 'an actual present loss,' which appears to us

to be a convertible term with actual value."[1] The owner of pamphlets which are alleged to be without the pale of the law because they contain matter which scoffs at and indecently attacks the Christian religion nevertheless has property in them independently of the printing, and is entitled to damages to the extent of the value of the paper, etc. If the pamphlets are not illegal the damages must be based upon their value as such as of the time of the tort.[2] One who is not engaged in editing a newspaper cannot recover compensation for the inconvenience which one so employed would experience from being deprived of the possession of a file of newspapers covering the period while he was such editor.[3]

[496] § **1118. Damages if property of fluctuating value.** As to the measure of damages for the conversion of such property there has been much conflict of opinion. The cases are numerous, and a review of them in detail would be prolix and unprofitable. The principal difference is that the courts in some states adhere to the general rule of damages where such property is in question, allowing the value at the time of the conversion and interest, and whether the property converted is stock or not.[4] And in others, the courts allow the

[1] The learned judge further distinguished the value from special damage by observing: "It is not necessary to determine whether notice is or is not necessary in trover in order to enable the plaintiff to recover special damage, which cannot form part of the actual present value of the thing converted, as in the case of withholding the tools of a man's trade, in which the damage arising from the deprivation of his property is not, and apparently cannot be, fixed at the time of the conversion of the tools. In that case, however, we are inclined to think that either express notice must be given, or arise out of the circumstances of the case. This point was not determined in Bodley v. Reynolds, 8 Q. B. 779, approved in Wood v. Bell, 5 E. & B. 772, but we think there must have been evidence of knowledge on the part of the defendant that, in the nature of things, inconvenience beyond the loss of the tools must have been occasioned to the plaintiff." See Seymour v. Ives, 46 Conn. 109.

[2] Boucher v. Sherwan, 14 Up. Can. C. P. 419.

[3] Leffingwell v. Gilchrist, 40 Iowa, 416.

[4] Sturges v. Keith, 57 Ill. 451; McKenney v. Haines, 63 Me. 74; Fisher v. Brown, 104 Mass. 259; Pinkerton v. Railroad Co., 42 N. H. 463; Third Nat. Bank v. Boyd, 44 Md. 47; Boylan v. Huguet, 8 Nev. 345; Bates v. Stansell, 19 Mich. 91; Brewster v. Van Liew, 119 Ill. 554; Galena, etc. R. Co. v. Ennor, 123 id. 505; First Nat. Bank v. Strong, 28 Ill. App. 325, 338; Baltimore M. Ins. Co. v. Dalrymple, 25 Md. 244; Noonan v. Ilsley, 17 Wis. 314; Ingram v. Rankin, 47 id. 406; Enders v. Board of Public

highest market value between the time of the conversion and the commencement of suit or the trial; though some of the latter annex the limitation that the suit be commenced within a reasonable time and prosecuted to trial with due diligence.[1]

Works, 1 Gratt. 364; White v. Salisbury, 33 Mo. 150.

[1] Clark v. Pinney, 7 Cow. 681; Stapleton v. King, 40 Iowa, 278 (but Gravel v. Clough, 81 id. 272, and Brown v. Allen, 35 id. 306, are inconsistent with the rule of the highest intermediate market value); Loeb v. Flash, 65 Ala. 526; Galigher v. Jones, 129 U. S. 192; Tatum v. Manning, 9 Ala. 144; Guerry v. Kerton, 2 Rich. 507; Ewing v. Blount, 20 Ala. 694; Jenkins v. McConico, 26 id. 213; Kid v. Mitchell, 1 Nott & McC. 334; Kent v. Ginther, 23 Ind. 1; Stephenson v. Price, 30 Tex. 715; Hatcher v. Pelham, 31 id. 201; Johnson v. Marshall, 34 Ala. 521; Freer v. Cowles, 44 id. 314. See Hubbell v. Blandy, 87 Mich. 209.

In Boylan v. Huguet, 8 Nev. 345, Whitman, C. J., said: "That this is the rule in New York, subject to some meaningless exceptions, such as bringing suit within reasonable time, etc., there is no doubt. That some other states, notably Iowa, Pennsylvania and California, have substantially adopted this rule, is true. Connecticut is sometimes ranked in the same line, but that is a mistake. St. Peter's Church v. Beach, 26 Conn. 355. California has endeavored to modify in some degree (Page v. Fowler, 39 Cal. 412), and New York shows its determination to recede, upon occasion made, in the following language of the entire court of appeals, by Church, C. J., pronouncing a recent opinion: 'An unqualified rule giving a plaintiff in all cases of conversion the benefit of the highest price to the time of trial, I am persuaded cannot be upheld by any sound principle of reason or justice. Nor does the qualification suggested in some of the opinions that the action must be commenced within a reasonable time, and prosecuted with reasonable diligence, relieve it of its objectionable character. Without intending to discuss this question at this time, we deem it proper to say that while the decisions and opinions of our predecessors will receive the utmost respect and consideration, we do not regard the rule referred to so firmly settled by authority as to be beyond the reach of review whenever an occasion shall render it necessary.' Matthews v. Coe, 49 N. Y. 57. This is only *dictum;* but such *dictum* is very ominous of the fate of the New York rule. It is not surprising that there is a desire to escape effects which are sometimes so absurd. As in this case, the first suit and recovery were for some $8,000; had that judgment stood, as it probably would have done but for the motion of appellants, the law would have declared that respondent was fully compensated for his loss consequent upon the wrongdoing of appellants; but that judgment having been set aside, it took over three times that amount to afford compensation only a few months after. In other words, damages were given which were purely speculative, which were not only not proven, but which were against all probable presumption, as human experience teaches that the man who sells his stock at the highest price is the rare exception to the generality of dealers. Yet the measure was correct if the rule be so; the suit had been

It is intimated in Florida that in the case of stocks held for investment, or rare pictures, jewels and the like articles held otherwise than for immediate commercial purposes, that it

brought seasonably, and prosecuted with diligence.

"Looking at the assumed basis of this rule it is impossible to add anything to the exhaustive *resumé* of the decisions said to constitute its foundation, as given in Suydam v. Jenkins, 3 Sandf. 614; but it is curious, and perhaps not uninstructive, to re-glance at them for a moment. And first the stock cases, so called, which were writs of inquiry to assess damages on bonds given to replace stock; and they hold that if the stock has risen in value since the day when it should have been delivered, the price at the time of trial is to be the measure of damages. Shepherd v. Johnson, 2 East, 211; McArthur v. Seaforth, 2 Taunt. 257; Donnes v. Back, 1 Stark. 318; Harrison v. Harrison, 1 C. & P. 413; Owen v. Routh, 14 C. B. 327. This upon the theory that the plaintiff wanted to keep his stock, and therefore could only be indemnified by a verdict for money sufficient to replace it, as the defendant was bound to do. None of these cases hold, and McArthur v. Seaforth expressly negatives, the idea that the highest price at any intermediate day can be allowed. This rule was followed in this state in an equity case to compel the transfer of certain shares of stock (O'Meara v. North America Mining Co., 2 Nev. 112), and is undoubtedly correct under similar circumstances, either at law or in equity; but how it can justify the measure of damages allowed in this case is inexplicable, for here and in like cases courts never would allow the converted property to be restored in specie, except where it might have been of such nature that its value could not have been changed; and the real question to be determined almost invariably is its worth, not that the party delinquent may replace it, as he would have been allowed to do in the cases cited, but that the injured party may be indemnified for its loss. When? Why, when he lost it; not before nor after, but at the time when the loss occurred.

"There are a few other decisions which seem to have been rendered rather upon the desire to do justice in the particular case than upon general principles, and which are hardly precedents for anything. In Greening v. Wilkinson, 1 C. & P. 625, trover for East India Company's warrants for cotton, the highest price either at time of conversion or subsequently, at jury's option, was given. Of this case Judge Duer says in Suydam v. Jenkins, *supra:* 'It is, however, only a *nisi prius* decision, and the report is not only brief, but we apprehend imperfect; material facts seem to be omitted, nor is it stated what was the verdict finally rendered.' That this is not the accepted rule appears from the uncontradicted remarks of counsel in Elliot v. Hughes, cited *post.* In Archer v. Williams, 2 C. & K. 26, action for the wrongful detention of scrip, Cresswell, J., directed the jury to find the highest price between conversion and trial; this direction they disobeyed; and finally, in making up the bill of exceptions, the instruction was considered to have been that more than nominal damages were to be allowed: so that case is not authority in point. In Shaw v. Holland, 15 M. & W.

is equitable and proper that the highest value after conversion should measure the damages, if the jury should be satisfied that the plaintiff would have held the property up to the

145. an action for non-delivery of railway shares, the same rule was applied as in Gainsford v. Carroll, 2 B. & C. 624, for non-delivery of goods; *i. e.*, the difference between the contract price and the market price on the day when the contract was broken; making the distinction, however, which is often found, but which upon reflection will be seen to be none, that the money not having been paid it was in the power of the vendee to go into the market and buy, and thus save himself, as if he was called upon to do so, and might not rely upon his contract. In Mercer v. Jones, 3 Camp. 477, Lord Ellenborough lays down the rule in trover, 'that the plaintiff is entitled to damages equal to the value of the article converted at the time of the conversion,' and applying it to the case in hand (trover for bills of exchange), disallowed interest after demand and refusal to deliver. Of this case Abbott, C. J., is reported to have said in Greening v. Wilkinson that it was hardly law. Thus the wisest disagree. In a recent case at *nisi prius* the highest price of goods between the agreed date of delivery and the time of trial was given; and the case is worthy to be quoted somewhat lengthily, as presenting a comical instance of reasoning in a circle to make a rule. Remembering that the New York rule is fathered on English decisions, hear counsel. The action was for non-delivery of hops contracted at 5*l.* 10*s.* the hundred weight; they had risen from the time of delivery to 7*l.* 10*s.*, at which price they continued till the day of the trial. To the offer by plaintiff of evidence to that effect, Joseph Brown (with whom was Shee, Sergt.) objected that such evidence was not admissible, as a series of cases had decided that the measure of damages for the non-delivery of goods purchased was the market price at the time of the breach of the contract. McMahon (with whom was Digby Seymour) submitted that the rule applied only where the goods were not paid for at the time of the purchase, in which case it was said that the buyer, not having parted with his money, could go with it into the market and buy at the current price; but that a different rule prevailed where, as in the present case, the price was paid at the time of purchase. There was no case in which this precise point had been decided in the courts of this country, though there were several decisions upon it in the American courts. The nearest analogous cases in our courts were those relating to the loan of stock, in which it was decided that on the failure to return it the lender was entitled to recover the highest price up to the day of trial. . . . His lordship (Byles, J.) said . . . he would rule that the plaintiff was entitled to recover the value of the hops at the price of the present day, but would give the defendant leave to move to reduce the damages if the court should think he was wrong. Elliot v. Hughes, 3 F. & F. 387. No motion was made to reduce; so the case stands decided upon American authority, there being confessedly none English; while, on the other hand, the American cases claim English parentage. The fact is, there is no such well established rule. There have been excep-

time it increased in value.[1] In Alabama the allowance of this measure of damages is discretionary with the jury.[2] And so in Wyoming[3] and South Carolina.[4] In California, Dakota and Georgia, by virtue of statutory provisions, the highest market value may be recovered at the option of the injured party, if suit is begun within a reasonable time. If such value is claimed interest cannot be recovered.[5] In England where there is a breach of an agreement to replace borrowed stock the damages are measured by its highest price on or before the day of the trial.[6]

tional instances of granting this measure of damages, probably with the laudable desire of doing exact justice at the moment in an individual case. There has also been an attempt to make these exceptions the rule; but that has not prevailed, nor should it; for the purpose of the law is to make the nearest practicable approach to justice in all cases; and that can only be attained by the preservation of fundamental principles. What are they in cases like the one at bar? To that question there can be but one answer. All the authorities concur. Complete indemnity to the party injured, but no punishment to the wrong-doer. To accomplish this end, all damages must be given which necessarily flow from the wrongful act. Those are the value of the property at the time of conversion, for that is what one has found and the other lost, together with damages for the detention of that value, which is legal interest from conversion to judgment, and in addition any special damage which may legitimately arise out of any matters in existence at the date of the tort."

[1] Moody v. Caulk, 14 Fla. 50.

[2] The venerable Judge Stone said in a recent case: "There are strong reasons for leaving this question discretionary with the jury. First. Trover is, to some extent, an equitable action, and many circumstances may enter into the transaction, requiring either full damages or mitigating defendant's conduct and consequent liability to simple compensation. Second. Conversions are sometimes wilful and wanton, while at other times they are innocently perpetrated by becoming the ignorant bailee or receiver of goods which had been converted by another. These varying phases of the question render it eminently proper that juries should be clothed with a discretion in determining whether they will give to plaintiffs the benefit of a rise in the value of a chattel sued for which took place after the first act of conversion." Loeb v. Flash, 65 Ala. 526; Burkes v. Hubbard, 69 id. 379; Terry v. Birmingham Nat. Bank, 93 id. 599.

[3] Hilliard Flume Co. v. Woods, 1 Wyo. 396.

[4] Kid v. Mitchell, 1 Nott & McC. 334; Carter v. Du Pre, 18 S. C. 179; Burney v. Pledger, 3 Rich. 191; Harley v. Platts, 6 id. 318.

[5] Jaques v. Stewart, 81 Ga. 81.

[6] Cud v. Rutter, 1 P. Wms. (4th ed.) 572, n. 3; Owen v. Routh, 14 C. B. 327; Loder v. Kekule, 3 C. B. (N. S.) 127; France v. Gaudet, L. R. 6 Q. B. 199. See § 1123.

§ 1119. Same subject; criticism and modification of the rule. The cases which originated this exception to the [497] general rule have proceeded upon the plausible principle that the owner who has been tortiously deprived of his property should have the benefit of any subsequent increase in its value, and not the wrong-doer; that where the advance is owing to general causes it would be unjust to allow the latter to determine the date of fixing the value that he should pay for a tort, as he might select a time of great depression to convert the property, and by having the benefit of a future ap- [498] preciation derive large gains by his own wrong. To prevent this seeming injustice the owner at the time of the trial has been allowed a retrospection of the intermediate market, and to recover the highest price reached during that period. This would not be unfair to the defendant nor more than a just indemnity to the owner if it were shown by the evidence that that was his real loss; that had the defendant done nothing to prevent his retaining the property he would have sold [499] it and realized that price; or that the defendant has in fact realized it. But the owner is more than compensated when he is allowed to recover on review of the market more than he would have sold for during the same period. By allowing him uniformly the highest intermediate market price he is saved from all hazard of mistake in this regard, and the wrong-doer is made to bear it without any possibility of gain for his sagacity, if he has sold at the right time; and without [500] premium or compensation to mitigate his loss in being obliged to indemnify the owner if he makes the common mistake of selling too soon or too late. These obvious considerations have prevented the adoption, as a uniform and invariable measure of damages, of the highest intermediate value where it has been fluctuating. In some states where the courts were once committed to this exceptional rule cases have since arisen in which its application would be so manifestly unjust that it has been reconsidered and substantially abandoned. This has notably occurred in New York and California. In Baker v. Drake[1] the court reviewed the previous decisions in the former state on this general question, and subjected them to the test of

[1] 53 N. Y. 211; S. C., 66 id. 518.

the fundamental principle on which damages are assessed, namely: that in civil actions the rule of damages does not depend on the form of the action; that whether it be on contract or in tort, the proper measure, except where punitory damages are allowed, is a just indemnity to the party injured for the loss which is the natural, reasonable and proximate result of the wrongful act complained of, and which a proper degree of prudence on the part of the person complaining would not have averted. And the court reached the conclusion that a fixed, unqualified rule giving the plaintiff in all cases of conversion the highest market price from the time thereof to the time of trial cannot be applied upon any sound principle of reason or justice. The case was against a broker who had purchased stock for a customer, the plaintiff, not as an investment but upon speculation, the latter furnishing a small amount as a margin, and the former supplying the residue of the capital embarked in the speculation. The broker made an unauthorized sale of the stock; and it was held that if, upon being advised of the sale, the customer desired further to prosecute the adventure, he had a right to disaffirm the [501] sale and to require the broker to replace the stock; and upon his failure or refusal to do this that the remedy of the principal was to replace it himself; and that the advance in the market price from the time of the sale up to a reasonable time to replace it after notice of the sale would afford a complete indemnity, and was the proper measure of damages. The case of Markham v. Jaudon,[1] so far as it relates to the rule of damages, was overruled. Later decisions have approved and followed Baker v. Drake.[2] This rule has been applied where the owner of stock which had been pledged had fully paid for it, the sale having been made in good faith under an honest mistake.[3] The existing rule in New York is approved by the supreme court of the United States in a case which was not at all governed by the local law of that state.[4]

[1] 41 N. Y. 235.

[2] Ormsby v. Vermont C. M. Co., 56 N. Y. 623; Tyng v. Commercial W. Co., 58 id. 308; Mechanics', etc. Bank v. Farmers', etc. Bank, 60 id. 40; Thayer v. Manley, 73 id. 307; Harris v. Tumbridge, 83 id. 99, 100; Gruman v. Smith, 81 id. 27; Colt v. Owens, 90 id. 368. See Hubbell v. Blandy, 87 Mich. 209.

[3] Wright v. Bank of the Metropolis, 110 N. Y. 237.

[4] Galigher v. Jones, 129 U. S. 193.

A recent Oregon case impliedly favors the same principle.[1] In California the rule of the highest intermediate value was twice held, and in the last instance it was treated as the doctrine of the state.[2] But a later case subjected that rule to an ordeal that exploded it.[3] The property in question was hay; it had been wrongfully taken by the defendant in 1863, when it was worth from $3 to $5 per ton; but at an expense of something over $5 per ton for transporting it, it might have been sold for $12.50 per ton. In the following year there was great scarcity of hay and the price rose to about $40 per ton. The case was tried in November, 1869, and the jury instructed that the plaintiff was entitled to the highest market value between the taking and the trial, with interest. This instruction was disapproved in a strong opinion which clearly shows the injustice of the rule.[4]

[1] Budd v. Multnomah Street Ry. Co., 15 Ore. 413.

[2] Douglass v. Kraft, 9 Cal. 562; Hamer v. Hathaway, 33 id. 117.

[3] Page v. Fowler, 39 Cal. 412.

[4] Temple, J., said: "When we consider that the object to be attained by this rule is indemnity for loss actually sustained, the result in this case is sufficiently startling. But the rule is claimed to be of universal application, and as to a large class of personal property, to wit, perishable articles, its operation is still more manifestly unjust. If a quantity of fruit — strawberries, for instance — in the season of their greatest abundance, were taken under circumstances which would entitle the owner to indemnity only, and a suit to recover their value were immediately commenced, the trial would not be likely to occur for many months. In the meantime the season of plenty has passed and the fruit bears an extraor- [502] dinary price. Nevertheless, by this rule, he is permitted to recover the enhanced value which he could never have realized, and this under pretense that it is necessary to indemnify him for his actual loss. This is, of course, an extreme case, and may be said to prove only that there should be exceptions to the rule; but I think that the rule is necessarily liable to work injustice in every case. In the cases where it has been enforced it is said to apply only to articles which fluctuate in value. If there is anything which can be said to have a market value which does not fluctuate, of course, it can make no difference when the value is ascertained. This distinction, therefore, might as well be omitted, and the rule applied indiscriminately to all descriptions of personal property. If goods belonging to a merchant, and designed for immediate sale, were taken, the trial of a suit brought to recover their value might, for reasons well understood by every member of the bar and in the usual course of things, be postponed for years. The highest price might be ten years after the sale, and yet it would be morally certain that had the goods not been taken the owner would have disposed of them within the next few months. It is obvious that the damages in

§ 1120. Same subject; conflict in New York cases. In New York there were many decisions prior to Baker v. Drake which adopted or affirmed the rule of the highest intermedi-

such a case (and the supposed case is the general rule) might be grossly unjust, and have very little reference to the loss actually sustained. Without the possibility of loss, the owner is allowed the range of the market for many years in which to choose his price, and perhaps realizes enormous profits in the face of proof to a moral certainty that, had he kept the goods, he would not, and perhaps could not, have received them. The best possible speculation would be to have one's property taken by a responsible person, and this under a rule which only indemnifies for actual loss, and does not permit speculative or hypothetical damages, and in which nothing is exacted as punishment to the wrong-doer. The English rule, so far as I can discover, has always been to leave to the jury, as a matter of discretion, the question as to the time the property should be valued, except in the case of stocks, when the value at the time of trial was the measure of damages. In the United States, on the other hand, it has always been considered a rule of law, and the jury [503] are allowed no discretion in the matter. The doctrine is, therefore, as I think, of American origin, and it may be remarked that all the cases concur in admitting that the general rule is that the damages are to be measured by the value of the property at the time it was taken, the doctrine in question being an exception to the rule; and though the exception has, perhaps, become the rule, it may be well to bear in mind that it originated in an exception made on the ground that, in certain cases (where the market value is fluctuating), the prevailing rule did not do full justice. The exception ought not, therefore, to be carried beyond the purpose for which it was made. That being accomplished, the ordinary rule should prevail. The reason for it must have been that, in the usual course of trade or business, it was likely that the owner would have realized the enhanced value if he had not been deprived of his property. All the cases are upon the ground that otherwise he would not be completely indemnified. It could not have been intended to give him profits it is certain he would not have realized. . . . In many of the cases it is said that the plaintiff will be allowed the highest price intermediate the taking and the trial, if the suit has been commenced within a reasonable time, and prosecuted without unreasonable delay, and no intimation is made as to what the rule would be if the suit were not commenced within a reasonable time; but it is evident that the question of damages ought to be the same in either case. The time of the commencement of the action or trial would not seem to have any natural or logical connection or relation to the question of damages; and the question as to whether a suit was or was not commenced within a reasonable time would rarely, if ever, depend upon any fact which would affect the indemnity to which the plaintiff is entitled. The reasonable time mentioned in the cases cannot mean a reasonable time within which to commence the action, independently of the question of damages. It must mean a time within which it would be reasonable to allow the plaintiff to take the highest market price as the measure of his damage.

ate value.[1] But while this course of decision was in progress, other cases were decided in that state somewhat out of harmony with it, and in accord with the later adjudications. In one case there had been a wrongful sale of stock by a pledgee.[2] Part of it was demanded afterwards, and the damage for its conversion was held to be its value at the date of the demand with interest. Another part was not demanded, and for its conversion its value within a reasonable time after the wrongful sale was allowed, the pledgee being permitted to deduct its cost, which he had paid for the plaintiff. In another case[3] a factor at Buffalo had wheat on consignment from his principal, who directed him to sell it at a specified price on [505]

In other words, the rule deducible from the authorities is, that in cases affecting property of a fluctuating value, where exemplary damages are not allowed, the correct measure of [504] damages is the highest market value within a reasonable time after the property was taken, with interest computed from the time such value was estimated." See Scott v. Rogers, 31 N. Y. 676. . . . "The rule thus stated may be somewhat indefinite, but it is certainly not more so than the rule in the New York cases, which have reference to the commencement of the action or its diligent prosecution; and the rule thus stated has this advantage, that what is a reasonable time would always be determined with reference to the question of indemnity; and if the old standard of value at the time of the taking be departed from, I can think of no rule more definite which would not be arbitrary and liable to work injustice."

By the California code, § 3336, it is declared that the measure of detriment for conversion of personal property is presumed to be, 1, the value of the property at the time of the conversion, with interest from that time; or, where the action has been prosecuted with reasonable diligence, the highest market value between the conversion and the verdict, without interest, at the option of the injured party; and 2, a fair compensation for the time and money properly expended in pursuit of the property. See Barrante v. Garratt, 50 Cal. 112; Fairbanks v. Williams, 58 id. 241. A delay of three months in bringing an action does not deprive a plaintiff of the benefit of this provision. Froman v. Sierra Nevada S. M. Co., 61 Cal. 629.

A similar rule is embodied in the codes of Georgia (§ 3077, Code of 1873) and Dakota. The court of North Dakota holds that a delay of eleven months in bringing an action bars the plaintiff of the right to recover the highest intermediate value. Pickert v. Rugg, 1 N. D. 230.

[1] West v. Wentworth, 3 Cow. 82; Clark v. Pinney, 7 Cow. 681; Blot v. Boiceau, 3 N. Y. 85; Romaine v. Van Allen, 26 id. 309; Wilson v. Mathews, 24 Barb. 295; Burt v. Dutcher, 34 N. Y. 493; Willard v. Bridge, 4 Barb. 361; Markham v. Jaudon, 41 N. Y. 235; Lobdell v. Stowell, 51 N. Y. 70; Lawrence v. Maxwell, 6 Lans. 469.

[2] Brass v. Worth, 40 Barb. 648.

[3] Scott v. Rogers, 31 N. Y. 676.

a given day, or, if not sold that day, to ship to New York. The factor sold it the day after that specified. If the directions of the principal had been followed the wheat would have reached New York between the 27th and the 31st of July, at an expense for transportation of fifteen cents per bushel. The New York market fluctuated between July 25th and November 29th from $1.25 to $1.65 per bushel. The unauthorized sale was treated as a conversion, and the measure of damages was held to be the difference between the price for which the wheat was sold, the proceeds of the unauthorized sale having been paid over, and what it was worth during a reasonable time afterwards, which was held to embrace the residue of the season to November 29th, when navigation of the river and canal closed. Had it appeared at what time the plaintiff intended to sell, after the arrival of the wheat in New York, the damages would have been computed with reference to its value at that time. In another case,[1] where a pledgee converted the pledge, which consisted of warehouse receipts for corn, the court, by Church, C. J., referring to the rule of the highest intermediate value, observed: "Whatever may be said of the propriety of such a rule, in any case not special and exceptional in its circumstances, it should not be applied in a case like this. The price was fixed a year and a half after the original action was commenced. There is not the slightest evidence that the plaintiff or his assignor contemplated or desired to keep the corn. On the contrary, it affirmatively appears that the intention was to sell it when it reached $1 a bushel, and such was the agreement, while the price allowed was $1.45. Besides, the evidence shows that it would have been difficult, if not impossible, to have preserved it until the time when the price was fixed. . . . An unqualified rule giving a plaintiff in all cases of conversion the highest price to the time of trial, I am persuaded cannot be upheld upon any sound principle of reason or justice. Nor does the qualification suggested in some of the opinions, that the action must be commenced within a reasonable time and prosecuted with reasonable diligence, relieve it of its objectionable character." [506] In a case still earlier than these[3] Mr. Justice Duer

[1] Matthews v. Coe, 49 N. Y. 57. [2] Suydam v. Jenkins, 3 Sandf. 614.

delivered a masterly opinion which contains a thorough discussion of the law of compensation for the loss of personal property by tort and breach of contract, upon principle and authority in opposition to the rule of the highest intermediate value, except upon proof of such facts as makes it manifest that it is a just indemnity for the owner's actual loss, or gives him a value which the wrong-doer actually obtained or might have realized. He says: "It seems to us exceedingly clear that the highest price for which the property could have been sold, at any time after the right of action accrued, and before the entry of judgment, cannot, except in special cases, be justly considered as the measure of damages. Whenever the evidence justifies the conclusion that a higher price would have been obtained by the owner had he kept the possession, or has been obtained by the wrong-doer, we have admitted and shown that it ought to be included in the estimate of damages; in the first case, as a portion of the indemnity to which the owner is entitled; and, in the second, as a profit which the wrong-doer cannot be permitted to retain; but we cannot admit that the same rule is to be followed where nothing more is shown than a bare possibility that the highest price would have been realized, and still less where it is proved that it would not have been obtained by the owner, and has not been obtained by the wrong-doer. Its allowance in these cases would in truth impose a penalty upon the wrong-doer, and render the damages vindictive instead of remunerative; and it must be remembered that we are treating exclusively of the cases in which vindictive damages are not claimed, or, if claimed, ought not to be given."

§ 1121. Same subject; Pennsylvania rule. In Pennsylvania the point under discussion has had pretty nearly the same history, beginning with Bank of Montgomery v. Reese.[1] In that case the court held that where bank stock has been wrongfully withheld from a party entitled to it, the measure of damages, where the consideration had been paid, is the highest market value between the breach and the trial, together with the bonus and dividends which have been [507] received in the meantime; but where the consideration has

[1] 26 Pa. St. 143. See Musgrave v. Beckendorff, 53 id. 310.

not been paid, the plaintiff should be allowed the difference between it and the value of the stock, together with the difference between the interest on the consideration and the dividends on the stock. Strong reasons are given why the general rule should not apply where the articles could not be procured elsewhere, and where, because of restrictions on its production, or other causes, its price is subject to considerable fluctuations. But the conclusion that the loss is the highest intermediate value is not so satisfactorily sustained where it rests merely on the inference that the owner would have realized it. It is true, as said in Harrison v. Harrison,[1] that "justice is not done if you do not place the plaintiff in the same situation in which he would have been if the stock had been replaced at the stipulated time;" but it does not maintain this measure of redress except in a retributive, rather than a compensatory, sense, to say we cannot act upon the possibility of his not keeping it, or that, if it was stock bought on speculation to be sold at the best opportunity, it will be assumed that but for the defendant's wrong the plaintiff would so have disposed of it. The English decisions referred to may have proceeded, and there is reason to suppose they did, on the reasonable presumption, from prevalent habit, that the stock was intended as a permanent investment, and therefore would be kept until the trial. That presumption is quite unlike one that if stock is bought to be sold again for profit the holder will sell when the market is the most favorable. This Pennsylvania case is subsequently referred to as laying down a principle exclusively applicable to a party who is bound by a contract or trust duty to deliver stock.[2] And finally that the rule here laid down has no application to trover, and does not apply to ordinary stock contracts; that it applies between trustee and beneficiary, or to cases where justice cannot be reached by the ordinary measure of damages.[3]

[1] 1 C. & P. 412.

[2] Neiler v. Kelley, 69 Pa. St. 403; Work v. Bennett, 70 id. 484.

[3] Huntingdon, etc. Coal Co. v. English, 86 Pa. St. 247; North v. Phillips, 89 id. 250; Wagner v. Peterson, 83 id. 238.

The trust relation referred to in the Pennsylvania case "would probably be deemed to exist between a stock broker and his client." Galigher v. Jones, 129 U. S. 193, 201.

§ **1122. Same subject; Massachusetts rule.** The rule of the highest market value within a reasonable time after a sale has been made by a factor in contravention of the orders of his principal has been approved in Massachusetts.[1] But no distinction is made there as to the measure of compensation for the conversion of different classes of property in other cases.

§ **1123. Same subject; English cases.** The measure of damages in trespass, trover or replevin for the loss of property is generally the same as that which a vendee, who has paid therefor, is entitled to recover against a vendor for its non-delivery. The rule applied in one such action is cited freely in the others. The English cases make a difference between vendor and purchaser when the vendee has paid the price in advance. Therefore the rule is the same for a conversion of the plaintiff's stock, and where he sues for a breach of a contract to replace stock or for non-delivery of stock contracted and paid for, its value at the time of the trial,[2] if the price has advanced, measures the damages; otherwise, he will be entitled to its value at the time of the conversion.[3] It has there been held that where a bond is given by the borrower of a share of stock, to secure its replacement, and payment in the meantime of a sum equal to the interest and dividends, and a bonus is afterwards declared upon the stock, the lender has an equity to be placed in the same situation as if it had remained in his hands, and is consequently entitled to the replacement of the original stock increased by the amount of the bonus, and to the dividends in the meantime as well upon the bonus as upon such stock.[4] This is a reasonable measure of damages on the footing of the English ventures in stock as an investment; but affords no support to the rule of the highest intermediate value which is not maintained to the time of the trial.[5]

§ **1124. Same subject; rule in North Carolina.** The rule in North Carolina is peculiar. The value at the trial is the

[1] Maynard v. Pease, 99 Mass. 555.

[2] Shepherd v. Johnson, 2 East, 211; McArthur v. Seaforth, 2 Taunt. 257; Harrison v. Harrison, 1 C. & P. 412; Shaw v. Holland, 15 M. & W. 145; Owen v. Routh, 14 C. B. 327.

[3] Forest v. Elwes, 4 Ves. 492; Sanders v. Kentish, 8 T. R. 161; In re Baha, etc. R. Co., L. R. 3 Q. B. 584.

[4] Vaughan v. Wood, 1 M. & K. 403.

[5] Williams v. Peel River, etc. Co., 55 L. T. Rep. 689; Simmons v. Lon-

measure of damage, and though the property may have suffered injury or deterioration, the defendant has the option to surrender it, and damages may be assessed for the detention, including compensation for the diminution of value.[1]

§ **1125. Departure from general rule sometimes justifiable.** The general rule may safely and justly be departed [508] from or supplemented when it fails to furnish adequate compensation for the entire injury; as if there be a subsequent increase in price, which the plaintiff would have, or which the defendant has, obtained.[2] And if he has the property in his possession at the time of the trial, there is no injustice in compelling him to pay what it is worth at that time.[3] The subject of special and consequential damages will be considered further on.

§ **1126. Recovery where value of property enhanced by defendant.** If the wrong-doer takes the property in one condition and by bestowing labor upon it puts it in a better condition, and thus makes it more valuable, is he chargeable in an action for its conversion with the improved value? The general rule in trover — the value at the time and place of conversion with interest — would exclude any such question by the very logic of the remedy. But under the more flexible rule of reaching the real equity of the particular case, or under the rule of giving the highest intermediate value, this has often been a grave practical question. The improved value is recoverable in some states upon general principles, and in others to some extent by statute. Thus where timber has been taken and converted into wood; wood into coal; logs into lumber; corn into whisky, or the like, the value in the latest and most improved form has been recovered.[4] As

don Joint Stock Bank [1891], 1 Ch. Div. 270; Earl of Sheffield v. Same, 13 App. Cas. 333.

[1] Boylston Ins. Co. v. Davis, 70 N. C. 485.

[2] Symes v. Oliver, 13 Mich. 9; Ewart v. Kerr, 2 McMull. 141; De Clerq v. Mungin, 46 Ill. 112; Ingram v. Rankin, 47 Wis. 406, 420.

[3] Ingram v. Rankin, *supra*.

[4] Betts v. Lee, 5 Johns. 348; Curtis v. Groat, 6 id. 168; Brown v. Sax, 7 Cow. 95; Riddle v. Driver, 12 Ala. 590; Rice v. Hollenbeck, 19 Barb. 664; Walther v. Wetmore, 1 E. D. Smith, 7; Silsbury v. McCoon, 3 N. Y. 379; S. C., 6 Hill, 425; 4 Denio, 332; Babcock v. Gill, 10 Johns. 287; Nesbitt v. St. Paul Lumber Co., 21 Minn. 491; Ellis v. Wire, 33 Ind. 127; Symes v. Oliver, 13 Mich. 9; Final v. Backus, 18 id. 218; Snyder v. Vaux,

against trespassers upon government land who wilfully convert timber thereon the rule of damages is the full value of the property at the time and place of demanding it in the

2 Rawle, 423; Millar v. Humphries, 2 A. K. Marsh. 446; Smith v. Gonder, 22 Ga. 353; Baker v. Wheeler, 8 Wend. 505; Davis v. Easley, 13 Ill. 192; Eastman v. Harris, 4 La. Ann. 103; Everson v. Seller, 105 Ind. 266; Shepard v. Pettit, 30 Minn. 481; Baker v. Hart, 52 Hun, 363; Guchenheimer v. Angewine, 81 N. Y. 397; Benson Mining & S. Co. v. Alta Mining & S. Co., 145 U. S. 428.

In Walther v. Wetmore, 1 E. D. Smith, 7, it is held that because the owner does not lose title to the property by the wrong-doer improving it, and may retake or replevy it, he is entitled to recover the improved value in trover. Grant v. Smith, 26 Mich. 201; Hendricks v. Evans, 46 Mo. App. 313 (improved condition of live animals).

It is provided by statute in Minnesota (vol. 1, Gen. Stats. of 1891, secs. 2294, 2295) that "In all cases of a wrongful or unlawful taking, detention or conversion of logs or timber, and intermingling of the same with other logs or timber, so that they cannot be identified or separated therefrom by the owner, the rule of the common law applicable to the case of a wrongful and fraudulent confusion of goods shall govern in determining the right of property in respect to said logs and timber.

"In cases where logs or timber, bearing the same mark but belonging to different owners in severalty, have, without the fault of any of them, become so intermingled that the particular or identical logs or timber belonging to each cannot be designated, either of such owners may, upon a failure of any one of them having the possession to make a just division thereof after demand, bring and maintain against such one in possession an action to recover his proportionate share of said logs or timber, and in such action he may claim and have the immediate delivery of such quantity of said mark of logs or timber as shall equal his said share, in like manner and with like force and effect as though such quantity embraced his identical logs and timber, and no more."

Sec. 4269, Sanborn & Berryman's Ann. Stats. of Wis. (1889), provides that "In all actions to recover the possession or value of logs, timber or lumber wrongfully cut upon the land of the plaintiff, or to recover damages for such trespass, the highest market value of such logs, timber or lumber, in whatsoever place, shape or condition, manufactured or unmanufactured, the same shall have been at any time before the trial, while in the possession of the trespasser, or any purchaser from him with notice, shall be found or awarded to the plaintiff, if he succeed, except as in this section provided. The defendant in any such action may, at or before the time of the service of his answer, serve on the plaintiff his affidavit that such cutting was done by mistake, and therewith an offer in writing to allow judgment to be taken against him for the sum therein specified, with costs. If the plaintiff accept the offer and give notice thereof in writing within ten days, he may file the summons, complaint and offer, with an affidavit of the service of the notice of acceptance, and the clerk must thereupon enter judgment accordingly, which shall be in full sat-

condition it then is.[1] The measure of liability of an innocent purchaser is the value of the property at the time the purchase was made. If the defendant is an innocent trespasser or purchaser without notice from him, the recovery is limited to the value of the property at the time it was converted.[2]

isfaction of the matters alleged in the complaint. If notice of acceptance be not so given, the affidavit of the defendant shall be deemed traversed. Upon the trial the jury shall find specially upon such issue, and also the true value of such logs, timber or lumber when so cut, as well as their highest market value, aforesaid. If the jury find such cutting was by mistake, and the sum, exclusive of costs, for which judgment was so offered, was not less than the value of such logs, timber or lumber when cut, with interest from that time to the time of such offer, and ten per centum as damages upon the combined sum, principal and interest, the plaintiff shall have judgment for the amount of such offer only, less the costs and disbursements of the action since the date of such offer, to be taxed and deducted in favor of the defendant. If the jury find such cutting was by mistake, but the sum, exclusive of costs, for which judgment so offered, was less than such value, and ten per centum damages combined, judgment shall be awarded the plaintiff on the verdict for the value found at time of cutting, with interest from the time of such cutting, and ten per centum thereon aforesaid, besides the costs of the action. If there be several defendants not alike liable, either, or any, may serve such affidavit and offer, and have a separate trial as to him or them, provided that in all actions hereafter commenced, when the defendant shall have in good faith acquired a title to and entered upon the land under the same, believing such title to be valid, and shall have cut the timber therefrom under such circumstances, then the plaintiff, if he shall recover, shall recover only the actual damages sustained by reason of such cutting. The defendant in his answer shall state the facts upon which he relies to establish such claim of title, and the burden of proof shall be on the defendant."

See Tuttle v. Wilson, 52 Wis. 643. This statute does not apply to an innocent purchaser. Wright v. Bolles W. W. Co., 50 Wis. 167. It applies where timber is cut by persons who claim to be licensees of the landowner, after he has executed a contract for the sale of the land. Schweitzer v. Connor, 57 Wis. 177. Interest on the highest market value is not recoverable. Smith v. Morgan, 73 Wis. 375. If the wrong-doer dies before judgment against him or his vendee their representatives are liable only for the value of the stumpage. Tucker v. Cole, 54 Wis. 539.

Before the statute the damages were measured by the highest price of the stumpage at any time between the trespass and the commencement of the action. Webster v. Moe, 35 Wis. 75.

[1] Wooden-ware Co. v. United States, 106 U. S. 432; Bly v. Same, 4 Dill. 466. See United States v. Mills, 9 Fed. Rep. 684; Schulenberg v. Harriman, 21 Wall. 44; S. C., 2 Dill. 398.

[2] Wooden-ware Co. v. United States, *supra*.

Where a tenant in common was fraudulently deprived of his interest in an oil leasehold by his co-tenant he was entitled to recover the value of his share of the oil produced and converted by the latter as it stood in the tank, without charge for the expense of producing it.[1]

§ 1127. Same subject. In Indiana a crop of wheat was [510] wrongfully taken, harvested and threshed; and the wrong-doer was held liable for it at the highest market price [511] between the taking and the sale made by him, without any abatement or allowance for harvesting and threshing.[2] [512] Similar rulings have been made in other states.[3] In such cases the plaintiff, by his recovery, is placed in a better situation than he would be in if the wrong had not been committed. He is not entitled to recover this increase of value as a necessary part of a perfect compensation for the loss and injury which he suffered. It is said that a wrong-doer cannot acquire title to another's property by improving it. As a general proposition this is true; but the principle does not apply when the owner sues for a conversion, and asks damages therefor. The injury then to be compensated is not affected at all by the use which the defendant has subsequently made of the property. When found guilty of the conversion, and the defendant pays the damages assessed therefor, the law vests him with the title as of that date. By bringing such an action the owner tacitly assents to this result.[4] Instead of the value added by the defendant, the value at the time and place of the conversion with interest is the rule founded in sound principle and now supported by a decided preponderance of authority. Maule, J., said upon this point:[5] "It may be that the wrong-doer who acquires no property in the chattel he converts acquires no lien for what he expends on it, and the owner may bring detinue or trover. But it does not follow that if the owner brings trover he is to recover the full value of the thing in its improved state. The proper measure of damages, as it seems to me, is the amount of the pecuniary loss the plaintiffs have

[1] Foster v. Weaver, 118 Pa. St. 42.

[2] Ellis v. Wire, 33 Ind. 127. Approved in Everson v. Seller, 105 id. 266, 271.

[3] Stuart v. Phelps, 39 Iowa, 14; Benjamin v. Benjamin, 15 Conn. 347. *Contra*, Boutwell v. Harriman, 58 Vt. 516.

[4] *Ante*, § 1108.

[5] Reid v. Fairbanks, 13 C. B. 692.

sustained by the conversion." Where the chattel has become such by a tortious severance from the realty, as where coal or minerals are taken from a mine, or timber or fixtures are severed from the freehold, the general rule is to allow the value immediately after the severance and when the property first becomes a chattel.[1] In the two California cases just cited the [513] action was for *mesne* profits or for injury to land, and the rule of damages applied was the value of the gold dust, less the expense of its extraction. In May v. Tappan the court say the rule of damages depends to some extent upon the form of the action; whether it is for an injury to the land itself or for conversion of a chattel severed therefrom. In that case the action was for injury to the land. The same rule was laid down in Clowser v. Joplin M. Co.[2] In Pennsylvania, Michigan, Wisconsin and in the federal court for Massachusetts the same rule has been applied in trover.[3] In Forsyth v. Wells it was held that the rule of the value after severance would transfer to the plaintiff all the defendant's labor in mining the coal which was the subject of the action, and thus give the plaintiff more than compensation for the

[1] Moody v. Whitney, 38 Me. 174; Martin v. Porter, 5 M. & W. 351; Morgan v. Powell, 3 Q. B. 278; Maye v. Tappan, 23 Cal. 306; Goller v. Fett, 30 id. 481; Single v. Schneider, 24 Wis. 301; 30 id. 570; Foote v. Merrill, 54 N. H. 490; Adams v. Blodgett, 47 id. 219; Tilden v. Johnson, 52 Vt. 628; Stockbridge Iron Co. v. Cone Iron Works, 102 Mass. 80; Winchester v. Craig, 33 Mich. 205; Firmin v. Firmin, 9 Hun, 571; McLean County C. Co. v. Long, 81 Ill. 359; Kier v. Peterson, 41 Pa. St. 357; Heard v. James, 49 Miss. 236; Young v. Lloyd, 65 Pa. St. 199; Lyon v. Gormley, 53 id. 261; Clarke v. Holford, 2 C. & K. 540; Bennett v. Thompson, 13 Ired. L. 146; Smith v. Gardner, 22 Ga. 353; Wood v. Morewood, 3 Q. B. 440, note; Cushing v. Longfellow, 26 Me. 306; United States v. Magoon, 3 McLean, 171; Greeley v. Stilson, 27 Mich. 154; Tome v. Dubois, 6 Wall. 548; Potter v. Mardre, 74 N. C. 36; Wetherbee v. Green, 22 Mich. 311; Omaha, etc. R. Co. v. Tabor, 13 Colo. 41, 56; Ayres v. Hubbard, 57 Mich. 322; S. C., 71 id. 594; Beede v. Lamprey, 64 N. H. 510; Railroad Co. v. Hutchins, 37 Ohio St. 282. See Gates v. Rifle Boom Co., 70 Mich. 309; and §§ 1019, 1020, *ante*. The rule has been to the contrary in Minnesota; but in a late case the court, without unqualifiedly accepting the doctrine of the text, holds that it should be applied whenever the act is not intentionally or grossly wrongful. Viliski v. Minneapolis, 40 Minn. 304; Whitney v. Huntington, 37 id. 197.

[2] 4 Dill. 469, note.

[3] Forsyth v. Wells, 41 Pa. St. 291; Single v. Schneider, 30 Wis. 570; 24 id. 299; Hungerford v. Redford, 29 id. 345; Winchester v. Craig, 33 Mich. 205; Ghen v. Rich, 8 Fed. Rep. 159.

injury done; and the court discuss the relation of the rule of damages to the form of action.[1]

§ 1128. Same subject. Where the plaintiff's timber standing was worth $1.50 per thousand feet, and an expense of $9

[1] "Yet we admit the accuracy of this conclusion if we may properly base it on the form rather than on the principle or purpose of the remedy. But this we may not do; and especially we may not sacrifice the principle to the very form by which we are endeavoring to enforce it. Principles can never be realized without forms, and they are often inevitably embarrassed by unfitting ones; but still the fact that the form is for the sake of the principle, and not the principle for the form, requires that the form shall serve, not rule, the principle, and must be adapted to its office. Just compensation in a special class of cases is the principle of the action of trover, and a little study will show us that it is no unyielding form, but adapts itself to a great variety of circumstances. In its original purpose, and in strict form, it is an action for the value of [514] personal property lost by one and found by another, and converted to his own use. But it is not thus restricted in practice; for it is continually applied to every form of wrongful conversion, and of wrongful taking and conversion, and it affords compensation not only for the value of the goods, but also for outrage and malice in the taking and detention of them. 6 S. & R. 426; 12 id. 93; 3 Watts, 333. Thus form yields to purpose for the sake of completeness of remedy. Even the action of replevin adapts itself thus. 1 Jones, 381. And so does trespass. 7 Casey, 456. In very strict form, trespass is the proper remedy for a wrongful taking of personal property, and for cutting timber, or quarrying stone, or digging coal on another man's land and carrying it away; and yet the trespass may be waived and trover maintained without giving up any claim for any outrage or violence in the act of taking. 3 Barr, 13. It is quite apparent, therefore, that this form of action is not so uniform and rigid in its administration as to force upon us any given or arbitrary measure of compensation. It is simply a form of reaching a just compensation, according to circumstances, for goods wrongfully appropriated. When there is no fraud, or violence, or malice, the just value of the property is enough. 11 Casey, 28. When the taking and conversion are one act, or one continued series of acts, trespass is the more obvious and proper remedy; but the law allows the waiver of the taking, so that the party may sue in trover; and this is often convenient. Sometimes it is even necessary; because the plaintiff, with full proof of the conversion, may fail to prove the taking by the defendant. But when the law does allow this departure from the strict form it is not in order to enable the plaintiff by his own choice of actions to increase his recovery beyond just compensation, but only to give him a more convenient form of recovering that much. Our case raises a question of taking by mere mistake, because of the uncertainty of boundaries; and we must confine ourselves to this. The many conflicting opinions on the measure of damages in cases of wilful wrong, and especially

was incurred by the defendant in wrongfully cutting it into logs and transporting them to a distant market where they were worth $12 per thousand, the owner was held entitled in

the very learned and thoughtful [515] opinions in the case of Silsbury v. McCoon, 4 Denio, 322; 3 N. Y. 379, warn us to be careful how we express ourselves on the subject. We do find cases of *trespass* where judges have adopted a mode of calculating damages for taking coal that is substantially the same as the rule laid down by the common pleas in this case, even where no wilful wrong was done, unless the taking of the coal out by the plaintiff's entry was regarded as such. But even then we cannot avoid feeling that there is a taint of arbitrariness in such a mode of calculation because it does not truly mete out just compensation. 5 M. & W. 357; 9 id. 627; 3 Q. B. 283. And see 28 Eng. L. & E. 175. We prefer the rule in Wood v. Morewood, 3 Q. B. 440, note, where Parke, B., decided, in a case of trover for taking coals, that if the defendant acted fairly and honestly, in the full belief of his right, then the measure of damages was the fair value of the coals, as if the coal field had been purchased from the plaintiffs. See, also, Bainbridge on Mines and Minerals, 510; 17 Pick. 1. Where the defendant's conduct, measured by the standard of ordinary morality and care, which is the standard of the law, is not chargeable with fraud, violence or wilful negligence or wrong, the value of the property taken and converted is the measure of just compensation. If raw material has, after appropriation and without such wrong, been changed by manufacture into a new species of property, as grain into whisky, grapes into wine, furs into hats, hides into leather, or trees into lumber, the law either refuses the action of trover for the new article, or limits the recovery to the value of the original article. 6 Hill, 425, and note; 21 Barb. 92; 23 Conn. 523; 38 Me. 174. Where there is no wrongful purpose or wrongful negligence in the defendant, compensation for the real injury done is the purpose of all remedies; and so long as we bear this in mind, we shall have but little difficulty in managing the forms of actions so as to secure a fair result. If the defendant in this case was guilty of no intentional wrong, he ought not to have been charged with the value of the coal after he had been at the expense of mining it; but only with its value *in place*, and with such other damage to the land as his mining may have caused. Such would mani- [516] festly be the measure in trespass for *mesne* profits." Forsyth v. Wells, 41 Pa. St. 291.

In Lyon v. Gormley, 53 Pa. St. 265, Strong, J., commenting on Forsyth v. Wells, used this language: "The decision was made by a bare majority of the court, and it is to be regarded as ruling nothing more than the law as applicable to the circumstances of that case. There the coal had been taken under a mistake of right, and the act complained of was substantially a trespass. It was a case for compensation, and though it was held trover would lie, the action was treated as an action *quare clausum fregit* for an injury not wanton." The rule and principle of Forsyth v. Wells has been followed in Herdic v. Young, 55 Pa. St. 176; Coleman's Appeal, 62 id. 278; Young v. Lloyd, 65 id. 199.

trover to recover the value when taken, that is the "stumpage" value in the ordinary market; or the value at the place where it was marketed less the sums expended in the cutting and transportation in thus putting the property in condition for sale, with interest from the date of conversion.[1] The value of property converted may be and often is enhanced by transportation. This increase of value is no just cause for an increase of damages to the owner; for it is no additional element in his pecuniary loss. He is, therefore, by the prevailing course of decision, allowed only the value at the place as well as time of conversion.[2] Where a conditional sale of cloths was made, and the purchaser printed them but did not perfect his purchase, in trover brought by the seller against one to whom the conditional vendee had consigned the cloths to be sold, it was held the plaintiff could recover in damages only their value at the time they were delivered, not their value after they were printed.[3] In trover for the conversion of a vessel which was taken in an unfinished state and completed by the de- [517] fendant, it was held, in an action by the purchaser at a sale under execution levied while it was in the unfinished state in which the defendant took it, that the plaintiff was entitled only to the value at the time of the levy.[4] And a similar rule was applied in England. The plaintiff had a bill of sale of a ship being built to secure advances. The defendant converted her before she was finished and afterwards completed her. The plaintiff was held entitled to her value at the time of the conversion, not at a subsequent time; and he was not entitled to special damages for loss of freight she might have earned.[5]

[1] Winchester v. Craig, 33 Mich. 205.

[2] Weymouth v. Chicago, etc. R. Co., 17 Wis. 550; Saunders v. Clark, 106 Mass. 331; Herdic v. Young, 55 Pa. St. 176; Tilden v. Johnson, 52 Vt. 628; Ayres v. Hubbard, 57 Mich. 322; Beede v. Lamprey, 64 N. H. 510. *Contra*, Baker v. Hart, 52 Hun, 363; Hilliard Flume Co. v. Woods, 1 Wyo. 396.

[3] Dresser Manuf. Co. v. Waterston, 3 Met. 9; Aborn v. Mason, 14 Blatch. 405.

[4] Green v. Hall, 1 Houst. (Del.) 506.

[5] Reid v. Fairbanks, 13 C. B. 692.

Where property was improved by the party who first converted it and sold thereafter by him, it was held that the betterments were wrongfully made, that the title thereto was in the owner, and the purchaser from the wrong-doer was liable for the value of the property at the time and place when and where he became such. There was no question in the case as to the damages recoverable from the vendee being in excess of the amount for which the original

This principle which confines the plaintiff's recovery to compensation for his actual loss, and therefore to the value of his property at the time of conversion applies when its identity is destroyed by a wrongful intermixture with other property, producing what is commonly called a *confusion of goods.* If the owner chooses to seek his remedy by an action for the conversion of his goods, he is fully compensated when he recovers their value at the time of such a conversion, as when it occurs in any other manner. By the general current of authority he is confined to that measure of redress.[1] But where this rule of strict compensation in this class of cases does not prevail, and the improved article may be taken after it has been enhanced in value by the wrong-doer, the right of the owner to take the entire property of which his goods have become a part by a wrongful admixture is recognized and enforced.[2] The cases which administer the mitigated rule, exempting the wrong-doer from paying the owner the enhanced value caused by his labor, or the loss of his property by its admixture with that of another, confine it to the case of conversion by mistake or in the *bona fide* assertion of his rights.[3] [518] But there are intimations in several cases that the value of the original property should be given as the measure of compensation without regard to the wrong having been done wilfully or fraudulently.[4] Cases may well arise in which the circumstances may be such that the increased value resulting to property from the labor of the wrong-doer may not be of

wrong-doer was liable. Glaspy v. Cabot, 135 Mass. 435.

[1] Hesseltine v. Stockwell, 30 Me. 237; Moody v. Whitney, 38 Me. 174; per Campbell, J., in Stephenson v. Little, 10 Mich. 433; Wetherbee v. Green, 22 Mich. 311; Potter v. Mardre, 74 N. C. 36. See Single v. Schneider, 30 Wis. 570; Ryder v. Hathaway, 21 Pick. 298.

[2] Rice v. Hollenbeck, 19 Barb. 664; Walther v. Wetmore, 1 E. D. Smith, 7; Silsbury v. McCoon, 6 Hill, 425; 4 Denio, 332; Isle Royal M. Co. v. Hertin, 37 Mich. 332; Burnham v. Marshall, 56 Vt. 365.

[3] Heard v. James, 49 Miss. 236; Forsyth v. Wells, 41 Pa. St. 291; Whitney v. Huntington, 37 Minn. 197; Viliski v. Minneapolis, 40 id. 304; Hoxsie v. Empire Lumber Co., 41 id. 548; Railroad Co. v. Hutchins, 37 Ohio St. 282; Wooden-ware Co. v. United States, 106 U. S. 432.

In New Hampshire the rule is extended to cases where the wrong is done carelessly, but not wilfully. Beede v. Lamprey, 64 N. H. 510.

[4] Single v. Schneider, 30 Wis. 570; Potter v. Mardre, 74 N. C. 36; Moody v. Whitney, 38 Me. 174. See vol. 1, § 103.

any practical advantage to its owner, as where he could have performed it without expense or loss if the conversion had not deprived him of the opportunity of doing so. In such a case no deduction should be made in behalf of the defendant.[1] In all cases the party who seeks to retain the advantage of his labor by deducting from the damages sought by the plaintiff the value thereby added to the latter's property must show the amount of such increased value, or he will be charged with the worth of the property in its improved state.[2] As a concluding objection to the allowance of anything but strictly compensatory damages in the action of trover, it may be said that anything beyond that, if it is imposed upon the defendant because of his bad motive, is in the nature of vindictive damages, and it is exceptional for the court instead of the jury to award them as matter of law and of right.[3]

§ **1129. Special or consequential damages.** In England, and generally in this country, special damages are recoverable in this action if alleged in the declaration. In trover for a horse valued at 15*l.*, special damage was claimed for the hire of another. There was some hesitation in recognizing the damage as recoverable, and a compromise result followed in a judgment for 25*l.*[4] Where a carpenter's tools were the subject of the suit the court allowed special damages by reason of the plaintiff, a carpenter, being prevented, in consequence, from working at his trade.[5] In a subsequent case[6] the court of queen's bench drew a distinction between special damage and special value, and said they were inclined to think that to enable a plaintiff to recover special damage which did not

[1] Taber v. Jenny, 1 Sprague, 315.

[2] Steele v. United States, 19 Ct. of Cls. 181.

[3] See Heard v. James, 49 Miss. 236.

[4] See Hughes v. Quentin, 8 C. & P. 703; Barrow v. Arnaud, 8 Q. B. 595; Saunders v. Brosius, 52 Mo. 50; Boylan v. Huguet, 8 Nev. 345.

In a Georgia case cotton was purchased from a warehouseman and while in his possession was resold. Delivery of it was impossible because he had disposed of it. In settling the accounts between him and the owner equity compelled the warehouseman to pay the amount the owner was obliged to pay his vendee on account of his inability to fulfill his contract, which was the difference between the price the cotton was then worth and the price at which it had been sold. Beall v. Rust, 68 Ga. 774.

[5] Bodley v. Reynolds, 8 Q. B. 779; Reilley v. McMinn, 2 Pugsley (N. B.), 370.

[6] France v. Gaudet, L. R. 6 Q. B. 199.

form part of the actual present value of the goods, as in withholding the tools of a man's trade, the defendant must have some notice of the inconvenience likely to be occasioned.[1] It has been held that if the goods have been returned after conversion, and accepted by the plaintiff, he can only recover a nominal sum, unless he claims special damages and alleges them in his declaration.[2] Such return accepted is treated as if ordered by the court; and therefore, in the absence of allegations in the declaration, or conditions agreed on at the acceptance, the latter is deemed an admission that the property has been returned in the same plight as when converted [519] and that no special damages have been suffered; for only in such a case would the court stay proceedings on return of the property.[3] In Pennsylvania such damages are not re-

[1] In trover against an officer for seizing the tools of one's trade damages for breaking up the plaintiff's business are not recoverable where that results from the award of the property in an action of replevin to the defendant in the action of trover. McGuire v. Galligan, 57 Mich. 38. Anticipated profits from fulfilling existing contracts for threshing grain are subject to too many contingencies to be made the basis of damages for the conversion of a machine necessary to be used in doing so. Cushing v. Seymour, etc. Co., 30 Minn. 301.

[2] Barrelett v. Bellgard, 71 Ill. 280; Moon v. Raphael, 2 Bing. N. C. 310.

[3] See *post*, § 1144. In Moon v. Raphael, *supra*, the defendant, a sheriff, who held goods taken in execution, delivered them to plaintiffs, assignees of a bankrupt, after an action of trover had been commenced by them; the plaintiff accepted the goods without condition; held, that they could not recover in the action more than nominal damages; at all events not without alleging special damages in the declaration. Tindall, C. J., said: "If the defendants had come to the court to stay proceedings on the delivery of the goods, the plaintiffs would not have been compelled to accept them, unless they were in the same plight as when they were taken, and no injury had accrued to the plaintiffs. But the plaintiffs have taken upon themselves to accept the goods, without imposing any condition on the defendants, and then proceed to trial, as they had a right to do, to recover their costs; in order to which, according to the practice of a century, the jury may, under such circumstances, give them nominal damages. But the plaintiffs seek for more; and, though no special damage has been alleged in the declaration, and the damage complained of is not necessarily incidental to the wrongful taking of the property, they claim to recover the amount of rent paid in respect of the premises on which the goods were detained for the period during which they were under detention. If an action of trespass had been brought, such an allegation of special damage might perhaps have been sustained; this, however, is an action of trover,

garded as special.[1] In allowing proof that the defendant's detention prevented the sale of the property when the market was high, and that the plaintiff was injured by the subsequent decline, the court thus stated what is believed to be the [520] theory of the American practice on this point: "The redelivery is the defense, and is evidence for the defendant, not in bar of the action but in mitigation of the damages; and the plaintiff in reply may surely present to the consideration of the jury the actual injury resulting to him from the trover or conversion, in order to show to what extent the damage should in justice be mitigated."[2] Any damages claimed in addition to the value and interest are necessarily special and must be alleged.[3] But the compensation the plaintiff may be entitled to in place of the value by reason of a return of the goods is not of this nature. Loss of profits resulting from the conversion of a stock of merchandise cannot be recovered for as compensatory damages.[4] An officer who has wrongfully seized and retained property is not liable for its loss by fire unless his wrongful act exposed it thereto, or it occurred through his negligence.[5]

and the declaration, which is in the common form, seeks only damages for the detention of goods which were delivered up before the trial. But it is said that if damages may be recovered in trover where the goods have been given up before the action, by the stronger reason may a plaintiff claim damages where injury has resulted to him from the conversion, and restoration of the goods has not been made till after the action commenced; and many cases have been cited to that purport, in all of which I am disposed to agree. But in all of them the damage was either an injury to the property converted, or the actual and necessary consequence of the conversion. The case of Gibson v. Humphrey, 1 Cr. & M. 544, does not much apply; it only decides that the court will not stay the proceedings on payment of costs, except in cases where the defendant has restored the chattel alleged to be converted, and where the plaintiff claims no special damage; or where, if the chattel was sold, there is no dispute as to price. But the injury of which the plaintiffs complain, not being a damage necessarily consequent on the wrongful conversion of the goods, if it could in any shape fall within the remedy of an action for trover, ought at least to have formed the subject of a special allegation."

[1] Rank v. Rank, 5 Pa. St. 211.

[2] See *post*, § 1139.

[3] Vol. 1, § 419.

[4] Miller v. Jannett, 63 Texas, 82; Anderson v. Sloane, 72 Wis. 566; *ante*, § 1102.

[5] Norris v. McCanna, 29 Fed. Rep. 757.

§ **1130. Attorney's fees.** In Alabama counsel fees incurred or paid in prosecuting an action of trover cannot be recovered.[1] But they have been allowed in Ohio against an agent in favor of his principal,[2] and in New York.[3]

§ **1131. Exemplary damages.** Where such damages are allowed they are generally held recoverable in all actions of tort where the wrong which is the gist of the action is committed wilfully or maliciously -- is attended with the aggravations which are treated as sufficient ground in trespass to justify such damages.[4] In trover, where property has been tortiously taken, the taking is not the gist of the action; and the manner of the taking is not usually considered for the purpose of exemplary damages. It is otherwise, however, in Pennsylvania,[5] Dakota[6] and Ohio.[7]

§ **1132. Conversion of money securities.** It is a well established principle that when a bill or note has been diverted from the object for which it was intended an action will lie against the person who has unlawfully diverted it for the conversion thereof or for money had and received by him.[8] For the conversion of such instruments or other money securities their owner is *prima facie* entitled to recover their face value; that is the presumptive value; and he will be entitled to recover the actual value if in any manner shown.[9] Thus, if

[1] Renfro's Adm'x v. Hughes, 69 Ala. 581.

[2] Peckham Iron Co. v. Harper, 41 Ohio St. 100, 108.

[3] Hynes v. Patterson, 95 N. Y. 1.

[4] Prebble v. Kent, 10 Ind. 325; Forsyth v. Wells, 41 Pa. St. 291; Neiler v. Kelley, 69 id. 403; Jacoby v. Laussatt, 6 S. & R. 300; Dennis v. Barber, id. 420; Berry v. Vantries, 12 id. 89; Day v. Woodworth, 13 How. 363; Dibble v. Morris, 26 Conn. 416; Mowry v. Wood, 12 Wis. 413.

[5] See last note.

[6] Bates v. Callender, 3 Dak. 256.

[7] Peckham Iron Co. v. Harper, 41 Ohio St. 100, 108 (case of fraud by agent against his principal).

[8] Hynes v. Patterson, 95 N. Y. 1; Decker v. Mathews, 12 id. 313; Comstock v. Hier, 73 id. 269; Murray v. Burling, 10 Johns. 172.

The right of action for the conversion of a series of notes is an entirety. Skeen v. Springfield E. & T. Co., 42 Mo. App. 158.

[9] Latham v. Brown, 16 Iowa, 118; Robinson v. Hurley, 11 id. 410; Bredow v. Mutual Sav. Inst., 28 Mo. 181; Craig v. McHenry, 35 Pa. St. 120; Roberts v. Berdell, 61 Barb. 37; Turner v. Retter, 58 Ill. 264; Dennis v. Barber, 6 S. & R. 420; Menkens v. Menkens, 23 Mo. 252; McPeters v. Phillips, 46 Ala. 496; St. John v. O'Connel, 7 Port. 476; Mercer v. Jones, 3 Camp. 476; Wilson v. Conine, 2 Johns. 280; Shotwell v. Wendover, 1 id. 65; Cortelyou v. Lansing, 2 Cai. Cas. 200; Ingalls v. Lord, 1

bonds are sold the amount realized, with interest from the time of sale, and such interest as had been collected on them previous to sale, is recoverable.[1] The maker of notes which are diverted from their purpose may recover the amount it costs him to discharge them.[2] The rule that the measure of damages for the conversion of securities is *prima facie* the amount due on them rests upon the fact that the owner has been divested of his property. This rule does not apply where the maker of obligations complains that by reason of the defendant's wrongful act he has become chargeable to and will be compelled to pay innocent holders of them, when but for such act the obligations would never have become binding against him. Where bonds were wrongfully obtained from the person who held them in escrow and transferred to *bona fide* purchasers, the damages were measured (the bonds being outstanding) by their amount at the time judgment was rendered, according to their terms; interest matured on the coupons attached thereto after the conversion and up to the time of judgment; interest at the legal rate upon each matured coupon from the date of its maturity to the date of the judgment, and interest upon the principal of the bonds at the stipulated rate from the time the last coupon matured, prior to the judgment, to the date of the latter.[3] Stated [**521**]

Cow. 240; King v. Ham, 6 Allen, 298; Tyng v. Commercial W. Co., 58 N. Y. 308; Fisher v. Brown, 104 Mass. 259; Potter v. Merchants' Bank, 28 N. Y. 641; Seals v. Cummings, 8 Humph. 442; Canton v. Smith, 65 Me. 203; Holt v. Van Eps, 1 Dak. 206; Decker v. Mathews, 12 N. Y. 313; Evans v. Kymer, 1 B. & Ad. 528; American Exp. Co. v. Parsons, 44 Ill. 312; Ray v. Light, 34 Ark. 421, 430; Merchants' & P.'s Nat. Bank v. Trustees Masonic Hall, 62 Ga. 271; Hayes v. Massachusetts L. Ins. Co., 125 Ill. 626; Pelley v. Walker, 79 Iowa, 142; Hersey v. Walsh, 38 Minn. 521; State v. Berning, 74 Mo. 87; Ramsey v. Hurley, 72 Texas, 194; Hurst v. Coley, 15 Fed. Rep. 645; Meixell v. Kirkpatrick, 29 Kan. 679. In Brightman v. Reeves, 21 Tex. 70, the presumption of face value was denied and proof required of the actual value.

[1] Loring v. Brodie, 134 Mass. 453, 463.

[2] Hynes v. Patterson, 95 N. Y. 1. In this case the plaintiff executed notes and loaned them to the defendant who was to discount them, pay plaintiff ten per cent. of the proceeds and apply the balance to a specified use. The notes were used for an entirely different purpose, and judgment was rendered on them against plaintiff, which he settled by paying less than it called for. The amount thus paid and the counsel fees were recovered.

[3] Winona v. Minnesota Railway Const. Co., 29 Minn. 68.

accounts,[1] and even accounts which have not been stated, are within the rule which presumes them to be worth their face value. This presumption may be easily overthrown as to the latter class.[2]

Interest should be computed to the date of the conversion where the face value is recovered and the converted security bore interest;[3] but it is error to compute interest on the face of the notes to the date of demand and then compute it on the whole amount to the date of the verdict.[4] The face value of a check which has been paid on a forged indorsement is the measure of damages after a refusal to surrender it on demand.[5] It seems that there cannot be a recovery of the amount paid for protest fees.[6] The recovery in trover for a receipted account of the plaintiff against the defendant is measured by the value of the document. There is no legal presumption that its value as a chattel is equal to that of the chose in action.[7] The maker of a promissory note can maintain an action for its conversion against one who, before it has any legal inception, wrongfully negotiates it to a *bona fide* holder for value. He is entitled to recover the full amount without averring or proving that he has paid it to the holder. It is sufficient that he is legally liable to pay it.[8] But where a note having the plaintiff's name on it as indorser only has been as to him fraudulently transferred to a *bona fide* holder, and has not yet matured, he is not entitled to maintain an action before he has been called on for payment or his liability is made absolute. He is not yet deemed to have suffered any damage.[9] Trover may be brought by the acceptor for the conversion of a paid bill of exchange; nor is he confined to nominal damages; he is entitled to recover in respect of

[1] O'Donoghue v. Corby, 22 Mo. 393.

[2] Sadler v. Bean, 37 Iowa, 439. See Doyle v. Eccles, 17 Up. Can. C. P. 644; Woodborne v. Scarborough, 20 Ohio St. 57.

[3] Roberts v. Berdell, 61 Barb. 37; Clark v. Bates, 1 Dak. 42; Nutting v. Thomasson, 57 Ga. 418; Merchants' & P.'s Bank v. Trustees Masonic Hall, 62 id. 271.

[4] H. S. Benjamin W. & C. Co. v. Merchants' Exch. Bank, 63 Wis. 470.

[5] Survey v. Wells, etc. Co., 5 Cal. 124.

[6] Hurst v. Coley, 15 Fed. Rep. 645.

[7] Moody v. Drown, 58 N. H. 45.

[8] Decker v. Mathews, 12 N. Y. 313; Winona v. Minnesota Railway & Const. Co., 29 Minn. 68. See preceding section.

[9] Freeman v. Venner, 120 Mass. 424.

the risk of liability although the bill is utterly valueless.[1] The obligee in a bond may recover in this action against the obligor who tore off his seal; and the whole amount of the [522] penalty, it appearing that the condition had been broken to the damage of the plaintiff to a still greater amount.[2] In such a case no alternative can be given the defendant to deliver up the obligation in discharge of damages.[3] It has been held that the owner may recover for the conversion of a bond the sum he would be entitled to recover on it from the obligee.[4] If the party liable on an instrument converts it he is subject to that measure of recovery, and the defense of insolvency has no application.[5] So where a plaintiff sues for conversion of notes made by himself the measure of damages is the amount due on them at the time of the trial without reference to his ability to pay.[6] If a judgment has been recovered against him thereon and he has satisfied it, the amount paid will be the measure of damages.[7] In other cases the insolvency of the parties liable on the paper may be shown in mitigation.[8] If, on account of peculiar circumstances, the note of a person having no property liable to execution would be available to the owner for its full amount he is entitled to recover it.[9]

The defendant has a right to show in reduction of damages payment in whole or in part; the inability of the maker to pay, or his release from his undertaking; the invalidity of the instrument, or any other matter which will legitimately affect or diminish its value.[10] But if the maker becomes insolvent after the conversion it will be no ground for mitigation of

[1] Dunne v. Thorpe, B., D. & O. 128. See Hansard v. Robinson, 7 B. & C. 90; Evans v. Kymer, 1 B. & Ad. 528; Stone v. Clough, 41 N. H. 290.

[2] Bank of Upper Canada v. Widmer, 2 Up. Can. Jur. (O. S.) 222.

[3] Id.

[4] Romig v. Romig, 2 Rawle, 241; Delany v. Hill, 1 Pittsb. 28.

[5] Stephenson v. Thayer, 63 Me. 143.

[6] Robbins v. Packard, 31 Vt. 570; Thayer v. Manley, 73 N. Y. 305; Metropolitan E. Ry. Co. v. Kneeland, 120 id. 134.

[7] Comstock v. Hier, 73 N. Y. 269; Hynes v. Patterson, 95 id. 1.

[8] McPeters v. Phillips, 46 Ala. 496; Potter v. Merchants' Bank, 28 N. Y. 641; Latham v. Brown, 16 Iowa, 118; Zeigler v. Wells, etc. Co., 23 Cal. 179; Cothran v. Hanover Nat. Bank, 40 N. Y. Super. Ct. 401.

[9] Rose v. Lewis, 10 Mich. 483; Delegal v. Naylor, 7 Bing. 460.

[10] Booth v. Powers, 56 N. Y. 22; Terry v. Allis, 20 Wis. 32; Ingalls v. Lord, 1 Cow. 240; Brown v. Montgomery, 20 N. Y. 287; Fell v. Mc-

damages.[1] Where an executor brought trover for the conversion of a note made by himself as an individual to the decedent, his appointment as executor not operating as a discharge of his obligation, he recovered only nominal damages. It was inequitable to apply the general rule and make the defendant liable for the value of the note because he would pay the debt owed the estate by the plaintiff. Besides, inasmuch as the plaintiff could not sue himself, the value of the note to the estate was not established.[2]

[523] **§ 1133. Conversion of insurance policies.** In trover for conversion of an insurance policy the rule of damages is probably the same as if the action were by the insured upon the policy; subject to mitigation by evidence of the insolvency of the insurer.[3] If the insurer converts a policy after liability for a loss has attached the damages are measured by the face of the policy.[4] Where the wrong is done by a third party before a life policy has become payable the damages are measured by the principle which governs where the insurer wrongfully refuses to receive premiums[5] — the difference between the rate of premiums paid for the insurance and what another company of equal credit and standing would charge to issue a new policy on the same life, and the difference in the rates of premium calculated upon his expectancy of life. This rule only governs where the insured is in as good condition of health as he was when his policy was procured. In such a case the amount paid on it and interest thereon is not the measure of recovery because he would have had insurance without cost.[6] If, however, the life insured is no longer insurable the value of the policy at the time the wrong was done,

Henry, 42 Pa. St. 41; King v. Ham, 6 Allen, 298; Mathew v. Sherwell, 2 Taunt. 439; Robinson v. Hurley, 11 Iowa, 410; Ray v. Light, 34 Ark. 421, 430; Thompson v. Halbert, 40 Hun, 536 (statute of limitations).

[1] Knapp v. United States, etc. Exp. Co., 55 N. H. 348; King v. Ham, 6 Allen, 298; Kellogg v. Tompson, 142 Mass. 76; Ramsey v. Hurley, 72 Tex. 194.

[2] Robinson v. Ferguson, 23 N. B. 332.

[3] Kohne v. Insurance Co., 1 Wash. C. C. 93. See Chicago Building Society v. Crowell, 65 Ill. 453.

[4] Hayes v. Massachusetts L. Ins. Co., 125 Ill. 626.

[5] *Ante*, § 838.

[6] This consideration has weight as between the insured and the insurer, but it is of very doubtful application as between the former and a third party.

with interest, may be recovered.[1] In trover for a policy it appeared that it was void; the plaintiff had assigned it as security for a debt, and the pledgee, on receipt of a certain amount from the insurer as a gratuity, had delivered it up to be canceled. It was held that the plaintiff was entitled to only nominal damages for the value of the parchment; he had no claim to the full amount of the policy, for it was confessedly bad, nor to the sum paid the defendant, for it was merely a gratuity.[2] In one case trover was sustained for a policy which was never effected. An agent had been employed to procure insurance, and reported that he had done so, when in fact he had not. He was not permitted to gainsay his representation, and was held to the same liability as an insurer for the indemnity the plaintiff would have had if the representation had been true.[3] A pledgor whose policy has been unlawfully canceled by the pledgee and the insurer is not bound to accept in mitigation of damages the original policy which has been re-issued to the pledgee upon the surrender of one obtained by him in lieu of the original. The question of the validity of the latter cannot be determined in an action between those parties. The defendant is presumed to have in his possession the market value of the plaintiff's policy, and that the increase of such value subsequent to the conversion, less the amount due the pledgee on the debt for which the policy was given as collateral, is the measure of recovery.[4]

§ **1134. Conversion of deeds, etc.** Damages for conversion of deeds and other instruments will be allowed according to the loss in the particular case. If the party deprived of a deed is in possession of all it was intended to convey the damages are less than when he is out of possession.[5] In the latter case the jury may give the full value of the estate as damages, but these are generally reduced to a small sum on the deed being given up.[6] Where the obligor in a bond to convey land has converted the bond, the measure of damages has been held to be the value of the land. This may justly

[1] Barney v. Dudley, 42 Kan. 212.

[2] Wills v. Wells, 8 Taunt. 264.

[3] Harding v. Carter, Park on Insurance, 5.

[4] Wheeler v. Pereles, 43 Wis. 332.

[5] Lloyd v. Sadlier, 7 Irish Jur. (N. S.) 15.

[6] Loosemore v. Radford, 9 M. & W. 657; Coombe v. Sansom, 1 D. & R. 201.

be awarded, for recovery and satisfaction would extinguish the equitable interest, and thus have the same effect to transfer title as in other cases.[1] But where the conversion of a deed will not affect the owner's title, and the wrong is not one for which punitive damages can be given, the proper measure is such a sum as will recompense the plaintiff for any [524] actual loss he may have sustained, and for the trouble and expense of going into a court of equity or elsewhere to establish and perpetuate the evidence of his title.[2] A. having agreed to purchase of B. the remainder of a term, the latter delivered to him the lease in order that he might get an assignment made out. A. then obtained an enlargement of the term from the original landlord, and refused to accept an assignment or pay the full price agreed on, because B.'s undertenant had removed some fixtures. It was held that B. might insist on A. accepting the assignment, and after demand and refusal of the lease might maintain trover for it and recover the agreed price as damages.[3]

§ **1135. Conversion of shares of stock.** It has been held in South Carolina that the person who converts certificates of shares of stock is liable for their full value.[4] This is doubtless correct if the effect of the act is to deprive the owner of his stock; but if that result does not follow and the defendant does not become the owner of it after recovery against him it is erroneous.[5] If a certificate of membership in a board of trade is converted and loss of membership follows the damages are, *prima facie*, the value of the right to transact business as a member thereof.[6] If the stock for the conversion of which an action is brought against the corporation which issued it by the purchaser and debtor has not been fully paid for, the amount due thereon may be deducted if it does not exceed the market price of the stock.[7]

[1] Clowes v. Hawley, 12 Johns. 483.

[2] Mowry v. Wood, 12 Wis. 413; Edwards v. Dickinson, 102 N. C. 519.

It is held in Texas that the owner of land scrip which has been converted is not bound to pursue the property in the hands of a third person or institute suit to establish his right to it as against the holder. The scrip was treated as if it were a chattel and unlike an ordinary deed, because it had a market value. Nelson v. King, 25 Tex. 655.

[3] Parry v. Frame, 2 Bos. & P. 451.

[4] Connor v. Hillier, 11 Rich. L. 193.

[5] Daggett v. Davis, 53 Mich. 35.

[6] Olds v. Chicago Open Board of Trade, 33 Ill. App. 445.

[7] Budd v. Multnomah Street Ry. Co., 15 Ore. 413.

§ 1136. Recovery limited to plaintiff's interest. To entitle a plaintiff in trover to recover the full value of the property from one who converts it, he must be the owner thereof, or, if not such, have a right of possession with responsibility over to the general owner. The goods must be stated in the declaration to be those of the plaintiff. He must have the title or right of possession at the time of the conversion.[1] Property in a third person, with whom the wrong-doer is in no privity, will be wholly unavailing to one who tortiously invades actual possession, or to rebut a right inferable therefrom. Actual possession not wrongful as to the defendant will be sufficient to maintain the action unless the plaintiff has possession as a mere servant to somebody else.[2] But under a plea which puts the plaintiff's possession and property in issue at the time of the conversion, the defendant may show title in a third person. Such proof tends to controvert the plaintiff's title; and where the defendant has a right of possession derived from the general owner, or has acted by [**525**] his authority, or has responded to him, he is entitled to set up his title.[3] If the plaintiff is not possessed of the full title, but has actual possession with responsibility over to the true owner for the property, or has any special possessory title, however temporary, if it existed at the time of the conversion, he may recover the full value as against a mere stranger or wrong-doer.[4] But if the plaintiff, having but a limited title, brings his action against one having the remaining interest, or

[1] Thayer v. Hutchinson, 13 Vt. 507; Kemp v. Thompson, 17 Ala. 9; Pattison v. Adams, 7 Hill, 126; Bond v. Mitchell, 3 Barb. 304; Curd v. Wunder, 5 Ohio St. 92; Fairbank v. Phelps, 22 Pick. 538; Ames v. Palmer, 42 Me. 197.

[2] Freshwater v. Nichols, 7 Jones' L. 251; Bartlett v. Hoyt, 29 N. H. 317; Harris v. Smith, 3 S. & R. 20; Hampton v. Brown, 13 Ired. L. 18; Gruman v. Smith, 81 N. Y. 27.

[3] Bates v. Stanton, 1 Duer, 79; Beach v. Berdell, 2 id. 327; Edson v. Weston, 7 Cow. 278; King v. Richards, 6 Whart. 418; Ogle v. Atkinson, 5 Taunt. 759; Sheridan v. New Quay Co., 4 C. B. (N. S.) 618; Floyd v. Bovard, 6 W. & S. 75; White v. Teal, 12 A. & E. 114; Sylvester v. Girard, 4 Rawle, 185.

[4] Mechanics' & Tr. Bank v. Farmers' & M. Bank, 60 N. Y. 40; Buck v. Remsen, 34 id. 383; Treadwell v. Davis, 34 Cal. 601; Davidson v. Gunsolly, 1 Mich. 388; McGowen v. Young, 2 Stew. 276; Pomeroy v. Smith, 17 Pick. 85; Gruman v. Smith, 81 N. Y. 27; Adamson v. Peterson, 35 Minn. 529; Leoncini v. Post, 37 N. Y. St. Rep. 255; Philbrook v. Eaton, 134 Mass. 398.

against one claiming under such residuary owner, he can then recover only according to his interest.[1] The defendant hired to the plaintiff a negro for two years and put him in possession; soon afterwards the defendant got possession of the negro and sold him. In trover it was held the hirer was entitled to recover the difference between the amount fixed as hire and the profits of the negro's labor for the stipulated term.[2] The holder of a lien, seeking to enforce it against the owner, or who sues the owner or one claiming under him for injury to or conversion of the property, can only recover the value of his lien.[3] A partner who sues for the conversion of his interest in firm property can recover only the value of his undivided share therein where the proceeds of the converted property have been applied in satisfaction of the firm indebtedness. It will not be assumed that the plaintiff in such an action owned more than an undivided half of the property, or that upon a settlement of accounts between the partners he would be entitled to a lien upon the other half for a balance due him as a partner.[4]

§ 1137. Same subject. A party who has a lien on or other special interest in property and converts it is liable to the owner for its value, but is entitled to recoup the value of his special property.[5] This right of recoupment may be extended under the American authorities to cases or to counter-claims [526] where there is no lien or special property. It does not

[1] Fowler v. Gilman, 13 Met. 267; Tenney v. State Bank, 20 Wis. 152; Briggs v. Boston, etc. R. Co., 6 Allen, 246; Case v. Hart, 11 Ohio, 364; Peebles v. Boston, etc. R. Co., 112 Mass. 498; McGuire v. Galligan, 57 Mich. 38; Ganong v. Green, 71 id. 1; Becker v. Dunham, 27 Minn. 32; Lugenbeal v. Lamert, 42 Ohio St. 1; Norris v. McCanna, 29 Fed. Rep. 757; Warner v. Vallily, 13 R. I. 483; Bradley v. Burkett, 82 Ga. 255; Horner v. Guiser Manuf. Co., 74 id. 790; Lacy v. Johnson, 58 Wis. 414; Mississippi Mills v. Meyer, 83 Texas, 433; 18 S. W. Rep. 748.

[2] Compton v. Martin, 5 Rich. L. 14.

[3] Hays v. Riddle, 1 Sandf. 248; Bailey v. Godfrey, 54 Ill. 507; Sheldon v. Southern Exp. Co., 48 Ga. 625; Spoor v. Holland, 8 Wend. 445; Ward v. Henry, 15 Wis. 239.

[4] Carrie v. Cloverdale Banking & C. Co., 90 Cal. 84.

[5] Jarvis v. Rogers, 15 Mass. 389; Stearns v. Marsh, 4 Denio, 227; Belden v. Perkins, 78 Ill. 449; Wheeler v. Pereles, 43 Wis. 332; Chadwick v. Lamb, 29 Barb. 518; McCalla v. Clark, 55 Ga. 53; Jones v. Horn, 51 Ark. 19; Ludden v. Buffalo B. Co., 22 Ill. App. 415; Rosenzweig v. Frazer, 82 Ind. 342; Torp v. Gulseth, 37 Minn. 135; Brink v. Freoff, 40 Mich. 610; S. C., 44 id. 69.

depend on a lien,[1] as we shall have occasion to notice under the next head.[2] In short, if the plaintiff, not being completely the owner, has the possession or the right of possession as to the defendant at the time of the conversion, so that he is under a contract obligation to preserve the property and deliver it to the owner, or is liable to him for it, however that liability may arise, he is entitled to recover the full value. On the other hand, if he is not completely and absolutely the owner and is under no such obligation or liability, he can recover only the value of his own interest. The suit then, in some sort, accomplishes a partition; the plaintiff takes his part in value and leaves the residue in the hands of the defendant. And in actions by the general owner, or one recovering in that right, the defendant is entitled to recoup for his special interest, whatever it may be, and for any cross-demand growing out of the same transaction, whether it be a lien interest or not. And he is besides entitled to mitigations, which we shall presently consider, arising from the principle of limiting the plaintiff's compensation to his actual loss. He may show that the latter has not suffered so great a loss as his case, on the proof, imports, by reason of other facts which are part of the *res gestæ;* as payments or other acts done by the defendant in connection with the conversion which have the effect to lessen the injury or partially to compensate it.

Where the vendee in a conditional sale sold the property before he acquired the title by fulfilling the condition of paying for it, the vendor in trover was held entitled to recover the full value without any deduction for payments received by him from his vendee.[3] But in Pennsylvania, where the party making the conditional purchase was the defendant, the plaintiff was held entitled to recover only the value of his beneficial interest; the defendant was allowed the benefit of his payments. As trover is an equitable action, this appears more just and in accordance with the principle of limit- [527]

[1] Baltimore Ins. Co. v. Dalrymple, 25 Md. 269; Johnson v. Stear, 15 C. B. (N. S.) 330; Cole v. Dalziel, 13 Ill. App. 23; Ludden v. Buffalo B. Co., 22 id. 415.

[2] See Briggs v. Boston, etc. R. Co., 6 Allen, 246; Parish v. Wheeler, 22 N. Y. 494.

[3] Brown v. Haynes, 52 Me. 578; Buckmaster v. Smith, 22 Vt. 203; Smith v. Foster, 18 Vt. 182.

ing recovery to just compensation.[1] The same rule has been laid down and applied in Missouri, Kansas, Georgia and Michigan.[2] A piano was sold conditionally, title to pass on all the payments being made. After a large part of the purchase-money had been paid the vendor sued for its conversion. The court held that the payments would go in mitigation; and that the defendant was also entitled to recoup the damages, if any, for breach of the warranties in the contract of sale.[3] A vendee of goods received them at a stipulated price, payable in certain indorsed notes, on condition that within a given period he should deliver the notes or return the goods; he afterwards refused to do either, and the vendor sued him for the goods in trover. It was held that the measure of damages was their actual value and interest; the vendee was not concluded by the agreed price. Under such circumstances it was thought that that price was high evidence of actual value as against the wrong-doer, and should not be reduced except upon strong proof. Had the vendor, instead of electing to disaffirm the contract, sued in *assumpsit*, he would have been entitled to the agreed price, though subject even then to a deduction, if it turned out that the notes stipulated for were of less value.[4] Where one of several part owners sues a stranger for conversion of the common property he can only recover in respect of his part, and the damages will be apportioned.[5]

§ **1138. Mitigation of damages.** If the case is such that the plaintiff can be fully compensated by a sum of money less than the full value of the property converted the recovery will be limited to the amount that will suffice for complete indemnity. He will be confined to compensation commensu- [528] rate with the actual injury.[6] The recovery is so reduced

[1] Farmers' Bank v. McKee, 2 Pa. St. 318; Rose v. Story, 1 id. 190. See Anderson v. Durant, 18 N. Y. 496.

[2] Guilford v. McKinley, 61 Ga. 230; Boutell v. Warne, 62 Mo. 350; Johnston v. Whittemore, 27 Mich. 463; Bower v. Birdsell, 49 id. 5.

If the purchaser has paid nothing his recovery is limited to the value of his bargain. Meixell v. Kirkpatrick, 29 Kan. 679.

[3] Guilford v. McKinley, 61 Ga. 230.

[4] Stevens v. Low, 2 Hill, 132.

[5] Noland v. Johnson, 5 J. J. Marsh. 351; Powell v. Glenn, 21 Ala. 458.

[6] Cook v. Loomis, 26 Conn. 483; Chamberlain v. Shaw, 18 Pick. 278; Jones v. Horn, 51 Ark. 19; White v. Allen, 133 Mass. 423.

when the plaintiff has only a special property subject to which the defendant is entitled to the goods.[1] Courts of law in actions of trover are authorized to investigate the justice and equity of the particular case in a manner and upon principles similar to those by which in such courts the defense of partial failure of consideration is sustained.[2] Where an officer was sued by the debtor for attaching exempt property, and he by direction of the creditor who had become the legal owner of a mortgage thereon sold it on the mortgage, and applied the proceeds thereon, it was held that the sum so applied should go in mitigation of damages.[3]

A special agent to whom a bill of lading was sent with instructions to deliver it to a purchaser on his paying a forthcoming draft for the price delivered it on a mere acceptance of the draft, and the purchaser obtained the goods from a common carrier on paying the freight; such purchaser then pledged the goods to the defendant. The latter was held liable for their value at the time of the conversion, less the freight paid by the pledgor; but no deduction was allowed for commissions which would have been due to the pledgor if the goods had been disposed of according to the owner's instruction.[4] The right to recoup for freight wrongfully paid has been denied in New York.[5] It has been held in Kentucky, after a careful review of the authorities, that there is no substantial difference between the effect of a pledge made by a factor and one made by a pledgee; that, though a factor wrongfully pledges the goods of his principal, the amount the latter may recover of the factor's innocent pledgee must be reduced by the sum the plaintiff owed the factor.[6]

[1] Id.; Hyde v. Cookson, 21 Barb. 92; Pierce v. Benjamin, 14 Pick. 356.

[2] McGowen v. Young, 2 Stew. & Port. 160; Bates v. Murphy, id. 161. See Wilson v. Conine, 2 Johns. 280.

[3] Cooper v. Newman, 45 N. H. 339.

[4] Stollenwerck v. Thacher, 115 Mass. 224; Covell v. Hill, 6 N. Y. 374; Whitney v. Beckford, 105 Mass. 267; Peebles v. Boston, etc. R. Co., 112 Mass. 498; Forbes v. Boston & L. R., 133 id. 154.

[5] Walther v. Wetmore, 1 E. D. Smith, 7.

[6] First Nat. Bank v. Boyce, 78 Ky. 42. The court criticises the following statement made in the eighth edition of Story on Bailments (§ 326): "Later decisions have, however, fully settled the law that a pledge by a factor of his principal's goods is wholly tortious and the owner may recover their whole value of the pledgee without any deduction or

§ 1139. Same subject. If after the conversion of property it goes into the possession of the plaintiff, and he accepts it, this will go in mitigation of damages, even though no agreement be shown on his part that he will receive it.[1] So, if the property has gone to the plaintiff's use with his consent, ex-
[529] pressed or implied, the fact may be shown in mitigation.[2] An offer to return the goods after conversion is of no

recoupment for his claim against the factor." The cases cited to sustain this proposition are Hoffman v. Noble, 6 Met. 74; Warner v. Martin, 11 How. (U. S.) 209; Holton v. Smith, 7 N. H. 446; Newbold v. Wright, 4 Rawle, 195. The three first of these, the court says, have no bearing upon the question, and the last did not necessarily involve the right of recoupment.

[1] Murphy v. Hobbs, 8 Colo. 17; Yale v. Saunders, 16 Vt. 232; Sparks v. Purdy, 11 Mo. 219; Reynolds v. Shuler, 5 Cow, 323; Easton v. Woods, 1 Mo. 506; Brady v. Whitney, 24 Mich. 154; Dailey v. Crowley, 5 Lans. 301; Wheelock v. Wheelwright, 5 Mass. 104; Cook v. Loomis, 26 Conn. 483; Hepburn v. Sewell, 5 Har. & J. 211.

In Sprague v. McKinzie, 63 Barb. 60, it appeared that B. converted A.'s horse by selling it to D. Without delay A. took the horse from D.; then sued B. in trover for it. It was held that he was entitled to recover the full value, and that evidence of the retaking was not admissible in mitigation. Cady, J., said: "He (defendant) did nothing between the time he converted the mare and the trial of the cause in the court of common pleas in satisfaction of the plaintiff's demand against him; nor did the plaintiff do anything to the defendant to cancel the demand which he had for the conversion of the mare; but the plaintiff took the mare by force from the defendant's vendee, and that act, the court instructed the jury, reduced the plaintiff's demand to nominal damages. Had the defendant been compelled to repay his vendee the value of the mare in consequence of the plaintiff having taken her, there would have been an apparent equity in confining the plaintiff's recovery to the actual, not to nominal, damages; but there was no pretense on the part of the defendant that he had repaid his vendee the money which he had received for the mare, or that he was liable to repay it in consequence of the plaintiff's having retaken her." This reasoning is open to comment. If the property is accepted there cannot be a recovery thereafter for time, trouble and expense incurred in obtaining its return. Collins v. Lowry, 78 Wis. 329. See Parroski v. Goldberg, 80 id. 339.

[2] Plevin v. Henshall, 10 Bing. 24; Irish v. Cloyes, 8 Vt. 39; Sharpe v. Graydon, 99 Ind. 232; Mears v. Cornwall, 73 Mich. 78; Dahill v. Booker, 140 Mass. 308. See Locke v. Garrett, 16 Ala. 698.

A carrier who delivered property, shipped for account of plaintiff and subject to his order, to one who had agreed to purchase it, but who had paid only a portion of the price therefor at the time of its delivery, was permitted to show that after the conversion the vendee had paid for the property, and that the vendor accepted payment with knowledge of the facts. Jellett v. St. Paul, etc. Ry. Co., 30 Minn. 265. Partial satis-

avail.[1] But in an action for conversion of machinery in a workshop, it not appearing that the defendant had ever appropriated it to his own use, or removed it, or had actual possession of it otherwise than by being in the rightful possession of the workshop, and the alleged conversion consisting in a refusal to allow the plaintiff to remove the machinery on demand, a subsequent notice to the plaintiff by the defendant that he relinquished all claim to the machinery it was held should be considered in mitigation.[2] If the plaintiff sells the property after conversion it has been held he can recover no more than nominal damages.[3] Where the property is returned an action may, notwithstanding, be brought for the conversion, and the measure of damages as generally held is the market value at the time of the conversion, less such value at the time of the return.[4] It has been so held in Pennsylvania, and that these are not special damages which should be specially alleged in the declaration.[5] The reason of the rule that the value of the goods with interest is the measure of [530] damages where the property has not been restored to the owner is that such value is equal to the goods themselves; and interest thereon is the legal damage for withholding such value. But where the property is returned to the owner the reason for allowing interest ceases after that time; and in place of interest for its previous detention compensation for the use, if valuable, should be allowed.[6] If the property is injured, or suffers deterioration from any cause after the conversion, it is the loss of the wrong-doer, and the owner may recover for it in trover.[7] In such case he cannot compel the owner to re-

faction by one tort-feasor mitigates the liability of his co-tort-feasors. Muser v. Lewis, 50 N. Y. Super. Ct. 431.

[1] Norman v. Rogers, 29 Ark. 365; Stickney v. Allen, 10 Gray, 352; Mears v. Cornwall, 73 Mich. 78; Allen v. Coates, 29 Minn. 46; Gilbert v. Peck, 43 Mo. App. 577.

[2] Delano v. Curtis, 7 Allen, 470; Bigelow Co. v. Heintze, 53 N. J. L. 69.

[3] Brady v. Whitney, 24 Mich. 154.

[4] Lucas v. Trumbull, 15 Gray, 306; Ewing v. Blount, 20 Ala. 694; Irish v. Cloyes, 8 Vt. 30; Renfro's Adm'x v. Hughes, 69 Ala. 581; Green v. Stephens, 37 Mo. App. 641; Gove v. Watson, 61 N. H. 136; Hough v. Bowe, 51 N. Y. Super. Ct. 207; Pollak v. Davidson, 87 Ala. 551; Murphy v. Hobbs, 8 Colo. 17.

[5] Rank v. Rank, 5 Pa. St. 211.

[6] Ewing v. Blount, 20 Ala. 694; Renfro's Adm'x v. Hughes, 69 id. 581; Post v. Munn, 4 N. J. L. 61; Farrel v. Colwell, 30 id. 123.

[7] Jamison v. Hendricks, 2 Blackf. 94.

ceive the property; and if he does so he only receives it in mitigation of damages for what it is then worth.[1] One who hires a horse to go to a certain place and drives him beyond is guilty of a conversion, and liable for any decrease in its value occurring after he has passed that point, although it happens by the fault of the horse.[2] If the property after conversion be destroyed, or taken by an officer on process against a third person, it is the loss of the wrong-doer so far as the owner is concerned; the cause of action in his favor is complete at the time and by the act of conversion, and if he is not able to return the property in some mode to the owner he can have no mitigation of damages, but they will be computed by the general rule of the value at the date of conversion and interest.[3]

§ **1140. Same subject.** If there was a wilful taking of the property, or a wilful refusal to surrender it on demand, or it has suffered an injury or deterioration in value, the defendant cannot compel the plaintiff to accept it in mitigation of [**531**] damages.[4] But if the property came lawfully into the defendant's possession, and his refusal to surrender was qualified, or the conversion technical only, or without intentional wrong, and it remains strictly in the same condition as before the conversion, the defendant may compel the plaintiff to accept it in mitigation.[5] In a late case in Wisconsin[6] the court, by Taylor, J., say: "It has been a well-established rule in the courts of England for more than a century that in actions of trover the court will, under certain circumstances, permit the defendant, after suit brought, to bring the property claimed

[1] Beach v. Raritan, etc. R. Co., 37 N. Y. 457; Mullen v. Ensley, 8 Humph. 428; Hooks v. Smith, 18 Ala. 338; Freer v. Cowles, 44 Ala. 314; Gray v. Crocheron, 8 Port. 191; Seay v. Marks, 23 Ala. 532.

[2] Perham v. Coney, 117 Mass. 102; Gove v. Watson, 61 N. H. 136.

[3] Ball v. Liney, 48 N. Y. 6; Wehle v. Butler, 61 N. Y. 245.

[4] Hart v. Skinner, 16 Vt. 138; Yale v. Saunders, 16 Vt. 243, note; Fisher v. Prince, 3 Burr. 1363; Olivant v. Perineau, 2 Str. 1191; Shotwell v. Wendover, 1 Johns. 65; Green v. Sperry, 16 Vt. 390.

[5] Bigelow Co. v. Heintze, 53 N. J. L. 69, 77, quoting the text; Pickering v. Truste, 7 T. R. 53; Earle v. Holderness, 4 Bing. 462; Tucker v. Wright, 3 Bing. 601; Whitten v. Fuller, 2 W. Bl. 902; Hayward v. Seaward, 1 Moore & Scott, 459; Hiort v. London, etc. Ry. Co., 4 Exch. Div. 188, 195.

[6] Churchill v. Welsh, 47 Wis. 39.

into court for the defendant,[1] with the costs up to that time, and will then order a stay of proceedings, or permit the plaintiff to proceed with the action at the risk of having the costs finally adjudged against him unless he is able to show that he has been specially damaged by the conversion of the property by the defendant in addition to its value at the time of its return. Or the courts will, in a proper case after verdict, upon a tender of the property, reduce the verdict to nominal damages." This practice has been recognized in several states.[2] The application for such an order is addressed to the discretion of the court.[3] The action must be for a specific chattel, quantity and quality, and unattended with any circumstances that enhance the damages above the real value; it must be a case where the real and ascertained value is the sole measure of damages.[4] The wrong-doer cannot entitle himself to a reduction of damages by applying the property or its proceeds to the plaintiff's use without his consent.[5] [532] And the fact that the defendant was a creditor of the plaintiff and took the property to satisfy the debt, or under void process, or by void service of valid process for such a purpose, will not in England, and some of the states of the Union, mitigate the injury or reduce the damages.[6]

[1] "Defendant" should read "plaintiff."

[2] Bucklin v. Beals, 38 Vt. 653; Hart v. Skinner, 16 Vt. 138; Rutland, etc. R. Co. v. Bank of Middlebury, 32 Vt. 639; Cook v. Loomis, 26 Conn. 483; Rogers v. Crombie, 4 Me. 274; Tracey v. Good, 1 Clark (Pa.), 472; Shotwell v. Wendover, 1 Johns. 65; Stevens v. Low, 2 Hill, 132; Thayer v. Manley, 8 Hun, 550.

[3] Hart v. Skinner, 16 Vt. 138; Churchill v. Welsh, 47 Wis. 39.

[4] Fisher v. Prince, 3 Burr. 1364; Whitten v. Fuller, 2 W. Bl. 902; Tucker v. Wright, 3 Bing. 601; Gibson v. Humphrey, 1 Cr. & M. 544.

[5] Wanamaker v. Bowes, 36 Md. 42; Sowell v. Champion, 6 A. & E. 407; Northrup v. McGill, 27 Mich. 234; Dalton v. Laudahn, id. 529; Bringard v. Stellwagen, 41 id. 54.

[6] Kelley v. Archer, 48 Barb. 68; Butts v. Edwards, 2 Denio, 164; Earl v. Spooner, 3 Denio, 246; Gillard v. Brittan, 8 M. & W. 576; White v. Binstead, 76 E. C. L. 304; Attack v. Bramwell, 3 B. & S. 520; East v. Pace, 57 Ala. 521; Northrup v. McGill, 27 Mich. 234.

In Edmondson v. Nuttall, 17 C. B. (N. S.) 280, it appeared that the plaintiff had certain looms in the defendant's mill and demanded possession of them, the defendant having no right to detain them. The defendant, however, having obtained a judgment against the plaintiff in the county court, in respect of which he would be entitled to issue execution against him on the next day, refused to deliver them up, and the looms were taken in execution on the following morning and sold. In an ac-

[533] § **1141. Same subject.** A different and more liberal rule generally prevails in this country. Where the defendant, in an honest and *bona fide* endeavor to enforce a right, or a supposed right, or to exercise a power, deals with the prop-

tion for this wrongful conversion, held, that the liability of the looms to the county court process and the fact that by the wrongful seizure the plaintiff's debt was (apparently) satisfied were not circumstances which the jury could take into consideration in estimating the damages. Williams, J., said: "It was clearly established that the goods were wrongfully seized by the defendant. But it is contended that the rule, which is beyond all question a *prima facie* rule, that for an act of this sort the plaintiff is entitled to recover as damages the full value of the goods seized, ought not to prevail here, because the defendant shows mitigating circumstances, viz., that after he had been guilty of wrongfully converting the goods of the plaintiff he caused them to be applied so as to be apparently a satisfaction of a judgment debt due to himself. In other words, the defendant insists that because with the proceeds of the plaintiff's goods which he so wrongfully converted he has satisfied his own debt, that fact must be taken into consideration by the jury in ascertaining what measure of damages the plaintiff ought to receive for the wrong done to him. I utterly decline to acknowledge the soundness of that argument. There is nothing unlawful in a man's withdrawing his goods for the purpose of avoiding an impending execution. He may choose to apply them in satisfaction of the claim of another creditor; and this he has a perfect right by law to do, apart from any question arising under the bankrupt or insolvency law. It is clearly no ground for mitigation of damages for the defendant to say that he has chosen to detain the plaintiff's goods in order that he may seize them and apply the proceeds in satisfaction of his own debt. If he might do this, what is there to prevent his doing so for the purpose of satisfying his friend's execution which he knows to be outstanding? The case has been likened to that of the redelivery of the thing converted, which is allowed to go in mitigation of damages. . . . Here, however, the goods were never redelivered to the plaintiff. He never had power to do as he pleased with them. There is no ground whatever for saying that the defendant ever restored to the plaintiff the control over his goods. Contrary to the plaintiff's wishes, he devoted them to the payment of his own debt. Then comes the main argument. It was said that if the plaintiff were allowed to recover by way of damages in this action the full value of the goods, the consequence will be that the goods will be, by virtue of the judgment and execution, regarded as having been the property of the defendant from the time of the conversion. The obvious answer to that is, that in the result the seizure of these goods will not have operated in satisfaction of so much of the debt due to the defendant upon his judgment in the county court. The execution, having been satisfied so far out of what turns out to have been the execution creditor's own goods, is no satisfaction at all, and the now defendant may go to the county court and obtain leave to issue fresh pro-

erty in such a manner as constitutes a conversion, either because the right or the power was wholly or partially wanting or has been exceeded or irregularly asserted or exer- [534] cised, the courts generally consider the whole transaction, and award only such damages as are necessary for complete reparation. Thus, in disposing of property rightfully distrained for rent, a step was omitted which made the sale irregular, legally a conversion; but the defendant was permitted to recoup the rent which the sale was made to satisfy, or [535] have it deducted in mitigation.[1] An officer by abuse of his process of execution was held to be a trespasser from the beginning, but was allowed in mitigation to prove the amount of the proceeds he had applied on the judgment.[2] A tax collector became a purchaser at his own sale, which was held voidable for that reason; but in trover by the owner of the property against him the amount of the tax paid was deducted from the damages.[3] An officer sold without giving notice, and was held liable as for a conversion; but the proceeds having been applied to the owner's debt, he was held entitled to recover only the damage suffered from the failure to give such notice; this was supposed to be that a less price was obtained for the property.[4] An executor sold property of the estate before the will was probated, and under circumstances which would not have been justifiable if probate of it had been made, and which sale was not legalized by the subsequent proof of the will. The money received was paid into and remained with the funds of the estate. The purchaser's liability was thereby mitigated.[5] In an action of trover against an attaching creditor and the officer, it appeared that after the levy upon the property the attachment was abandoned, and the indorsement of service erased. Without being surrendered the property was taken on a new writ for the same creditor and debt, and after judgment sold on execution and the proceeds applied to satisfy it. The action was brought for a conversion by the original taking. As the defendants

cess. There is no ground for urging what has been done in mitigation of damages."

[1] Tripp v. Grouner, 60 Ill. 474; Ball v. Campbell, 30 Kan. 177.

[2] Lamb v. Day, 8 Vt. 407.

[3] Pierce v. Benjamin, 14 Pick. 356.

[4] Wright v. Spencer, 1 Stew. 576.

[5] Thomas v. New York L. Ins. Co., 50 N. Y. Super. Ct. 225.

could not justify, they suffered judgment by default, and on the assessment of damages claimed the right to show such subsequent disposition of the property in mitigation, and were [536] allowed to do so. The court, by Waite, J., say: "If goods are tortiously taken and a creditor of the owner afterwards attaches them, and disposes of them according to law, and applies the proceeds in satisfaction of a judgment against the owner, such proceeding may be shown, not as a justification of the taking, but in mitigation of damages. For it would be palpably unjust for the owner to receive the full value of his goods in their application to the payment of his debts, and then afterwards recover that value from another who has received no substantial benefit from his property. This rule is not only in conformity with justice, but has the sanction of authority."[1] The case was held to be within the reason of that rule, although the subsequent process was in favor of one of the defendants, and executed by the other. "The plaintiff," the learned judge continued, "has no more right to complain of a second attachment than he would if made by any other creditor, or if there had been no previous taking of the property. When the goods were attached the second time the copy left in service with him showed their situation. It was then at his option to regain the possession either by writ of replevin or by payment of the debt upon which they were attached, or suffer them to be applied in satisfaction of that debt. Had he obtained his goods in either of the former modes, it would hardly be claimed that he could afterwards recover their value of the defendants. The same result ought to follow if he suffers them to be applied in due form of law to the payment of his debt." This is in accordance with the

[1] Curtis v. Ward, 20 Conn. 204; Bates v. Courtwright, 36 Ill. 518.

In Wehle v. Butler, 12 Abb. (N. S.) 139, it was held that evidence of payment, or of application of the fund in suit to plaintiff's benefit, cannot be introduced under a general denial (in code pleading); that if a defendant, when sued for a conversion of goods, sets up a subsequent valid sale on execution, in favor of the defendant and against the plaintiff, it constitutes a defense, and does not go in mitigation of damages, and must be specially pleaded. Murray v. Burling, 10 Johns. 172; Baker v. Freeman, 9 Wend. 39; Baldwin v. Porter, 12 Conn. 473; Ford v. Williams, 24 N. Y. 359; Hurlburt v. Green, 41 Vt. 490; McInvoy v. Dyer, 47 Pa. St. 118; Tamvaco v. Simpson, 19 C. B. (N. S.) 453; Kaley v. Shed, 10 Met. 317; Ward v. Benson, 31 How. Pr. 411.

course of decision in some other states.[1] It will be proper now to notice some limitations upon this right. A tort-feasor cannot mitigate his liability by proving the mere levy of an execution or attachment upon property by the creditor of its owner. He must go farther and show that the owner had the benefit of the property in such a way as to operate in law as a restoration of it.[2] In New York and some other states the application of the property in satisfaction of a judgment does not mitigate the wrong-doer's liability if his act was done in collusion with the creditor whose judgment is satisfied, or if the latter participated in such act.[3] If the converted property is exempt from the demands of creditors the application of it in satisfaction of a judgment against the owner does not affect the liability of the wrong-doer.[4] But if there is a limitation upon the value of the property which may be claimed as exempt and non-divisible property, exempt and not exempt, is sold, the damages cannot exceed the amount specified as the limit of the exemption.[5] There is no abatement of an officer's liability for the full value of a mortgagee's property because he sold it to the mortgagor who keeps possession of it. The delivery to the latter was as purchaser, not as mortgagor, and his possession was under his new title, and adverse to the mortgagee.[6] The sureties upon the bond of an executor who converts securities belonging to the estate cannot lessen their liability by claiming the commissions which would have been due him if had he not misconducted himself.[7] A wrong-doer cannot reap any benefit from payments made by a third party out of the proceeds realized from the sale of the converted property. Thus where trover was brought by the mortgagee of crops against a purchaser with notice he was not allowed to mitigate his liability by proving that a portion of the proceeds received by the mortgagor was ap-

[1] Stewart v. Martin, 16 Vt. 397; Board v. Head, 3 Dana, 489; Hopple v. Higbee, 23 N. J. L. 342; Morrison v. Crawford, 7 Ore. 472; Howard v. Mansfield, 31 Minn. 337; Mississippi Mills v. Meyer, 83 Texas, 433; 18 S. W. Rep. 748.

[2] Roberts v. Stuyvesant Safe Deposit Co., 123 N. Y. 57; Ball v. Liney, 48 id. 6.

[3] Wehle v. Spelman, 25 Hun, 99; *ante*, § 1105.

[4] Cone v. Lewis, 64 Tex. 331.

[5] State v. Harrington, 33 Mo. App. 476.

[6] Leonard v. Hair, 133 Mass. 455.

[7] State v. Berning, 74 Mo. 87.

plied by him to the payment of rent, the lien of the landlord therefor being superior to that of the mortgagee.[1]

[537] If the plaintiff procures a return of the property he is entitled to recover for time spent and other outlays reasonably made to obtain it. He may recover for money paid to satisfy an exaction of one having the property to obtain possession,[3] or at a wrongful public sale.[4] The sums so paid detract from the benefit the defendant will derive by way of mitigation of damages from its return. He will be entitled to a deduction from the damages which would otherwise be recoverable for any partial satisfaction of the wrong made by him, or by any of several jointly charged with or guilty of the same conversion and accepted by the plaintiff. Where in such a case against two the plaintiff obtained judgment by default against one and withdrew his action against the other upon receiving partial satisfaction and agreeing no further to prosecute him personally therefor, it was held that damages might be assessed against the defaulted defendant for the value of the converted property, deducting therefrom the amount received by way of compromise from his co-defendant.[5]

§ **1142. Plaintiff's duty to mitigate damages.** The rights and liabilities of parties to actions for the conversion of property are determined by the facts existing at the time and place of conversion, with an exception or two, such as those which allow the highest intermediate value of the property to be recovered. The modification of the rule which allowed that value to be fixed as of any time between the conversion and the time of the trial of the action therefor to

[1] Keith v. Ham, 89 Ala. 590; Carpenter v. Going, 20 id. 587.

[2] Hough v. Bowe, 51 N. Y. Super. Ct. 207; Davis S. M. Co. v. Best, 50 Hun, 76; Bennett v. Lockwood, 20 Wend. 223; Renfro's Adm'x v. Hughes, 69 Ala. 581; Greenfield Bank v. Leavitt, 17 Pick. 1; Ewing v. Blount, 20 Ala. 694; McDonald v. North, 47 Barb. 530; Sprague v. Brown, 40 Wis. 612. See Sprague v. McKinzie, 63 Barb. 60; Parroski v. Goldberg, 80 Wis. 339, qualifying Collins v. Lowry, 78 id. 329.

[3] Keene v. Dilke, 4 Exch. 388.

[4] Hurlburt v. Green, 41 Vt. 490; Baldwin v. Porter, 12 Conn. 473.

There cannot be a recovery of expenses incurred in anticipation of operating a machine without knowledge of its conversion unless the demand therefor is special. Cushing v. Seymour, etc. Co., 30 Minn. 301.

[5] Heyer v. Carr, 6 R. I. 45.

a reasonable time after the wrong has been done may be considered an application of the principle which imposes upon the wronged party the duty to lessen the damages which may result from the act of the other. How far this principle may apply to actions of this class is a question upon which the authorities do not throw much light. We incline to the view that it is not applicable, except in unusual circumstances, as where loss of profits or other consequential damages are claimed. Property reduced to rightful possession is the subject of ownership. He who interferes with the owner's rights therein must compensate him for the wrong done. The injured person who has been deprived of a deer or a fish he has taken is not bound to relieve the wrong-doer of his duty to pay the value thereof, because the woods abound in deer or the waters are filled with fish. One who appropriates ice formed on public waters, in a mode recognized by persons engaged in securing ice thereon, is entitled to recover its value if another enters upon and cuts that so appropriated, regardless of the quantity which he may be at liberty to secure elsewhere. Some light may be gathered on this question from the cases referred to in the note.[1]

[1] Taber v. Jenny, 1 Sprague, 320; 8 Fed. Rep. 159; Swift v. Gifford, 1 Low. 29.
Bourne v. Ashley, 1 Low. 27; Bartlett v. Budd, id. 223; Ghen v. Rich,

CHAPTER XXIX.

REPLEVIN.

SECTION 1.

PLAINTIFF'S CASE.

§ 1143. Definitions.
1144. Measure of damages.
1145. Exemplary damages.
1146. Special and consequential damages.
1147, 1148. Recovery if property not returned.
1149. Damages affected by the object of the action.
1150. Recovery for use and increase in value.
1151–1153. Intermediate injury and depreciation.
1154. Increase in value by defendant.

SECTION 2.

DEFENDANT'S CASE.

1155. Successful defendant's rights.
1156. A plaintiff obtaining possession and failing in his suit a wrong-doer.
1157. Measure of damages.
1158. Special and consequential damages.
1159. Mitigation of damages.
1160. Recovery affected by interest in property.
1161. Recoupment.
1162. Part of property found for each party.

SECTION 1.

PLAINTIFF'S CASE.

[538] § **1143. Definitions.** Replevin and detinue are common-law actions for the recovery of specific personal property. The former enables the plaintiff to obtain possession at the commencement of the suit, on giving security to prosecute it and to return the property if return be adjudged; the other enforces delivery of the property by the final judgment and the process thereon. The remedy by claim and delivery under the code combines substantially the advantages of both these actions.[1]

§ **1144. Measure of damages.** Where the plaintiff obtains possession on his writ of replevin, as is usually the case where the defendant has no legal right to retain it by giving bond,

[1] See McLaughlin v. Piatti, 27 Cal. 451; Morgan v. Reynolds, 1 Mont. 163.

and on the trial maintains his right to it, if the property is obtained without injury or deterioration he is only entitled to damages for its caption and detention. There cannot be a recovery for the breach of the contract out of which grew the dispute as to the right of possession.[1] The ordinary measure of these damages is interest on the value of the property.[2] This rule will be applied to securities not bearing interest, the detention of which prevents the owner from collecting the money they represent, or of making demand so as to put them upon interest if payment should be delayed.[3] This rule, however, is not inflexible. Following the principle that the [**539**] injured party is entitled to just compensation only, when there is no injury, or but a slight one, the damages will be only nominal, or according to the injury actually sustained. If securities for money bearing interest at the legal rate are detained, and the interest has not been paid, no more than nominal damages can be recovered.[4] Where corporate stock was the subject of the action, and by statute the value at the date of the trial was recoverable, it was held that in addition the plaintiff was entitled to the dividends that had been paid upon the stock as damages for the detention.[5] Interest on the value will not be adequate compensation, and is not the measure of damages where the use of the property detained

[1] Hersberg v. Sachse, 60 Md. 426.

In Iowa the right to damages for the detention is not waived by exercising the statutory privilege of taking judgment for the value of the property instead of for its return. Cook v. Hamilton, 67 Iowa, 394. Compare Hanselman v. Kegel, 60 Mich. 540; Just v. Porter, 64 id. 565.

[2] Brizsee v. Maybee, 21 Wend. 144; State v. Smith, 31 Mo. 566; Bigelow v. Doolittle, 36 Wis. 115; Gillies v. Wofford, 26 Tex. 76; New York Guaranty, etc. Co. v. Flynn, 55 N. Y. 653; McDonald v. Scaife, 11 Pa. St. 381; McDonald v. North, 47 Barb. 530; Robinson v. Barrows, 48 Me. 186; Oviatt v. Pond, 29 Conn. 479; Schenuit v. Brueggestradt, 8 Mo. App. 46; Wadleigh v. Buckingham, 80 Wis. 230; Hainer v. Lee, 12 Neb. 452; Redmond v. American Manuf. Co., 121 N. Y. 415; Johnson v. Bailey, — Colo. —; 28 Pac. Rep. 81.

In Delaware the allowance of interest is discretionary with the jury. Boyce v. Cannon, 5 Houst. 409. And so in North Carolina. Patapsco Guano Co. v. Magee, 86 N. C. 350.

[3] McCoy v. Cornell, 40 Iowa, 457; Wegner v. Second Ward Sav. Bank, 76 Wis. 242. In this case there was a detention of a depositor's pass-book; his deposit had been paid to a stranger. The legal rate of interest was recovered, though the bank was to pay less.

[4] Bartlett v. Brickett, 14 Allen, 62.

[5] Bercich v. Marye, 9 Nev. 312.

is valuable. The owner is entitled to recover the value of the use if he prefers it to interest, during the time he was deprived of possession.[1] Without alleging special injury the plaintiff may recover in replevin such damages for the detention of the property as the jury, upon all the evidence, may be satisfied that its use, considering its nature and character, was worth during the time of the detention.[2] As between vendor and vendee, the former holding the title until the property is paid for, the latter is liable for the value of the use from the time he refuses to deliver until verdict, regardless of any compensation due him from the vendor for services rendered by the use of the property while the vendee was legally in possession of it, and of payments made under the contract of purchase.[3] There is no right in a mere pledgee[4] or mortgagee[5] to recover the value of the use. Where the

[1] Minkwitz v. Steen, 36 Ark. 260; Cook v. Hamilton, 67 Iowa, 394; Turner v. Younker, 76 id. 285; Kennett v. Fiskel, 41 Kan. 211; Aber v. Bratton, 60 Mich. 357; Anchor Milling Co. v. Walsh, 24 Mo. App. 97; Reno v. Kingsbury, 39 id. 240; Chauvin v. Valiton, 8 Mont. 451, 466; Corn Exchange Nat. Bank v. Blye, 56 Hun, 403; Coffin v. Taylor, 16 Ore. 375; Stanley v. Donoho, 16 Lea, 492; Washington Ice Co. v. Webster, 62 Me. 341, 362; Odell v. Hole, 25 Ill. 204; Clark v. Martin, 120 Mass. 543; Davis v. Davis, 30 Ga. 296; Morgan v. Reynolds, 1 Mont. 163; Allen v. Fox, 51 N. Y. 562; Carroll v. Pathkiller, 3 Port. 279; Fralick v. Presley, 29 Ala. 463; Dorsey v. Gassaway, 2 Har. & J. 413; Scott v. Elliott, 63 N. C. 215; Clapp v. Walter, 2 Tex. 130; Clements v. Glass, 23 Ga. 395; Butler v. Mehrling, 15 Ill. 488; Machette v. Wanless, 2 Colo. 180; Hanover v. Bartels, id. 514; McGavock v. Chamberlain, 20 Ill. 219; Dunnahoe v. Williams, 24 Ark. 264. See Twinam v. Swart, 4 Lans, 263.

It has been held that the failure to claim damage in a declaration in replevin is a fatal defect. Faget v. Brayton, 2 Har. & J. 350; Crosse v. Bilson, 6 Mod. 102. See Smith v. Dodge, 37 Mich. 354.

In Minnesota the value of the use cannot be recovered unless it is specially claimed. Gray v. Bullard, 22 Minn. 278; Ferguson v. Hogan, 25 id. 135. An assessment of damages is not necessarily erroneous because the allowance for the detention of the property is in excess of its value. Washburn v. Roberts, 72 Ind. 213. Where the detention continued for two years and five months the allowance of five times the value of the property was held excessive. Anchor Milling Co. v. Walsh, 24 Mo. App. 97. And so where more than twice the value of the property was allowed, no deterioration being shown, the assessment was set aside. Romberg v. Hughes, 18 Neb. 579.

[2] Boston Loan Co. v. Myers, 143 Mass. 446; Clark v. Martin, 120 id. 543.

[3] McGinnis v. Savage, 29 W. Va. 363.

[4] McArthur v. Howett, 72 Ill. 358.

[5] Thompson v. Scheid, 39 Minn. 102.

value at the time of the taking is adopted, and interest is added to that, it is erroneous to give compensation also for the use between the taking and the trial.[1] And so where the value of the property at the time of the trial is the test.[2] There is no right to recover for the use beyond the time verdict is rendered.[3] Where the property involved is manufactured for sale there is no presumption that the plaintiff would have put it to any use which would have been more profitable to him than the interest on its value; hence that will limit his recovery.[4] Where an engine was the subject of the action it [540] was held that damages for the use could not be recovered during the time of the detention without a showing that, but for the detention, the owner was in a situation to use it.[5] He may recover for the use of property while it is detained, but not in addition for the natural depreciation in its value while in the defendant's possession.[6] If there is a wrongful levy upon and sale of property and the owner purchases it his damages are measured by the price paid; the defendant cannot be heard to allege that the actual value was less than that.[7] In replevin for materials, which before their removal composed a fence attached to and a part of the realty, the plaintiff can recover only the value of the materials after their removal, not the value of the fence as it stood before the removal.[8] But where a house was sold, removed and placed upon a permanent foundation, it was held that the recovery should "have been the value of the house, not the house itself."[9]

§ 1145. Exemplary damages. These may be recovered where the taking is accompanied with outrage and insult or the detention is aggravated by bad faith and oppression.[10] On

[1] Bigelow v. Doolittle, 36 Wis. 115; Freeborn v. Norcross, 49 Cal. 313; White v. Sheffield, etc. Ry. Co., 90 Ala. 253; Hanselman v. Kegel, 60 Mich. 540.

[2] Reno v. Kingsbury, 39 Mo. App. 240.

[3] Coffin v. Taylor, 16 Ore. 375.

[4] Redmond v. American Manuf. Co., 121 N. Y. 415; 56 N. Y. Super. Ct. 372.

[5] Barney v. Douglass, 22 Wis. 464.

[6] Odell v. Hole, 25 Ill. 204; Mayberry v. Cliffe, 7 Md. 117; White v. Sheffield, etc. Ry. Co., 90 Ala. 353.

[7] Leonard v. Maginnis, 34 Minn. 506; Northrup v. Cross (N. D.), 51 N. W. Rep. 718.

[8] Pennybecker v. McDougal, 48 Cal. 160.

[9] Reese v. Jared, 15 Ind. 142.

[10] Heard v. James, 49 Miss. 236; Craig v. Kline, 65 Pa. St. 399; Schofield v. Ferrers, 46 id. 438; Burrage

the question of damages, the means by which the goods have been taken or retained will be considered. In Pennsylvania damages beyond the value of the property may be given in replevin where the taking was accompanied with any wrong or outrage, though the declaration contains no count for special damages, nor any averment of such aggravation;[1] and the same rule has been recognized in Mississippi[2] and New York.[3] In Iowa the purchaser of mortgaged property is not liable to the mortgagee for exemplary damages because he refused to deliver and maliciously concealed it.[4] Such damages may be awarded in California although plaintiff obtains possession of the property under provisional process.[5]

§ **1146. Special and consequential damages.** There may be a recovery of such special and consequential damages as arise naturally and proximately from the wrongful caption or detention of property.[6] In replevin to recover possession of a [**541**] heifer secretly taken from the plaintiff by the defendant damages were held recoverable for time spent and expenses incurred in searching for the heifer after she was so taken; but such damages should be specially alleged.[7] The defendant is not usually liable for the personal expenses of the plaintiff, or his loss of time in connection with the prosecution of his action,[8] nor for his attorney's fees therein.[9] The owner of a horse who pays entrance fees and fines pursuant to the rules of a trotting association in order that the horse may compete for purses in future races, such payments being made after the horse was taken on process, cannot recover the amount.[10] The loss of employment as the result of taking and detaining the tools of a mechanic is too remote to be the

v. Melson, 48 Miss. 237; Cable v. Dakin, 20 Wend. 172; McDonald v. Scaife, 11 Pa. St. 381; Gross v. Hays, 73 Tex. 515; Arzaya v. Villalba, 85 Cal. 191.

[1] Schofield v. Ferrers, 46 Pa. St. 438.

[2] Burrage v. Melson, 48 Miss. 237.

[3] Cable v. Dakin, 20 Wend. 172; Brizsee v. Maybee, 21 Wend. 144.

[4] McDonald v. Norton, 72 Iowa, 652.

[5] Arzaya v. Villalba, 85 Cal. 191.

[6] Schofield v. Ferrers, 46 Pa. St. 438.

[7] Miller v. Garling, 12 How. Pr. 203; Blackwell v. Acton, 38 Ind. 425; Mitchell v. Burch, 36 Ind. 529; Davis S. M. Co. v. Best, 50 Hun, 76; Dutro v. Kennedy, 9 Mont. 101; Arzaya v. Villalba, 85 Cal, 191, overruling Kelly v. McKibben, 54 id. 192; Redington v. Numan, 60 id. 632.

[8] Taylor v. Morton, 61 Miss. 24; Jandt v. South, 2 Dak. 46, 69.

[9] Id.; Kepner v. Mix, 81 Mo. 93; Winstead v. Hulme, 32 Kan. 568; Cowden v. Lockridge, 60 Miss. 385.

[10] Riley v. Littlefield, 84 Mich. 22.

basis of a recovery;[1] and so is injury to credit where a mercantile stock is taken.[2] The rule concerning the recovery of prospective profits is the same in replevin as in actions upon contract, in the absence of any circumstances showing malice. They cannot be recovered for if the testimony shows that they could have been realized only under the most favorable circumstances.[3] In Wisconsin a complaint under the code, being in the statutory form (which does not allege damages), will let in proof of special damages for the detention, as the statute provides for their recovery. For that reason, the rule that such damages must be alleged is to that extent inapplicable. In replevin for a horse it was held the plaintiff might recover as damages, not only the value of its use during the time it was unjustly detained, but, if injured by defendant's neglect while so detained, the plaintiff's expenses in taking care of and doctoring it, in excess of what those expenses would have been but for the injury, and for the loss of the animal's services after the plaintiff had gained possession, as well as for the permanent depreciation of its value resulting from the injury.[4] In an English case the plaintiff in replevin, after obtaining judgment for the expenses incurred in giving the replevin bond, brought an action of trespass to recover for the breaking and entering of his shop and dwelling, and removing fixtures and other property therefrom, whereby, it was alleged, he was prevented from carrying on his business, and was believed by his customers to be incapable of doing so, and was put to expense in and about replevying his goods. It was held that the judgment in replevin was a bar to the action of trespass so far as the personalty was concerned, because that element of damage was recoverable in the replevin suit; but it was otherwise as to the trespass to the realty.[5] Bovill, C. J., said: "When the goods were not redelivered by the sheriff, according to the books, it would appear that the plaintiff could recover the full amount of the damages that he had sustained. . . . I see no reason in principle why there should be any

[1] Kelly v. Altemus, 34 Ark. 184. See § 1117, *ante*.

[2] Winstead v. Hulme, 32 Kan. 568.

[3] Talcott v. Crippen, 52 Mich. 633; Aber v. Bratton, 60 id. 357.

[4] Zitske v. Goldberg, 38 Wis. 216; Wadleigh v. Buckingham, 80 id. 230.

[5] Gibbs v. Cruikshank, L. R. 8 C. P. 454; Graham v. O'Callaghan, 14 Ont. App. 477.

limitation as to the amount of the damages recoverable in such a case. I do not know any ground in law for confining the damages to the amount of the expenses of the replevin bond. In practice, these expenses are all that are recovered, merely because there is generally no other damage. . . . Whatever damages have been actually sustained may be recovered." In a New York case replevin was brought for a machine, the invention of plaintiff, made as a model and for the purpose of experimenting with and exhibiting at fairs soon to be held. The defendant had entered into a contract for its purchase and took possession of it for the ostensible purpose of testing it, but in fact with the object of preventing its exhibition. The plaintiff was permitted to recover the expense incurred in a partially successful attempt to manufacture another machine for the purpose of showing it at the fairs, and interest on such expense, notwithstanding the fact that the invention was practically worthless.[1]

§ 1147. Recovery if property not returned. The plaintiff may still proceed with his action where he does not obtain the property, and will be entitled to recover, in addition to damages, the property or its value.[2] If he is entitled to recover the value, the measure of damages is the same as in trover or trespass.[3] But the value and damages must be proved, otherwise the plaintiff will recover only a nominal sum.[4] This principle will not be strictly adhered to if the property has no market value. Thus, where the owner of Sioux half-breed scrip is wrongfully deprived of the same he may recover its value to him, although the scrip, being unassignable, is valueless in the hands of third persons, and notwithstanding duplicates might be obtained on proof of the loss of the originals. A wrong-doer, it was held, will not be permitted to resort to such a defense.[5] The plaintiff furnished de-

[1] Scattergood v. Wood, 14 Hun, 269. The second machine was made at less expense than the original, and the court thought the damages were as favorable to the defendant as he had a right to ask.

[2] Harrisburg Electric L. Co. v. Goodman, 129 Pa. St. 206; Ryan v. Fitzgerald, 87 Cal. 345.

[3] Bigelow v. Doolittle, 36 Wis. 115; Frazier v. Fredericks, 24 N. J. L. 162; Hanselman v. Kegel, 60 Mich. 540; Aultman v. Stichler, 21 Neb. 72; Romberg v. Hughes, 18 id. 579.

[4] Phenix v. Clark, 2 Mich. 327; Seabury v. Ross, 69 Ill. 533; Mann v. Grove, 4 Heisk. 403.

[5] Bradley v. Gamelle, 7 Minn. 331.

fendant vouchers, a statement of expenditures and an affidavit for inspection. They had a peculiar value to him which might be affected by circumstances, and such value measured his recovery.[1] In several states the defendant has a right to retain the property by giving a counter-bond, either to pay for or deliver it if the plaintiff shall succeed in establishing a right to it. In Pennsylvania the defendant has an election to deliver the property on the writ when the sheriff calls for it or to retain it by giving security. If the property be delivered and the plaintiff sustains his action the defendant is answerable in damages for the taking and detention up [542] to the time of delivery. If the property be retained, he is answerable in addition for its full value. In either case the action thenceforth proceeds for damages alone. The property itself can in no event be recovered at law from the defendant; nor can he tender it afterwards in discharge of the action or even in satisfaction *pro tanto* of the damages claimed.[2] The claim and delivery of the code as generally adopted allows the defendant to retain the property by executing the counter-bond. The judgment, if for the plaintiff, where this right to retain the property has been exercised, is in the alternative after the form of the judgment in detinue; it is for delivery of the property or for its value if delivery cannot be had; and for damages absolutely. The value is found, and usually of the date of the trial. But the statutes are not entirely uniform on these points, nor the decisions where the statutes are similar.

§ **1148. Same subject.** In Missouri if the plaintiff succeeds he has the choice of taking the property or its value. And by the value is meant the value at the time of the verdict.[3] In New York this option does not exist; at the termination of the suit by judgment in his favor the plaintiff must take the property if the defendant has it and will permit him to take it.[4] The jury are required to assess its value and dam-

[1] Drake v. Auerbach, 37 Minn. 505. The defendant had the right to satisfy the judgment by surrendering the property and paying the costs.

[2] Fisher v. Whoollery, 25 Pa. St. 197; Schofield v. Ferrers, 46 id. 438.

[3] Chapman v. Kerr, 80 Mo. 158; Mix v. Kepner, 81 id. 93; Pope v. Jenkins, 30 id. 528; Miller v. Bryden, 34 Mo. App. 602; Hinchey v. Koch, 42 id. 230.

[4] Dwight v. Enos, 9 N. Y. 470; Fitzhugh v. Wyman, id. 559; Brewster v. Silliman, 38 id. 423.

ages for the detention. The value is assessed of the date of the trial; and any intermediate deterioration or depreciation must be recovered for as damages.[1] The value at the time of the trial is the usual subject of the inquiry, and the proper subject of proof. Such value is to be accepted as a substitute for the property itself if the sheriff cannot deliver possession, and it should be the equivalent thereof.[2] An action of claim and delivery may be brought against a wrong-doer although he has parted with the possession of the property before the commencement of the action. If the jury find that the acts of the defendant in obtaining and sending away [**543**] the property were fraudulent, the plaintiff has a right to recover its value if possession cannot be delivered.[3] In Minnesota the alternative form of the judgment is required.[4] It is there held not to be necessary for the jury to assess the value of the several articles in question separately, unless requested by the plaintiff, with a view to obtaining a part of the property where all cannot be delivered on final process.[5] Where part has been replevied and a part not, only the value of the latter need be found.[6] And that is to be assessed at the time of the wrongful taking or detention. If the defendant recovers the value is fixed at the time the property is replevied from him.[7] If a levy is made upon growing crops by filing a certified copy of the execution, and a statute forbids their sale until they are ripe or fit to be harvested, their value is to be found as of the date of the sale made in pursuance of the statute.[8] In Tennessee where the sheriff returns that he cannot get possession of the property described in the writ, and has made known the contents of the writ to the defendant, the plaintiff may elect to declare in trover or detinue and proceed as in the form of action selected.[9] In Nevada the judgment for the plaintiff in claim and delivery, where the property has remained in the possession of the de-

[1] Id.; Allen v. Fox, 51 N. Y. 562; Redmond v. American Manuf. Co., 121 id. 415.

[2] Brewster v. Silliman, 38 N. Y. 423.

[3] Ellis v. Lersner, 48 Barb. 539.

[4] Berthold v. Fox, 13 Minn. 51.

[5] Caldwell v. Bruggerman, 4 Minn. 270.

[6] Hecklin v. Ess, 16 Minn. 51.

[7] Sherman v. Clark, 24 Minn. 37.

[8] Howard v. Rugland, 35 Minn. 388.

[9] Act of 1816, ch. 65; Nashville Ins. & T. Co. v. Alexander, 10 Humph. 378.

fendant, is for the property or its value if delivery cannot be had. The defendant has a right to deliver it instead of paying the value.[1] The value is there fixed at the time of trial.[2] The rule is the same in Kansas[3] and Nebraska.[4]

§ 1149. Damages affected by the object of the action. In this contrariety of practice it is important to observe, with reference to the subject of damages, the distinction between those cases in which the actual pursuit of the property in specie ceases upon the return of the writ showing that it has not been obtained, either because it has been eloined or retained by execution of a counter-bond, and those cases in which the plaintiff continues the pursuit until final judgment. At common law if the plaintiff declares in the *detinuit* he can recover damages for the detention only until replevin, though he should prove the property still in the defendant's [544] possession.[5] Such declaration implies that the property has been taken and delivered to the plaintiff, and that the detention does not continue. The declaration depends on the return of the sheriff. If that shows that he has replevied the property and delivered it to the plaintiff his declaration is necessarily in the *detinuit*, for he has got the property, and complains only of the taking and detention until replevied. If, however, the return shows that the property has not been delivered to the plaintiff the declaration is in the *detinet* and goes for damages including the value of the property.[6] Then the action is like trespass or trover: solely for damages; it is in effect trespass when the plaintiff was deprived of the property by a tortious taking; trover, if the wrong consists in an unlawful detention merely. The measure of damages is the same as in those actions upon a similar state of facts. The same proof is admissible for compensatory and exemplary damages. The defendant is charged, by the rule generally recognized, with the value at the time of the taking or conversion and interest from that time to the trial.[7]

[1] Lambert v. McFarland, 2 Nev. 58; Carson v. Applegarth, 6 id. 187; Buckley v. Buckley, 12 id. 423.

[2] O'Meara v. North Am. M. Co., 2 Nev. 112; Bercich v. Marye, 9 id. 312.

[3] Russell v. Smith, 14 Kan. 366.

[4] Deck v. Smith, 12 Neb. 389.

[5] Truitt v. Revill, 4 Harr. (Del.) 71.

[6] Id.; Kehoe v. Rounds, 69 Ill. 351; Karr v. Barstow, 24 Ill. 580; Frazier v. Fredericks, 24 N. J. L. 162; Bruen v. Ogden, 11 id. 370; Field v. Post, 38 id. 346.

[7] Id.; Fisher v. Whoollery, 25 Pa.

§ 1150. Recovery for use and increase in value. There is no principle upon which the defendant can be charged with the use of the property, though valuable, after the date at which he is charged with its value; that would involve the inconsistency of allowing the plaintiff compensation for such use after he will have ceased to be the owner of the property on the satisfaction of the judgment. The same consideration is adverse to allowing him any benefit from any subsequent appreciation in market value, or by the defendant's labor. But other principles are invoked to sustain such recoveries. One is that the defendant should not be permitted to make a profit out of his own wrong. This principle is sound; but it is often loosely applied. If the wrong-doer is sued for the value of property which he has taken and converted it is in anticipation that the judgment will be collected or paid. When it is satisfied this principle does not derogate from the defendant's [545] title to the property, nor from the beneficial incidents of his ownership. The owner is to have just compensation for the injury; this has been held to entitle him to any advance in price from general causes that he would immediately have realized, or which the defendant has or might have obtained. When any departure is properly allowed from the price at the time of the taking or conversion it is justified only on the ground of giving full and adequate compensation. When that is paid the property belongs to the defendant, and by relation from the time he was charged with and convicted of taking and converting it. Whatever use, otherwise, he can make of the property, and whatever advantages he can derive from it, belong to him without any prejudice from the circumstance that his title had a tortious inception. The plaintiff is entitled to the value at the time of the wrongful appropriation, and to interest from that date at least; and therefore is not affected by any depreciation afterwards. If the property perishes, or is in any manner injured after the time when the defendant's title by relation attaches, it is his loss, a loss incident to ownership.

Where the judgment in replevin is required, in case the prop-

St. 197; Schofield v. Ferrers, 46 Pa. Just v. Porter, 64 id. 565; Romberg
St. 438; Heard v. James, 49 Miss. 236; v. Hughes, 18 Neb. 579.
Hanselman v. Kegel, 60 Mich. 540;

erty has not been replevied and delivered to the plaintiff, to be in the alternative, for its delivery or for its value if delivery cannot be had, there is a strong implication that the value shall be assessed at the time when delivery is adjudged in favor of the prevailing party. The value is the substitute for the delivery, and where the property is still within the defendant's control it has been deemed proper in detinue, from which this feature of the code remedy of claim and delivery is derived, to magnify the estimate of value to insure its actual delivery.[1] So it has been held proper to reduce it under particular circumstances, on the principle of limiting the compensation to the actual injury.[2] It is, however, consonant to legal analogies to fix the value at the time when delivery is required to be made rather than at another time.[3] But that is not the time to which the whole injury is referred; on the con- [546] trary, it is then merely adjusted and the due recompense ascertained. The wrong is done when the taking or conversion occurs; that wrong is a continuing one while property belonging to the plaintiff is tortiously withheld from him. By the remedy for the recovery of specific property by which he is entitled and obliged to resort to final process for its delivery to him, he continues to assert a right to it until he voluntarily receives the value for it. The law aims to compensate the entire injury. It is usually satisfied if the plaintiff succeeds in obtaining the property in as good condition, not depreciated, but worth as much as when taken, and he receives interest on its value; unless he has been put to greater expense and inconvenience from being deprived of its use than the interest will compensate; then in lieu of interest he may recover the value of the use; and where this is allowed there ought not to be any compensation for the wear and depreciation naturally consequent upon such use.[4] If the defendant by his wrongful conduct has deteriorated the property, or a loss on its value has proximately and with certainty resulted from the wrongful detention, that should be recovered for in addition to the value in order to give the owner full indemnity.

[1] Goodman v. Floyd, 2 Humph. 59; Mayberry v. Cliffe, 7 Cold. 120; Cochrane v. Winburne, 13 Tex. 143; Hoeser v. Kraeka, 29 Tex. 450.

[2] Single v. Schneider, 24 Wis. 299; Buckley v. Buckley, 12 Nev. 423.

[3] Swift v. Barnes, 16 Pick. 194.

[4] Odell v. Hole, 25 Ill. 204.

He is entitled to any advance in market value, for it is an appreciation of his own property. But in some cases where the alternative judgment is rendered the value is fixed at the inception of the wrong.[1] This may be done without materially changing the result by keeping in view that the time of trial is the day of final reckoning for surrender of title if the property itself cannot be had. In making up the account the owner is credited with the value at the time of the defendant's wrongful appropriation; this cannot be diminished by any injury to or depreciation of the property after that date, for which the defendant is the responsible cause, and whether any could occur for which he is not responsible will be considered presently. But if it subsequently appreciates so that it is worth more at the trial the owner must consider himself thereby injured, and add to the value noted at the date of the conversion the amount of such appreciation; so if the use of [547] the property is worth more than the interest he may elect to consider himself more injured by loss of the use than the interest will compensate, and claim the former. In this way, though the computation is very illogical, the same practical result may be reached.

§ **1151. Intermediate injury and depreciation.** The property may suffer injury or depreciation in the hands of the defendant intermediate the taking or wrongful detention and the bringing of replevin when it is taken and delivered to the plaintiff; and in other cases it may suffer it during the pendency of the action when the defendant retains the property and the plaintiff, on recovery, is obliged to take an alternative judgment. The question whether the plaintiff, if he maintains his suit, must bear this loss is the same in each of these cases. It is a loss relative to the property while it belongs to him by his original title and by the effect of the adjudication. The defendant should be charged with this loss if he is the occasion of it; be responsible for it if it is the natural and proximate consequence of the wrongful taking or detention; or if in like manner it resulted from any subsequent act or negligence on his part during such detention. Such a ground of liability existed in some of the cases which are sometimes cited to support a broader responsibility. A stock of mer-

[1] Sherman v. Clark, 24 Minn. 37.

chandise is likely to suffer deterioration by seizure, removal and detention,[1] and so of household goods;[2] and also by the lapse of time.[3] A loss may also result in such case from keeping the stock from market through the proper season for sale.[4] As the defendant, in the cases supposed, retains the property upon an honest claim of ownership, he should preserve, manage and dispose of it as men having such property ordinarily do to make it most beneficial to them. On this principle, if it has a usable value he is charged with it; so if it is kept as a commodity for sale he may be presumed to judiciously dispose of it at a reasonable time.[5]

There are cases which hold and some *dicta* in the books favoring the doctrine that the wrong-doer must make good all injury to the property and all deterioration which it suffers while he detains it, whether such damage accrues [548] through his fault or not. The owner can hold him responsible for such loss by suing in trespass or trover; for by that form of action the plaintiff gives effect to the wrongful taking or conversion to clothe the wrong-doer with the title from the date of his interference with the property; the wrong-doer is charged with the property at the time he takes or detains it; and the effect of recovery in such actions, followed by satisfaction, is to make him the owner from that time. Hence the subsequent loss, though wholly by accident, falls upon him as the owner. It is optional with the injured party to acquiesce in such taking or detention to make it a disposition of his

[1] Rowley v. Gibbs, 14 Johns. 385; Beveridge v. Welch, 7 Wis. 465; Riley v. Littlefield, 84 Mich. 22; Anderson v. Sloane, 72 Wis. 566; Chapman v. Kerr, 80 Mo. 158; Miller v. Bryden, 34 Mo. App. 602.

Where a stock of drugs was replevied from an officer it was ruled that in estimating the damages during the week plaintiff was deprived of possession the evidence was not confined to the net income of the business at or about the time of the levy. The elements of damages were the closing of the store and handling the goods in making an inventory. Schars v. Barnd, 27 Neb. 94. The stock in this case was worth $3,000; a verdict for $150 damages was sustained.

[2] Baldridge v. Dawson, 39 Mo. App. 529.

[3] Young v. Willet, 8 Bosw. 486; Russell v. Smith, 14 Kan. 366.

[4] Carson v. Golden, 36 Kan. 705.

[5] Gordon v. Jenney, 16 Mass. 465.

In an action to recover notes deposited as collateral the damages may include the amount received on them, and any depreciation in their value arising from the defendant's failure to present them to the assignee of their maker. Sullivan v. Sullivan, 20 S. C. 509.

property; by bringing trespass or trover he does so, even though he takes it back; for when it is returned in such cases it does not affect the cause of action, but only goes in mitigation of damages. But by bringing replevin he expresses his determination not to acquiesce; his purpose then is to recover his property, and there is no interruption of his ownership; he continues his pursuit of it in specie till judgment. Every question affecting his indemnity, therefore, is to be decided on the theory and assumption of his continued and uninterrupted title to it. If it has suffered injury or deterioration he must bear the loss as an incident of ownership, unless he can make a case for charging it upon some other person. He must be able to show that such loss naturally and proximately resulted from the defendant's act, or he cannot hold him liable for it; unless, indeed, there is some consideration of policy that imposes the loss on the defendant on some other terms. In an early Kentucky case[1] the court held in such an action for a slave that though the defendant acquired the possession rightfully, yet if he continued the detention after suit brought to recover it, the possession became wrongful; that he who wrongfully detains the property of another does it at his own peril, and will be responsible to the proprietor, though it be destroyed by accident or taken from him by violence. And that doctrine seems to have become the settled law of that [549] state[2] as well as of Alabama.[3] A case in the latter state was commenced in 1861 for the recovery of certain slaves. The action was of the nature of detinue, and therefore did not disturb the defendant's possession during its progress. It was tried in 1866, and the plaintiff succeeded in establishing his title. The judgment was for the delivery of the property or the payment of the alternate value, assessed at $20,000, although, pending the suit, general emancipation had taken effect, of which the court had, of course, judicial notice. This change in the *status* of the subject was treated, not as a determination of the plaintiff's title to the several negroes named in the declaration, but as a death or destruc-

[1] Carrel v. Early, 4 Bibb, 270.

[2] Caldwell v. Fenwick, 2 Dana, 333: Gentry v. Burnett, 6 T. B. Mon. 115; Scott v. Hughes, 9 B. Mon. 104.

[3] White v. Ross, 5 Stew. & P. 123; Rose v. Pearson, 41 Ala. 692; Fragin v. Pearson, 42 Ala. 335.

tion of the property; and because it occurred while the defendant had a wrongful possession he was liable for the value; and the value, not when the delivery was ordered, but at any time between the commencement of the suit and its termination.[1] Walker, C. J., said: "When an owner's property has been converted there immediately springs up in his favor a right to have its value, and that right may be enforceed in an action of trover, without the peril of defeat by the death or destruction of the property. If in detinue a recovery of the property or its alternate value is prevented by its death or destruction, it is obvious that that form of action is inadequate to redress the wrong or enforce the right in its full extent. The plaintiff must yield his desire to obtain the specific property, or he must incur the peril of losing it in the possession of the tort-feasor. The policy of this court has been so to shape its adjudications in reference to the action of detinue as to encourage the delivery of property wrongfully withheld. This policy, which seems to us to be wise, would not be consulted by placing the subject of litigation at the hazard of the owner and relieving the wrong-doer from responsibility. Indeed, the contrary policy, when the property is of a perishable nature, would enable the defendant by retaining possession and prolonging the litigation to defeat the plaintiff's right to enjoy his own property." The plaintiff was a mortgagee, and it was plausibly said that if he had ob- [550] tained the possession he might have sold the property and realized its full value. And the learned judge further remarked: "It is unjust and unconscientious under such circumstances that the loss, if it had resulted from death, should fall upon the plaintiff."

§ 1152. Same subject. In Suydam v. Jenkins,[2] which is noted for furnishing the opportunity improved by a learned jurist to write one of the best judicial opinions on the law of compensation to be found in the English language, Duer, J., expressed himself strongly in favor of the same doctrine. He said: "We cannot think that a wrong-doer is ever to be treated as a mere bailee, and that the property in his possession is to any extent at the risk of the owner. We have seen

[1] Rose v. Pearson, 41 Ala. 690. See Johnson v. Marshall, 34 Ala. 522.

[2] 3 Sandf. 614.

that the defendant in trover or trespass is in all cases responsible for the value of the property when taken or converted, and certainly it has never been supposed that he can discharge himself from this responsibility, in whole or in part, by showing that the property had been destroyed or injured by an inevitable accident after he had obtained its possession. A plaintiff who, without right or title, has seized the property of another by a writ of replevin is as much a wrong-doer as a defendant in trover. No reason can be given why his liability should be less extensive; and in fact, when the replevin suit is terminated, although he cannot be treated as a trespasser, he may be sued in trover at the election of the defendant.[1] The decision in Carpenter v. Stevens[2] is plainly inconsistent with the prior decision of the same court in Rowley v. Gibbs,[3] in which the defendants in a replevin, in addition to a return of the goods, were held to be entitled to damages for deterioration in their value from the time of the replevy, although it was not pretended that the decrease in value was attributable in any degree to the act or default of the plaintiff, and it is irreconcilable with numerous cases in which it has been held expressly or by implication that, in a suit upon a replevin bond, the value of the property as fixed by the penalty of the bond is, at the election of the plaintiff, the measure of damages."[4] The question is the same, and is [**551**] here treated as identical, where the plaintiff has obtained the property by his writ of replevin and the defendant succeeds in his defense, and is entitled to a return or the value at his election.

In Massachusetts the replevin bond was formerly by statute expressly conditioned for return of the goods in like good order and condition as when taken; and when that special requirement was dropped by revision no change was deemed to have been contemplated.[5] Therefore the defendant was entitled at least to have the property or what it was worth

[1] Yates v. Fassett, 5 Denio, 21.

[2] 12 Wend. 589.

[3] 14 Johns. 385.

[4] Citing Middleton v. Bryan, 3 M. & S. 158; Mattoon v. Pearce, 12 Mass. 406; Huggeford v. Ford, 11 Pick. 223; Wood v. Braynard, 9 id. 322; Barnes v. Bartlett, 15 id. 71; Brizsee v. Maybee, 21 Wend. 144; McCabe v. Morehead, 1 W. & S. 513. To these may be added as supporting the same view, Young v. Willett, 8 Bosw. 486; Mayberry v. Cliffe, 7 Cold. 117.

[5] See Parker v. Simonds, 8 Met. 205.

when taken; but being entitled to the property itself, its value when demanded on the writ of restitution could be recovered.[1] This is the rule in Iowa.[2] In Maine the bond requires the property to be returned in like good order and condition as when taken.[3] But there the plaintiff in replevin was held not liable for a horse which died without his fault while he held it pending the suit, on judgment being recovered by the defendant for a return. This was held in an action on the replevin bond. Such a loss of property had been previously held available to exonerate a receiptor[4] and also an officer having the property in custody on *mesne* process;[5] and the same principle was deemed applicable to a plaintiff in replevin because his possession was a lawful one. The court say, by Kent, J.: "The distinction in fact is, that in the case at bar the replevin suit was instituted on the day the animal was seized on execution by the officer for the purpose of selling it to satisfy the same. It is urged that this distinction is vital on the ground that if the replevin suit had not been interposed the animal would have been sold in four days, and the proceeds thus secured to the creditors, whereas, in the cases cited, the animal was attached on *mesne* process, and held only as security to await final judgment, the animal dying before such judgment." After adverting to the grounds on which those cases were decided, and also Carpenter v. Stevens,[6] he continued: "The result from these author- [552] ities seems to be, that the writ of replevin is one authorized by law to enable a party who in good faith asserts a claim of title or right of possession in a chattel to have his claim investigated and determined judicially." The property is treated as, in a certain sense, in the custody of the law. "The party who replevies, having given the bond required by the statute, is not a wrong-doer if he acts fairly, although the result may show that he was mistaken in his belief of his right of property."[7] Why should not the same reasoning apply in favor of a defendant who got possession and retains it in good faith and in a manner which would be justified if

[1] Swift v. Barnes, 16 Pick. 194.
[2] Hinkson v. Morrison, 47 Iowa, 167; Lillie v. McMillan, 52 id. 463.
[3] Berry v. Hoeffner, 56 Me. 170.
[4] Shaw v. Laughton, 20 Me. 266.
[5] Melvin v. Winslow, 10 Me. 397.
[6] 12 Wend. 589.
[7] Walker v. Osgood, 53 Me. 422.

"his belief of his right of property" had been well founded, though the result of the suit may show that he was mistaken? No rule can be adopted in such a case for the purpose of deterring one who believes himself to be the owner from exercising an owner's dominion and right of possession. He is technically a wrong-doer if he fails to maintain his title; and he is such if he gets possession by a writ of replevin without having a right and title which will sustain it. Where there is an honest dispute about the ownership of specific property, and the parties determine to contest to obtain and retain it in specie rather than for its value, one or the other must hold while the controversy is being settled; and if in such a case it perishes without the custodian's fault, it seems more just to regard the loss as one which must be borne by him who is really the owner. The subject of the controversy ceases to exist; and as it has gone out of existence without either's fault, why, from that point, should not the controversy cease, and be confined to the adjustment of compensation to the owner for any damage which occurred before that time?

§ 1153. Same subject. It has been held in Missouri that if slaves are sued for, and die in the hands of the defendant during the pendency of the suit, the plaintiff has no just claim for more than damages for the detention up to the time of the death; that if the depreciation or death be produced by the defendant's ill-treatment or neglect or if the slaves be sold to another the rule might be otherwise.[1] Napton, J., said: [553] "In relation to the death of three of the slaves sued for, which occurred after the institution of the suit, and was suggested by a supplemental answer, the question presented is not free from difficulty and doubt, and, it must be confessed, has been very differently viewed by different courts. Our opinion, however, will be based principally upon our statute which regulates the action brought in this case, and upon what we believe to be principles of sound public policy and natural equity. . . Before the adoption of our present code of practice, which abolishes the forms and names of actions as known to the common law, there was a distinction between detinue and trover, although in many cases it was at

[1] Pope v. Jenkins, 30 Mo. 528.

the option of the plaintiff to bring whichever he preferred. In trover the plaintiff admitted the title to the property sued for to be in the defendant, and only asked damages for the conversion which he asserted was wrongful. In detinue the plaintiff claimed to be the owner still, and demanded the specific property detained. As an act of God does an injury to no one, though it may occasion a loss, the loss of course falls upon the owner, and, therefore, where detinue was brought and an accidental loss occurred by the death of the property sued for, it must fall upon the plaintiff if determined to be the owner. But it was otherwise in trover where the plaintiff admitted the change of title, and only claimed damages for its conversion; there the loss would be the defendant's upon the same principle that it would be the plaintiff's in detinue."[1] A plaintiff in replevin, retaining the articles replevied until judgment in the suit, cannot claim damages for any depreciation in their value during that period because he may sell them immediately in such manner as will ascertain their value, for which alone he is answerable on his bond.[2]

§ 1154. Increase in value by defendant. If a wrong-doer has taken or converted the property without wilful fault, and by labor or money has improved it and thus added to its value, if its identity has not been destroyed, the right [**554**] of the owner to retake it, subject to some fixed and some vague and unsettled limitations, is universally admitted. Extreme cases can be mentioned where the exercise of the right would be very unjust, where a retaking would give the owner more than he ought to have and impose an undeserved loss on the wrong-doer. This injustice, when it occurs, results from necessity; for the owner cannot be divested of his property without his consent or fault, and no wrong-doer can divest him by any unauthorized act done to it which does not destroy its legal identity. While the owner's right subsists he cannot take his own without taking also the labor which has been bestowed upon it; therefore the wrong-doer, however innocent of intentional wrong, is unfortunate in having

[1] Bethea v. McLennon, 1 Ired. 530; Austin v. Jones, Gilmer (Va.), 341, per Coalter, J.; Buckley v. Buckley, 12 Nev. 423; Frey v. Drahos, 7 Neb. 194; Parker v. Simonds, 8 Met. 205. See Boylston Ins. Co. v. Davis, 70 N. C. 485.

[2] Gordon v. Jenney, 16 Mass. 465.

inseparably annexed his work to another's property so that the latter must take it when he asserts his right to enjoy his own. The loss to the wrong-doer does not result from any principle or rule of damages, but from the exercise of an undoubted right of property. We have seen that where trover is brought for a conversion, which has been succeeded by such improvement of the property, the plaintiff is ordinarily confined in his recovery to the value of the property in the place or condition in which the defendant converted it.[1] The damages are measured against such a wrong-doer on the principle of compensation; they do not include the value added by his labor when he has improved the property under a mistaken belief that he owned it. The same rule has been applied in replevin where the defendant has retained the property — logs made from timber by him — and the value is assessed as a part of the damages.[2] Agnew, J., said: "It is in the power of the defendant in replevin to relinquish that proportion of its value which his labor or money has added to it by suffering the sheriff to return it to the owner. But this result depends on himself. If he claim the additional value, it is always his right to retain the property by giving a property bond, and the effect of a verdict for damages in favor of the [555] plaintiff is to transfer the title to the defendant. If, therefore, he denies that his trespass was wilful and wanton, and claims a right to the additional value given to the chattel by his labor and money in converting and transporting it to the place where it is replevied, he has it in his power to bring the damages of the plaintiff to their true standard. In a case of inadvertent trespass, or one done under a *bona fide*, but mistaken, belief of right, this would generally be the value of the logs at the boom (the place of replevy), less the cost of cutting, handling and driving to the boom. Such a standard of damages, growing out of the nature of the act and of the form of action, is reasonable and does justice to both parties. It saves the otherwise innocent defendant his labor and money, and gives the owner the enhancement of the value of his property growing out of other circumstances, such as a rise in the market price, a difference in price between localities or

[1] See *ante*, §§ 1126–1128.

[2] Herdic v. Young, 55 Pa. St. 176; Peters' Box & L. Co. v. Lesh, 119 Ind. 98 (innocent purchaser).

other adventitious causes." The same ruling has been made in Wisconsin, though the judgment is there for delivery of the property if delivery can be had, and otherwise for its value.[1]

In Mississippi if timber is unlawfully cut and converted into staves which are mingled with others owned by the defendant so that the plaintiff is unable to identify his property, he may maintain replevin for part of the common lot equal to that which was made from his timber. If the defendant retains the property by giving a bond and it appears that he wilfully cut the timber or did not take reasonable precautions to ascertain its ownership, the value of the property in the form it was in at the time and place of seizure measures the recovery.[2] In Michigan, where the writ of replevin is peremptory for delivery of the property to the plaintiff on his executing the requisite bond, it has been held that where the property had been taken by the wrong-doer in good faith and immensely improved by converting it into a new species of property, as timber into hoops, replevin would not lie; that the defendant's labor had added such value to the original material that the latter was a mere incident, and to prevent the injustice of allowing the owner in such a case to retake it by judicial process, and thus obtain so much more than compensation and subject the defendant to a loss so disproportioned to the injury he had done, it should be deemed that the identity of the property was lost.[3]

Section 2.

DEFENDANT'S CASE.

§ 1155. Successful defendant's rights. Damages in [556] favor of a defendant from whom property has been taken by a writ of replevin were not allowed at common law, but merely a judgment for its return.[4] But this deficiency has been remedied to some extent in England, and fully in this country, generally by statute. Defendants are not only allowed a return of the property, but are permitted to recover

[1] Single v. Schneider, 24 Wis. 299; S. C., 30 Wis. 570. See Brewster v. Silliman, 38 N. Y. 423.

[2] Peterson v. Polk, 67 Miss. 163.

[3] Wetherbee v. Green, 22 Mich. 311.

[4] White v. Lloyd, 3 Blackf. 390; Parnell v. Hampton, 10 Ired. 463; Hopewell v. Price, 2 Har. & G. 275.

in the replevin suit its value under some conditions in lieu of the thing itself, and damages for the detention.[1] The defend- [557] ant will be entitled to a return on any termination of the plaintiff's case for irregularity before pleading; and afterwards, where he succeeds upon such an issue as gives him a right to a return.[2]

§ 1156. A plaintiff obtaining possession and failing in [558] **his suit a wrong-doer.**[3] Dispossessing a defendant of personal property by means of a writ of replevin is in legal contemplation a wrong where the plaintiff does not prosecute his writ and suit to effect, and subjects the plaintiff to damages for the taking and detention on the same principles that govern the recovery of damages in favor of a prevailing plaintiff against a defendant. But the redress which a defendant can obtain in the replevin suit beyond a return of the property on a discontinuance, nonsuit or trial depends upon local statute. He is, however, generally allowed to recover damages where he is entitled to a return.[4]

[1] See Whitwell v. Wells, 24 Pick. 25; Brown v. Stanford, 22 Ark. 76; Pierce v. Van Dyke, 6 Hill, 613.

In School District v. Shoemaker, 5 Neb. 36, it was held under the code in that state, in an action of replevin, if the jury find in favor of the defendant they must assess for him such damages as they shall think just and proper, whether he pleads a general denial, new matter as a defense, or a demand for damages.

[2] Gould v. Barnard, 3 Mass. 199; Hill v. Bloomer, 1 Pin. (Wis.) 463; Hopkins v. Burney, 2 Fla. 42.

In Fleet v. Lockwood, 17 Conn. 233, it was held that an avowry, or suggestion in the nature of an avowry, by the defendant in replevin, is not necessary to authorize the court to render a judgment of return, where the writ is abated or set aside on account of an irregularity or defect in the replevin process. See Potter v. North, 1 Saund. 347, and note 1; Crosse v. Bilson, 6 Mod. 102; Anon., 1 Vent. 127; Foot's Case, 1 Salk. 93; Anon., id. 94; 18 Vin. Abr. 586, 591–2; Parker v. Mellor, Carth. 398; S. C., 1 Ld. Raym. 217; Butcher v. Porter, Carth. 243; S. C., Shower, 400; Salkold v. Skelton, Cro. Jac. 519; Wildman v. North, 2 Lev. 92; S. C., *nomine*, Wildman v. Norton, 1 Vent. 249; Allen v. Darby, 1 Show. 99. See, also, Hartgraves v. Duval, 6 Ark. 506.

[3] See *post*, § 1157.

[4] Mikesill v. Chaney, 6 Ind. 52; Ramsey v. Thomas, 45 Mo. 111; Berghoff v. Heckwolf, 26 Mo. 511; Collins v. Hough, 26 Mo. 149; Smith v. Winston, 10 Mo. 299; Dickinson v. Noland, 7 Ark. 25; Haviland v. Parker, 11 Mich. 103; Campbell v. Head, 13 Ill. 122; Broadwell v. Paradice, 81 Ill. 474; Hooker v. Hammill, 7 Neb. 231; Gould v. Scannell, 13 Cal. 430; Bonner v. Coleman, 3 B. Mon. 464; Smith v. Snyder, 15 Wend. 324.

Where the writ was void because

It is ruled otherwise, however, in Vermont, Massachusetts and Michigan under conditions stated in the note below.[1]

§ 1157. Measure of damages. When the defendant is entitled to a return and damages for the detention, the [559] general measure of the latter is interest on the value of the property to the date of the judgment.[2] He is entitled to

the property was not described in it as required by the statute, an assessment of damages was refused; for the right to an assessment given by the statute was limited to cases where the property is described in the writ. Parsell v. Circuit Judge, 39 Mich. 542.

[1] In Collamer v. Page, 35 Vt. 387, a replevin suit for a flock of sheep was dismissed because brought in the wrong county. The error in the proceedings was treated as an irregularity, not a want of jurisdiction of the subject-matter. It was held to be the duty of the court to render judgment for return of the property, and without any plea or avowry by the defendant, and that the plaintiff had no right to contest such a judgment on the ground that he owned the property. But a judgment of return, in such a case, was held not conclusive of the right in another action. And the court also held that, after a dismissal of the plaintiff's action on some ground not relating to the merits of the case, the defendant is not entitled to have his right to damages for the taking and detention or improper use of the replevied property tried or adjudicated The damage sought to be recovered was wool shorn from the sheep after the replevy. See Hoag v. Breman, 3 Mich. 160; Haviland v. Parker, 11 Mich. 103.

In Ware River R. v. Vibbard, 114 Mass. 458, the court refused an order for return upon this state of facts. Motion was made after nonsuit in replevin for the return of the property, which was a large quantity of imported railroad iron, and for damages for its detention. It appeared by the officer's return that he had replevied the iron and delivered it to the plaintiff, and, by an indorsement upon the writ, that the plaintiff had received it; but it also appeared that from the time of its importation by the defendant it had been in bond under the laws of the United States; that the plaintiff had never obtained actual possession, the warehouse receipt and the custom-house delivery order, the possession of which the parties regarded as a necessary means of obtaining possession, and without which the warehouseman refused to deliver, being in the possession of the defendant, who refused to transfer them to the plaintiff; held, that the defendant, having prevented the plaintiff's obtaining actual possession of the property, was not entitled to damages for its detention; and that, as there had never been an actual change of possession, an order for return was unnecessary.

Under the Michigan statutes a defendant who waives a judgment for the return of the property or for its value is not entitled to damages. Bateman v. Blake, 81 Mich. 227.

[2] Suydam v. Jenkins, 3 Sandf. 614; Smith v. Dillingham, 33 Me. 384; Barnes v. Bartlett, 15 Pick. 71; McCabe v. Morehead, 1 W. & S. 513; Wood v. Braynard, 9 Pick. 322; Miller v. Whitson, 40 Mo. 97; Hooker v. Hammill, 7 Neb. 231; Moore v. Kop-

damages for the interruption of his possession, the loss of the use of the goods from the time they were replevied till their restoration, and for any deterioration resulting from the taking or detention, or plaintiff's misuse or want of care.[1] The replevin is to the defendant a wrong; and he is entitled to [560] damages on the same principles as a plaintiff.[2] If the property is valuable for use, the value of the use may be recovered instead of interest.[3] This right is not vested in an officer who prevails in a replevin suit as against a person who has the right to the use because he has no title to the property held by him under process and no right to use it or recover for being deprived of its use. The fact that he may be made to respond to somebody for its use if his levy fails to protect him is immaterial.[4] But if property is taken from an officer by a stranger and his action is dismissed and a return awarded the damages assessed in the defendant's favor, it has been ruled, should include the value of the use. In such a case the officer holds the entire proceeds of the property, in-

ner, id. 291; Hurd v. Gallaher, 14 Iowa, 394; Washington Ice Co. v. Webster, 62 Me. 341.

In Atherton v. Fowler, 46 Cal. 323, the action was brought for hay in May, 1863, and the plaintiff obtained possession at the commencement of the suit, which was finally tried in April, 1871. The defendant obtained a verdict, and judgment thereon was rendered in October, 1872. The value of the hay was taken in pursuance of the opinion in Page v. Fowler, 39 Cal. 412, about a year subsequent to the taking by the replevin, with a view to giving the owner the price he would have realized if he had kept it, and interest on that value from the commencement of the suit; held, it was erroneous to add interest from a date prior to that when the value was taken. Interest was computed on the verdict to the date of the judgment, and this was held erroneous. But see McCarty v. Quimby, 12 Kan. 494; Smith v. Robey, 6 Heisk. 546.

[1] Chapman v. Kerr, 80 Mo. 158; Mix v. Kepner, 81 id. 93; Washington Ice Co. v. Webster, 62 Me. 341; Hinchey v. Koch, 42 Mo. App. 230; Whitwell v. Wells, 24 Pick. 25; Beveridge v. Welch, 7 Wis. 465.

In Massachusetts depreciation in the value of property is not an element of damages in the defendant's favor except in a suit on the bond. Citizens' Nat. Bank v. Oldham, 136 Mass. 515.

[2] Suydam v. Jenkins, 3 Sandf. 614; Berghoff v. Heckwolf, 26 Mo. 512; Fallon v. Manning, 35 Mo. 274; McArthur v. Lane, 15 Me. 245; Pierce v. Van Dyke, 6 Hill, 613; Dawson v. Wetherbee, 2 Allen, 461; Jansen v. Effey, 10 Iowa, 227; Wilkins v. Treynor, 14 Iowa, 391; Anchor Milling Co. v. Walsh, 20 Mo. App. 107. See *ante*, § 1152.

[3] Boston Loan Co. v. Myers, 143 Mass. 446; Allen v. Fox, 51 N. Y. 562. See *ante*, § 1144.

[4] Tandler v. Saunders, 56 Mich. 142.

cluding such damages, for the benefit of those who have a right to it.[1] An officer who holds property under process against a mortgagor is entitled, on succeeding against the mortgagee, to recover the amount called for in his writ if the value of it equals or exceeds that sum.[2] In some states judgment for return is not rendered, but for the value, and it is assessed at the time of the replevy together with interest.[3] In others the value is assessed for an alternative judgment to be paid or collected if return cannot be had; or because it can be and is waived. In the former case it is assessed at the date of the trial;[4] in the other when taken, and then interest is added.[5] Where the alternative judgment is given, the value, being collectible only on the contingency of the specific property not being delivered or returned, must be separately assessed.[6] The party injured is entitled to full indemnity for the injury he suffers in consequence of being deprived of his goods by means of a replevin; and the time when their value will be estimated and the manner of the estimate may be varied to meet any peculiarities of the case with a view to adjusting the compensation to the actual loss.[7] Such damages

[1] Broadwell v. Paradice, 81 Ill. 474; Burt v. Burt, 44 Mich. 82.

[2] Kersenbrock v. Martin, 12 Neb. 374.

[3] Messer v. Bailey, 31 N. H. 9; Kendall v. Fitts, 22 N. H. 1; Bell v. Bartlett, 7 N. H. 178.

[4] Chapman v. Kerr, 80 Mo. 158; Mix v. Kepner, 81 id. 93 (overruling earlier cases); Walls v. Johnson, 16 Ind. 374.

In Treman v. Morris, 9 Ill. App. 237, it was held that the defendant was entitled to the value of the property when taken, and interest from that time; and if the property increased in value, the increase at the date of the order for return should also be added.

[5] Just v. Porter, 64 Mich. 565; Nitz v. Balton, 71 id. 388; Hanselman v. Kegel, 60 id. 550; Berthold v. Fox, 13 Minn. 501; Brizsee v. Maybee, 21 Wend. 144; McCabe v. Morehead, 1 W. & S. 513; Swift v. Barnes, 16 Pick. 194; Ormsbee v. Davis, 18 Conn. 555; Walker v. Osgood, 53 Me. 422; Smith v. Dillingham, 33 Me. 384; West v. Caldwell, 23 N. J. L. 736; Huggeford v. Ford, 11 Pick. 223; Hopkins v. Ladd, 35 Ill. 178; Barnes v. Bartlett, 15 Pick. 71; Hurd v. Gallaher, 14 Iowa, 394; Middleton v. Bryan, 3 M. & S. 155; Story v. O'Dea, 23 Ind. 326.

In Darling v. Tegler, 30 Mich. 54, it was held that where judgment is given in favor of a defendant for the value of his special interest that includes all his damages, and to give other damages is erroneous.

[6] Sayers v. Holmes, 2 Cold. 259; Pickett v. Bridges, 10 Humph. 173.

[7] Parker v. Simonds, 8 Met. 205; Eaton v. Caldwell, 3 Minn. 134; Berry v. Vantries, 12 S. & R. 89; Backenstoss v. Stahler, 33 Pa. St. 257.

[561] are frequently recovered most beneficially in an action on the bond, as where there is a judgment for return simply and return is not effected.[1] But this is not always the case, since the scope of recovery depends on the terms and comprehensiveness of the obligation and the statute governing the remedies.[2]

§ 1158. **Special and consequential damages.** In the action of replevin under statutes or a practice allowing a recovery of the damages for detention, special and consequential, and even exemplary, damages[3] may be recovered. The expenses actually incurred of procuring teams and appurtenances for the purpose of removing ice, the subject of the suit, were allowed to be recovered, they having been rendered useless by the wrongful replevin.[4] But damages resulting from the possible loss of customers were too remote and contingent, and losses caused by inability to fulfill existing contracts were not recoverable because the supply necessary for that purpose might have been obtained in the market.[5] A manufacturer from whom the entire machinery of his cloth-printing factory, in running order and actual use, was replevied, including steam apparatus for supplying the power, took judgment for a return, and for damages assessed by computing interest on the appraised value of the property from the date of the writ to that of the judgment, under an agreement expressly provided to be without prejudice to his action on the replevin bond. On demand of the officer upon the writ of return tender was made of all the machinery except the steam apparatus, with an offer to pay the value of that or replace it. The tender was not accepted; and the writ was returned in no part satisfied, and suit brought on the bond. It was held, 1, that the officer had a right to treat the property as an organized whole, and re-

[1] Vol. 2, §§ 501–504; Swift v. Barnes, 16 Pick. 194; Howe v. Handley, 28 Me. 251; Smith v. Dillingham, 33 Me. 384. See Hemstead v. Colburn, 5 Cr. C. C. 655; also Nickerson v. California Stage Co., 10 Cal. 520.

[2] See White v. Van Houten, 51 Mo. 577.

[3] McCabe v. Morehead, 1 W. & S. 513; Cable v. Dakin, 20 Wend. 172; Brizsee v. Maybee, 21 Wend. 144.

Sickness resulting from the manner in which a writ of replevin is served cannot be recovered for unless it is specially pleaded. Bateman v. Blake, 81 Mich. 227.

[4] Washington Ice Co. v. Webster, 62 Me. 341.

[5] Id.

fuse the offer to return part of it; 2, that the manufacturer's claim for damages in the action of replevin included compensation for the general inconvenience and loss resulting from the interruption of his possession, and for the expense, trouble and delay of restoring the factory to its former condition, as well as interest on the value of the property; [562] but 3, that the claim was an entire claim, and no portion of it recoverable in the suit on the bond, notwithstanding the proviso in the agreement under which he took his judgment; and 4, that the measure of his damages in the suit on the bond was the sum which, under the ordinary circumstances attending a sale, might reasonably be agreed on as a fair price for the property between a seller desirous of selling and a buyer desirous of buying it as a whole, to be used in the place from which it was taken and for the purposes for which it was intended and arranged.[1] An interesting case arose in Nevada illustrating, and containing an instructive discussion of, the distinction between matters which must be estimated as part of the value if return cannot be had, and damages which are to be paid or collected in any event. An action of replevin was brought for a flock of sheep, and was pending for several years. The defendant, in her answer, claimed to be their owner, and demanded a return. She succeeded in establishing her right, and was entitled to that judgment. During the pendency of the action the flock, which was large, was largely increased by lambs; and the plaintiff yearly derived considerable sums from the wool which he sheared and marketed; and during this period many of the sheep died without his fault, and he bestowed much care, labor and attention, and incurred considerable expense in the keeping, preservation and management of the flock, and in shearing and marketing the wool. These facts were the subject of supplemental answers. The trial court treated not only the flock replevied, but the lambs added by natural increase, and the wool shorn after the plaintiff got possession, as constituent parts of the property in controversy, and adjudged a return of each separately, or, if it could not be had, that their value respectively be collected. Evidence of the necessary cost and expense of keeping and preserving the flock, raising the lambs, shearing and market-

[1] Stevens v. Tuite, 104 Mass. 328.

ing the wool, etc., was rejected.[1] On appeal it was held that [563] the judgment was erroneous; that the lambs were a constituent part of the property, and might be included in the judgment for return, and the alternate value be paid,[2] but that the wool must be recovered for as damages for the use of the property, and from these damages should be deducted the reasonable and necessary labor and expense of keeping, preserving and managing the flock, and shearing and marketing the wool. It was also considered that the plaintiff should not be charged with the loss of such sheep as had died without his fault.[3]

[1] The following is section 202 of the Nevada practice act: "In an action to recover the possession of personal property judgment for the plaintiff may be for the possession or the value thereof in case a delivery cannot be had, and damages for the detention or the value of the use thereof. If the property have been delivered to the plaintiff, and the defendant claims a return thereof, judgment for the defendant may be for the return of the property, or the value thereof in case a return cannot be had, and damages for the taking and withholding the same, or the value of the use thereof."

[2] Deck v. Smith, 12 Neb. 389.

[3] Buckley v. Buckley, 12 Nev. 423. Leonard, J., speaking for a majority of the court, said: "If the original band belongs to the respondent, it is certain that she has rights in the lambs and wool which the law will protect in this or a subsequent action. All the rights of the parties should be settled in one action if this can be done without doing violence to well-established rules of practice or going counter to provisions of law. As a rule in actions of this character, and such is the case here, all, or nearly all, damages for detention, or for the use of the property, accrue after the defendant files his answer. In such cases he is unable to insert in his pleadings even a proper general allegation of damages; and certainly in cases where he is obliged to plead special causes of damages, he oftentimes may be unable to frame his pleadings so as to obtain full compensation for his injury. And yet the statute declares that he may have damages for taking and withholding the property or the value of its use in every case. . . . It is plain that the 'damages for taking and withholding' referred to are such as accrue after the action is commenced. They are damages which accrue after the property has been delivered to the plaintiff, and that can never be done until after the commencement of the action. So, aside from the general rule allowing damages accruing after the commencement of the action, where the subsequent damages are the mere incident or accessory of the principal thing demanded, or [564] where no subsequent action can be maintained for them, it is plain that the statute, in a proper case, and with proper pleadings, permits judgment in favor of defendant for damages that accrue subsequent to the commencement of the action on account of the wrongful taking and withholding of the property in dispute by

The defendant is entitled to damages for the time the sheriff holds the property for the plaintiff to give security, [569]

the plaintiff. Admitting as a fact, then, that the original band belonged to respondent at the time they were replevied by the appellant, as the jury found, and so continued until the trial, it follows that respondent was entitled to judgment for their return, if a return could be had; otherwise, their value, together with such damages as with their return in one case, or their value in the other, was necessary in order to completely indemnify her on account of the wrongful act of the appellant. And under the maxim *partus sequitur ventrem*, her rights relative to the increase were precisely the same as those just stated concerning the original flock." Newman v. Jackson, 12 Wheat. 570; Seay v. Bacon, 4 Sneed, 103; Jordan v. Thomas, 31 Miss. 558; McVaughten v. Elder, 2 Brev. (S. C.) 12; Tyson v. Simpson, 2 Hayw. (N. C.) 321. The learned judge quoted what was said in Jordan v. Thomas as follows: "It may be true, as a general proposition, that things which did not exist at the commencement of the suit could not be embraced in the judgment of the court. But this rule, however correct it may be as a general rule, can have no application to that which is merely an incident to the subject-matter of the suit. For instance, a suit may be commenced to enforce the payment of a debt the day after it is due. No interest has then accrued, yet interest is recovered, not that it existed when the suit was commenced, but because it is an incident to the subject-matter. So in regard to the hire of slaves, to recover which an action is brought; and, indeed, we may say in regard to everything which is but an incident, or profits accruing pending the litigation. When, therefore, the jury determined the plaintiff's rights to the slave, they at the same time determined that which was incidental to the right. The title to the mother carried with it a title to her offspring when born. Having a right to the mother, the plaintiff could recover that which the mother produced pending the suit, and the only question which could arise would be whether it was even necessary [565] to name the offspring in the judgment of the court." Referring to the other subject of the judgment below, the wool, he continued: "But respondent could not recover a valid judgment for the wool itself, for the reason that the moment it was shorn it became separate and independent property; and thereafter, in this action brought prior to shearing to recover the sheep, etc., it could no more be recovered in specie than could wool shorn from other sheep belonging to respondent but in the wrongful possession of appellant. As to the wool, respondent's remedy was a judgment in damages for taking and withholding the sheep or for the value of their use. If the property sued for had been milch cows, it would hardly be claimed that judgment for a return of their milk, or the butter or cheese made therefrom, would be proper in an action to recover the cows. In that case respondent's remedy would have been a judgment in damages for withholding the cows or for the value of their use. It is equally so in this case as to the wool.

"Briefly stated, then, conceding the verdict of the jury to be correct as to the ownership of the original flock, respondent was entitled to a

[570] where he fails to furnish it, and the property is returned to the defendant and he recovers in the action. He is en-

judgment for the return of them, and the increase, if a return could be had, together with such damages as were necessary, if any, with the return, to indemnify her for all certain, actual losses sustained on account of the unlawful taking and withholding, or on account of the use of the sheep. If a return could not be had she was entitled to judgment for the value of such portion of the original band and increase as appellant was bound to return or pay for, together with such damages as were necessary, with the value, to indemnify her for all certain actual losses sustained." Returning to the assignment of error for rejection of testimony of the cost and expense of plaintiff's care and labor in the management of the sheep, shearing and marketing the wool, as well as to the general question of damages, the learned judge said: "What the rule may be where the elements of fraud, malice and wrong may accompany the taking it is unnecessary to in quire, for in this case no facts appear which take it out of the general rule [566] stated. We find no evidence that in commencing the action and taking possession of the original band according to the forms of law, or the subsequent retention of the property in controversy, appellant was actuated by any improper motive, or that he intentionally committed a wrong upon respondent. . . . Upon the question of 'damage for taking and withholding the property, or the value of its use,' we shall therefore consider the case stripped of all elements of exaggeration on the part of appellant. What then were the rights of the respective parties in the matter of damages, considering the value of the property in dispute as found by the jury, satisfactory to both parties? . . . The law aims to make good the certain, natural and proximate losses of the one, but there it stops, unless after full compensation is made there yet remains in the hands of the other a pecuniary benefit or profit. In such case we think with the court in Suydam v. Jenkins, 3 Sandf. 614, the wrong-doer should be required to pay beyond indemnification to the extent of his gains. No person should be permitted to enrich himself by the wrongful use of another's property, no matter how innocent his intentions may have been in taking and withholding it; and certainly, if he has acted in good faith, with equal truth it may be said that he should not be compelled at a personal sacrifice to pay beyond the actual damage sustained in consequence of his conduct. This case is in many respects analogous to that class of cases, above referred to, where the property honestly, but wrongfully, converted has been improved and its intrinsic value enhanced by the labor and expenditure of a wrong-doer. The value of the band at the time of the trial was much greater than that of the original flock, and the value of the wool being added the difference is increased still more. In such cases it is by no means an unvarying rule in trover even to give to the successful party the benefit of the proper necessary labor and expenditure of the other in addition to his real damages; and in replevin, when punitory damages are not allowable, if a return cannot be had, the rule very generally adopted, and certainly the one most consonant with the

titled to damages for that disturbance of his possession; [571] and he may recover interest on the value and any depreciation

[567] principle of awarding complete indemnity to the owner, and doing no injustice to the wrong-doer, is to allow the latter out of the enhanced value all of his legitimate outlay, or such portion as remains after the indemnification of the former is assured. There are reported cases which not only give to the rightful owner the property itself in its improved state if a return can be had, but also its enhanced value if it cannot be returned, without any deduction for the expenditure of the wrong-doer after the true owner has been fully compensated for his actual damages. To this rule we cannot give our concurrence in cases like this, for it would confer upon one party more than he can in justice demand, and take from the other that which he has a right to call his own.

"It is generally and perhaps always true, so long as the identification is practicable, or until the original property taken becomes of insignificant importance in comparison with the article in its improved and altered condition, that the owner is entitled to that of which he has been wrongfully deprived without making compensation to the wrong-doer for his expenditure, for the reason that as a rule the property to which he is entitled, and of which he has been deprived without fault on his part, cannot be separated from that portion which is not in fact his, and, in order to take the former, he is compelled to take the latter. Under such circumstances the wrong-doer must lose, and the rightful owner gain. But when compensation in money is to be given for the property taken, together with damages for taking and withholding the same, or for the value of its use, a different rule in reason and justice should, and in our opinion does, obtain, by great weight of authorities. In such case the rights of the respective parties can and should be protected. Single v. Schneider, 24 Wis. 300; 30 id. 570; Hungerford v. Redford, 29 Wis. 345; Suydam v. Jenkins, 3 Sandf. 614; Moody v. Whitney, 38 Me. 178; Hyde v. Cookson, 21 Barb. 103; Wetherbee v. Green, 22 Mich. 311; Herdic v. Young, 55 Pa. St. 178; Curtis v. Ward, 20 Conn. 206; Note to Baker v. Wheeler, 8 Wend. 508; Sedgw. on Meas. Dam. 501, and note 3. Applying these principles to this case, if a return could not be had, and considering respondent's admissions as to the losses of sheep from year to year, she was entitled to judgment [568] for the value of the original flock and their increase, less such losses as occurred, together with a sum equal to legal interest upon such values from the time appellant became possessed of the original band and the increase respectively, as damage for the taking and withholding the property, or for the value of its use; for to this much, at least, the rightful owner is always entitled in an action of this kind. From the balance of the value of the entire flock and the wool, at the time of trial, if in possession of appellant, and if not, the amount received therefor by him, or the amount he could have received, appellant was entitled to deduct his proper legitimate expenses in the care and support of the sheep, their shearing and the disposition of the wool; and the remainder, if any, should have been added as damages to

tion in consequence of the taking and expense of replacing the property.[1]

§ 1159. Mitigation of damages. The plaintiff may show on the assessment of value and damages under a judgment for

the amount already deducted, equal to interest, making respondent's entire damages for the taking and withholding the sheep, or for the value of their use. If a return could have been had, it should have been left to the jury to decide, according to the principles herein stated, whether or not respondent, in addition to a return, was entitled to damages, and if so, the amount. If the value of the flock to be returned was less at the time of the trial than the aggregate value of the original band and the increase (the necessary losses being deducted), together with legal interest upon the value of the original band, and of the increase from the time appellant became possessed of each, respectively, until the trial, then certainly she was entitled to the difference in addition to a return, and after deducting such difference, if any, from the value of the wool, appellant should have been allowed from the balance his proper necessary expenditures, and the remainder, added to the difference just stated, should have been awarded to respondent as damages."

Beatty, J., dissented from some of the views of the majority, and in the following excerpt from his opinion the grounds of his dissent are pithily stated: "I think it is a correct doctrine that he whose breeding ewes have been wrongfully taken may recover in specie not only the original flock but also their natural increase, in an action brought before the birth of the young; and whether or not it is necessary in such a case for the owner to file a supplemental complaint or answer, setting up the fact of such natural increase, it is at least certain that, if he is permitted to do so, that furnishes no ground of complaint to the opposite party. The principle from which this conclusion follows is that the identity of the flock remains notwithstanding its natural increase and decrease; lambs may be born and old sheep may die, but the flock remains the identical thing it was in the beginning. If this is the principle, and I can conceive of no other upon which a recovery of the flock in specie can be allowed, there are other consequences which also necessarily flow from its adoption. One is that where proof of the value of the flock is made at the time of the trial, account must be taken, not only of the natural increase of the flock, but also of its natural decrease. If the value of the lambs is taken into the account, the value of the old sheep that have died from natural causes must be deducted. Up to this point I understand there is no difference between myself and the court. But I go further. The verdict of the jury in cases of this character, when it is in favor of the party out of possession of the property, must include a finding as to the value of the property and as to the damages of the owner on account of the taking and detention. This is what the jury has to decide, and it is all it has to decide. It is not called upon to determine, and it cannot determine, whether a return of the property can be had or not,

[1] Morris v. Baker, 5 Wis. 389.

return and damages for the detention, that shortly after the delivery of the property to him the defendant repossessed

and it cannot, therefore, assess damages in an amount to fit the case of a return, and in another amount to fit the case where a return of the property cannot be had. The value of the property must be fixed in one sum without any alternative, and the amount of the damages must be fixed in one sum without any alternative. This I understand to be the law, and this so far as I know is the universal practice. I have seen no procedure for a judgment awarding damages in one amount to be recovered with the property, and damages in a different amount to be recovered with its assessed value in case a return cannot be had. . . . At what time is the condition and value of the property to be estimated? It has been twice decided in this court, and as I think correctly decided, that the condition of the property at the time of the trial can alone be considered in assessing its value — its value at the date of the trial is the value which the jury must fix by its verdict. Bercich v. Marye, 9 Nev. 312; O'Meara v. North Am. M. Co., 2 Nev. 112. Applying the rule of these decisions to this case, it appears clear to my mind that the jury should have assessed the value of this flock of sheep in its condition at the time of the trial. In doing so they were bound to make allowance not only for the natural losses by the death of the old sheep, but for the actual decrease of the flock from whatever cause, accident, sales or wilful destruction by the wrong-doer. The only flock of sheep that could be returned was the actual flock in existence and capable of identification; and the only value that could be assessed to be recovered as an alternative, in case a return could not be had, was the value of that actual flock. To hold otherwise would lead to this consequence: Either that the damages would have to be assessed in two different sums — one to be recovered in case the property was returned, and the other in case it was not returned — or else the amount actually received by the defendant would vary according to her ability or inability to find and identify her sheep, or according to the choice of the plaintiff to return the property or to pay its assessed value. To my mind it seems to be an absurd conclusion that the amount of compensation to be recovered by the injured party in cases of this kind is to be left to depend on his good or bad luck after judgment; and as for a judgment for damages in alternative amounts, there is, as I have said, no precedent for such a judgment, to my knowledge, and there is no provision for such a judgment in the statute. Assuming then that the duty of the jury was to find the value of the flock as it existed, capable of identification, at the time of the trial, the other special finding which they were required to make was the damage which the plaintiff had suffered by reason of the taking and detention of the property.

"Her damages consisted, in case the value of the flock at the time of the trial was less than that of the original flock at the time of the taking, of the amount of such depreciation, plus the interest on the original value, or the amount of the depreciation plus the value of the use of the flock, if that was proved to be greater than the interest. In case the value of the flock at the

himself of the greater part of it.[1] It is held in some states that where an animal replevied dies without the fault of the plaintiff while in his possession pending the suit, the fact may be proved to exonerate him from liability for its value.[2] In Arkansas it was held that death of the property after judgment does not relieve the party bound to deliver.[3] And in Kentucky and Alabama the party having a wrongful possession is liable for the property though it perish without his fault.[4]

time of the trial was greater than that of the original flock at the time of the taking, then her damages would have been the amount of legal interest, or the value of the use of the flock, if that was greater than the interest, less the amount of the appreciation in the value of the property. If the value of the flock at the time of the trial was greater than its original value, together with the interest or the value of the use, then she was entitled to no damages. It is at this point that the widest divergence of opinion occurs between myself and the court. We are entirely agreed that the rule of the statute is plain; that aside from such special damages as may be recovered for depreciation in the value of the property between the time of taking and the trial, the owner is not entitled to recover both interest on its value and the value of its use. We agree that he may have interest at least, and, if he proves that the value of the use is greater than interest, that he may recover that in the place of, but not in addition to, interest. What we differ about is the practical operation of the rule announced in the majority opinion, that the defendant, if she was the owner of the sheep, was entitled to recover at least the value of the original flock and of the increase, together with interest on such values. In my opinion this is allowing double damages — interest and value of use. The increase of a flock by breeding is a part of the use of the flock just as much as the shearing of the wool is a part of the use. He who gets the increase gets the value of the use as much as he who gets the value of the wool that is shorn. Interest is allowed as damages on the theory that the owner might have sold his property and invested the value at interest; the value of the use is allowed upon the theory that he would have kept his property and got the advantage of its use. He is allowed in claiming damages to take either position, but he cannot take both. No man can sell his flock and invest the proceeds at interest, and at the same time keep his flock and get the increase." See Sherman v. Clark, 24 Minn. 37.

[1] DeWitt v. Morris, 13 Wend. 496.

In Case v. Babbitt, 16 Gray, 278, the action was against the officer who served the writ, by the defendant in replevin, for taking an informal bond, after obtaining a dismissal of the action on that ground. The court held that the officer might show in mitigation that the property replevied, at the time of the service of replevin, was, and has since remained, the property and in the possession of the plaintiff in the replevin.

[2] Walker v. Osgood, 53 Me. 422. See *ante*, § 1151.

[3] May v. Jameson, 11 Ark. 368.

[4] See *ante*, §§ 1151–1153.

In Illinois it is held that where a replevin suit is dismissed, and the court proceeds to assess the plaintiff's damages for the detention of the property, it is competent for the plaintiff to prove that the defendant is a mere pledgee of the property to secure a debt from the plaintiff, as the defendant would not in such a case be entitled to recover anything for its use.[1] In Michigan where a plaintiff is nonsuited the defendant has, by statute, a right to a return of the property, or to waive return and recover the value. If he waives a return he is entitled to a judgment for its full value; and [572] in an action on the replevin bond afterwards the measure of damages is the amount of the judgment; the obligors cannot show in mitigation that the defendant in replevin was but a part owner of the property.[2] A plaintiff cannot mitigate his liability to the defendant by delivering a portion of the property to the receiver of the latter's vendor unless it is established, between the receiver and the defendant, that the former was entitled thereto.[3]

§ 1160. Recovery affected by interest in property. Where the plaintiff or defendant is entitled to recover the value the same principles apply as in trover or trespass in regard to recovering full value or only that of his special interest. If the party made liable is a stranger, and has no right or title whatever in the property, the judgment will be for the full value to the party whose possession or right thereto has been invaded.[4] If a party has a general or special property in goods, either alone or in connection with others, he can maintain an action of replevin in the detinet against a stranger; and the mere fact that the plaintiff owns the property with others, and not alone, is not a bar, either under the plea of non-detinet or when it is specially pleaded; but it is proper matter of a plea in abatement.[5] On the other hand,

[1] McArthur v. Howett, 72 Ill. 358. See Lewis v. Lochiel Iron & S. Works, 129 Pa. St. 238; *ante*, § 1157.

[2] Williams v. Vail, 9 Mich. 162.

[3] Yallop-De Groot Co. v. Minneapolis, etc. Ry. Co., 33 Minn. 482.

[4] Allen v. Butman, 138 Mass. 586; Stevenson v. Lord, 15 Colo. 131; First Nat. Bank v. Crowley, 24 Mich. 492; Frei v. Vogel, 40 Mo. 149; Dilworth v. McKelvy, 30 Mo. 149; Nelson v. Leichtenmeyer, 49 Mo. 56; Fallon v. Manning, 35 Mo. 271; Morss v. Stone, 5 Barb. 516.

[5] Wright v. Bennett, 3 Barb. 451.

If the plaintiff is a lienholder and the property has been sold for more than his claim and interest thereon,

where the party recovering has but a limited interest, and is under no duty to account for any surplus to any other party, and the defendant represents that residue, the recovery will be limited to the special interest of the prevailing party.[1] If property is replevied from an officer who holds it under process, with no other interest in it than that of the creditor whom he represents, and the officer is successful, his recovery cannot exceed the amount owing by the debtor and the costs of the suit.[2] The amount called for by writs which are received by an officer after he has been served with process in the replevin suit and has delivered the property to the plaintiff is not to be regarded.[3] If the defendant's right of possession expires before trial judgment for return will not be ordered and damages for detention will be limited accordingly.[4] The same rule applies to a plaintiff when he is entitled to recover value and damages; he can only recover the value of the right while it existed and damages for detention.[5]

[573] § **1161. Recoupment.** Set-off does not exist in replevin, but when the goods are the subject of a lien or charge, it may be enforced by way of recoupment; for the charge is inseparable from the thing itself, and, therefore, when the value of the thing is to be allowed in damages the charge may be admitted to reduce them by way of recoupment in order to do justice to both parties.[6] So where property is distrained for rent and replevied, the plaintiff may answer the justification of seizure for rent by way of recoupment that the landlord has failed to keep his covenants in the lease.[7]

the amount of the claim with interest may be recovered under an ordinary petition. Dolan v. Van Demark, 25 Kan. 304.

[1] Hickman v. Dill, 32 Mo. App. 509; Baldridge v. Dawson, 39 id. 527; Allen v. Judson, 71 N. Y. 77; Lillie v. Dunbar, 62 Wis. 198; Cruts v. Wray, 19 Neb. 581; Schwab v. Owens, 10 Mont. 381; Union L. Co. v. Tronson, 36 Wis. 126; Hass v. Prescott, 38 Wis. 146; Wolfley v. Rising, 12 Kan. 535; Weber v. Henry, 16 Mich. 399; Jennings v. Johnson, 17 Ohio, 154; Scrugham v. Carter, 12 Wend. 131; Dodge v. Chandler, 13 Minn. 114; Walrath v. Campbell, 28 Mich. 111. See Veazie v. Somerby, 5 Allen, 280; Empire State F. Co. v. Grant, 44 Hun, 434.

[2] Clark v. Lamoreaux, 70 Wis. 508; Smith v. Phillips, 47 id. 202; Sloan v. Coburn, 26 Neb. 607.

[3] Sloan v. Coburn, 26 Neb. 607; Merrill v. Wedgewood, 25 id. 283.

[4] Deal v. Osborne, 42 Minn. 102; Wheeler v. Train, 4 Pick. 168.

[5] Barham v. Massey, 5 Ired. 192.

[6] Macky v. Dillinger, 73 Pa. St. 85; Babb v. Talcott, 47 Mo. 343.

[7] Lindley v. Miller, 67 Ill. 248; Fairman v. Fluck, 5 Watts, 516;

§ 1162. Part of property found for each party. On the issue made by the plea of property in the defendant a jury may find that a part of the property belonged to the plaintiff, and assess damages for its detention; and that the residue did not belong to the plaintiff and assess damages for the defendant. In such case the verdict is considered as rendered upon an issue, because effect is given to it in the same manner as though the declaration had contained two counts for the respective articles, or the defendant had avowed for each separately.[1] Each party may have judgment for damages and costs as far as he is successful.[2] And doubtless the general power of the court will extend to the setting off of these mutual recoveries, and issuing execution for the balance where no reason exists for a contrary course.[3]

Phillips v. Monges, 4 Whart. 226; Peck v. Brewer, 48 Ill. 55; Peterson v. Haight, 3 Whart. 150; Warner v. Caulk, 3 Whart. 193; Nichols v. Dusenbury, 2 N. Y. 283; Guthman v. Castleberry. 49 Ga. 272; Wade v. Halligan, 16 Ill. 508; Hatfield v. Fullerton, 24 Ill. 279.

[1] Williams v. Beede, 15 N. H. 483; Powell v. Hinsdale, 5 Mass. 342.

[2] Id.; Brown v. Smith, 1 N. H. 36; Wright v. Mathews, 2 Blackf. 187; Clark v. Keith, 9 Ohio, 72; Seymour v. Billings, 12 Wend. 286, Vollum v. Simpson, 2 Bos. & P. 368; McLarren v. Thompson, 40 Me. 284; Poor v. Woodburn, 25 Vt. 239.

[3] Poor v. Woodburn, *supra*.

CHAPTER XXX.

FRAUD.

§ 1163–1165. Scope of the natural and proximate consequences.
1166. False representations.
1167. Same subject; materiality.
1168. Same subject; reliance upon representations.
1169. Same subject; defendant's belief in representations.
1170. Same subject; representations need not be made to plaintiff.
1171. The measure of damages.
1172. Same subject; another rule.
1173, 1174. Same subject; other elements of damage.
1175, 1176. Remote and contingent damages.
1177. Expenses of litigation.
1178. Exemplary damages.
1179. Parties.
1180. Pleading.

§ 1163. Scope of the natural and proximate consequences. [574] Fraud is an odious tort, and when actual injury proceeds from it damages are allowed as for other tortious injuries. It is necessary to a cause of action for fraud that it produce actual injury; damage is of the gist of the action. In other words, fraud and damage must concur to give a cause of action.[1] Sometimes the wrong is done chiefly by the defendant; at other times the injured party is duped into becoming the immediate and unwilling agent to consummate it. He is entitled to recover compensation for the injury including all the natural and proximate consequences of the fraud. In determining the scope of these consequences the law applies no new principle; but that which guides and controls the inquiry of damages in all cases of tort, namely, that the wrong-doer is answerable for all those consequences of his misconduct which happens in the natural course of things, and were to be expected to ensue according to the general experience of mankind.[2] Whenever one person by breach of confidence, deception or departure from the course of fair dealing deprives

[1] Zabriskie v. Smith, 13 N. Y. 322; Bennett v. Terrill, 20 Ga. 83; Hanson v. Edgerly, 29 N. H. 343; Upton v. Vail, 6 Johns. 181; Tryon v. Whitmarsh, 1 Met. 1; Carvill v. Jacks, 43 Ark. 454; Holton v. Noble, 83 Cal. 7; Brown v. Blunt, 72 Me. 415.

[2] Vol. 1, § 15.

another of his property or any pecuniary advantage, the law gives the latter adequate compensation for the injury in damages as for a fraud. If the plaintiff or injured party is not chargeable with negligence in yielding to the deceit, it is immaterial whether the party who practices the fraud is the chief actor in causing the loss, or whether the injured party, while under the influence of the deception, contributes to his own injury in a manner which was antecedently probable and might and should have been foreseen. A few examples will make these propositions clear. An auctioneer pretended [575] to have received a bid not actually made, and thus ran up the price of the property he was employed to sell from $20,000, which was the last real bid, to $40,000. The vendee had no knowledge of this deception. In a suit for redress it was decreed that the vendor should refund $20,000, the excess above the highest real bid.[1] A broker undertook to invest money for a customer upon a safe bond, well secured by mortgage; he was employed by and received remuneration from a borrower, which he did not disclose to the lender, to whom he falsely represented that the security offered was ample. Such broker was held liable to make good the loss arising from the insufficiency of the security.[2] Another broker was employed to sell certain real estate under a contract by which he was to have as his commission all he could obtain above $6,000. He procured G. to become a joint purchaser with himself for $8,000, concealing from him that he was acting as the vendor's agent. After the consummation of the sale by which the vendor conveyed three-fourths to G., who paid $6,000, and one-fourth to the broker, who paid $2,000, and which was, according to the vendor's agreement, refunded to him as commission, it was held that the transaction as between the broker and G. was a fraud on the latter, and that the law would not permit the former to retain the advantage he had gained.[3]

§ 1164. Same subject. Where several persons are engaged in a joint enterprise for their mutual benefit each has a right to demand and expect from his associates good faith in all

[1] Veazie v. Williams, 8 How. (U. S.) 134.

[2] Turnbull v. Gadsden, 2 Strobh. Eq. 14; Bacon v. Bronson, 7 Johns. Ch. 194; Horne v. Walton, 117 Ill. 130; S. C., id. 141.

[3] Grant v. Hardy, 33 Wis. 668.

that relates to their common interest; and no one of them will be permitted to take to himself a secret and separate advantage to the prejudice of the others; and where, unknown to his associates, one causes to be transferred to the association property previously purchased by himself at a price exceeding that paid by him therefor, he is accountable to his associates for the profits thus made. Thus, four persons owning and having interests in certain oil lands which cost them about $30,000, agreed to combine their interests to organize [576] a company and transfer the land to it at a price largely above its cost, and divide the profits. To carry out this purpose they procured a subscription paper to be drawn up by which the subscribers agreed to pay the sums subscribed for "the purchase of property," specifying therein the lands mentioned, at the sum of $125,000. Each of them subscribed $5,000, and caused certain others to sign as decoy subscriptions for about one-half the amount to be subscribed. These subscriptions were not intended to be paid, and were not in fact paid, although so marked. The plaintiffs, induced to believe by the fraudulent assurances of one of the originators of the scheme and of their agent that the lands originally cost $125,000, and upon the belief that they became subscribers on a footing of equality with the others, subscribed also and paid in their subscriptions, as did others, to the amount required. The moneys so paid were received and divided by the four associates. A company was thereupon organized, the property transferred to it, and the stock taken in payment and divided among the subscribers, as well those who had not as those who had paid, in proportion to their subscriptions. The plaintiffs subsequently made loans to the company, and under executions issued upon judgments rendered thereon sold a portion of the lands. In an action for the fraud it was held that said four associates were each and all liable. 1st, because putting the subscription paper in circulation with their names subscribed, under the circumstances stated, was a gross fraud upon every subscriber ignorant of the facts; 2d, because the original purchases inured to the benefit of the *bona fide* subscribers, and in receiving and dividing the large profits a fraud was perpetrated upon them; 3d, because the four associates might be regarded as partners in that adventure, and all were

responsible for false representations made by either or by their agent; that the plaintiffs could not, on account of such fraud, recover all the moneys paid by them, because they could not restore said associates to the position they were in before the transfer to the company; but that such associates could be required to account for the profits made upon the lands thus fraudulently appropriated, and the plaintiffs could recover their *pro rata* share.[1]

§ 1165. Same subject. In such cases the fraud con- [577] sists in the wrong-doer appropriating to himself by deceptive practices profits belonging to the injured party; the undue gain of the defrauding party is the amount of the injury to the defrauded party. The latter is in all cases entitled to be made good for the injury suffered, and the advantage gained by the fraud is not the measure of that injury, though, as in the foregoing instances, the gain of one and the loss to the other may be the same amount. An interesting and instructive case arose in New Jersey, and was decided in the court of errors and appeals in 1869. As an example it illustrates the scope of natural and proximate consequences taken into account to give compensation for injury and loss caused by fraud. The defendant had purchased in connection with another party a tract of oil lands. Proposing to form an oil company, he applied to the plaintiff and solicited him to become a member. The defendant represented that the original cost of the land was $28,000, and that the scheme would require a working capital of $4,000, making the amount of immediate investment $32,000. His proposition was to divide the property into eight shares of $4,000 each, one of which he offered to the plaintiff, who accepted and paid for it. In a few months the associates finding themselves in debt each paid in the further sum of $500. A small portion of the property was subsequently sold with the assent of all the members for $16,000. The property purchased originally had been conveyed to the defendant in trust for the members of the association. The speculation turned out a failure. The false representation relied on to support the action for fraud was

[1] Getty v. Devlin, 54 N. Y. 403. See Pratt, 45 Minn. 215; Gruber v. Baker, 20 Nev. 453. Pittsburg Mining Co. v. Spooner, 74 Wis. 307; St. Paul Distilling Co. v.

that relating to the cost of the property. The real price paid did not exceed $18,000. Other facts in the case are referred to as giving this false representation force to induce the plaintiff to make the purchase at the price paid. The trial court instructed the jury that the proper measure of damages was the entire loss sustained by the plaintiff in the transaction into which he was inveigled by the fraud of the defendant. A verdict was given accordingly, but erroneously ignoring the value of the plaintiff's interest in the land standing in the defendant's name in trust. The defendant contended for reversal on the ground that the proper measure [578] of damages was one-eighth of the difference between $18,000, the real cost of the property, and $28,000, the false price, constituting the fraudulent representation. The measure of liability adopted was held erroneous.[1]

[1] Crater v. Binninger, 33 N. J. L. 513. Beasley, C. J., said: "I can find nothing in the reason of the thing, nor in the precedents, for the adoption of such a standard. Regarding this case simply as a sale of lands, which is the view most favorable to the contention, this rule could not be in any case applied with propriety. The principle of justice, as I understand the law, is that the party injured is to be compensated to the extent that redress is awarded judicially for the actual loss sustained. The effort is to reach this measure as near as possible, and, unless in cases fit for punitive damages, nothing more than this is to be given. But the criterion contended for is in no sense compensation, but a mere arbitrary amount, bearing, it may be, no just relation to the *quantum* of damage. . . . Nor can I perceive how this rule sought to be established can properly be received for the purpose of establishing the ultimate limit to which damages are to extend. There appears no reason for circumscribing the damages of a vendee of property to the difference between the actual and represented cost price of the property. It is obvious that often his loss will exceed such bound. If the fraudulent representation has been the efficient cause of the purchase, the actual loss sustained would seem to be the proper and usual measure of redress. But if, on the other hand, the effect of the fraud has been merely to induce the payment of a larger price than otherwise would have been paid, then there would seem to be some substantial ground for the theory that the sum recovered should be the sum comprised in the overestimate of the cost of the property. In this latter case, upon the assumption that the sale would have taken place if the truth had been known, all that the fraud produced is the payment by the vendee of an excessive price; the reduction, therefore, of such excess would afford a fair reparation. But where the sale itself is the product of fraud, the vendee may either repudiate the contract, or claim, by way of damages, the difference between the price paid by him and the real value of the property which he

Where the vendor of a mare falsely and fraudulently represented her to be perfectly gentle and kind, and the purchaser, confiding in the truth of the representation, attempted to drive her, soon after the purchase, before a buggy, and she

has acquired. This I regard as the general and well established rule. But the present case has peculiar [579] characteristics which seem to require a modification of the ordinary rule by which damages are measured in cases of fraudulent sales. The plaintiff in this instance, by reason of the fault of the defendant, became something more than a mere purchaser of real estate. By the fraudulent practice of the defendant the plaintiff was induced to embark in a speculation. . . . The original understanding was that the land was to be held and improved, and a company was to be formed. The land was retained, except a small portion sold with the assent of all the parties, officers appointed and expenses incurred. These steps were taken in conformity with the scheme of proceeding adopted by the parties in the inception of the business. Starting, then, from the position that the jury on the trial of this cause have found the fact that the plaintiff was induced to enter into this speculation by the falsehood of the defendant, it seems to me clear that, in conformity to well settled rules, we must hold the defendant answerable for the loss of the moneys which the plaintiff without fault on his part lost in this speculation. The rule to be applied in cases of this character is that the defendant is responsible for those results, injurious to the plaintiff, which must be presumed to have been within his contemplation at the time of the commission of the fraud. When the defendant unlawfully enticed the plaintiff into this speculation he was aware that the plaintiff would put at risk such sums as he might commit to the venture. With this knowledge, by false pretenses, he drew the plaintiff in. On what principle is it, then, that the wrong-doer is not to be made to answer for the loss which he must have foreseen as probable, and which would not have happened without his fault? I think clearly these damages are not too remote. . . . The test is that those results are proximate which the wrong-doer, from his position, must have contemplated as the probable consequence of his fraud or breach of contract."

The foregoing case suggests the remark that courts differ as to the effect of the misrepresentation of the cost of property by a vendor (Van Epps v. Harrison, 5 Hill. 63; Sanford v. Handy, 23 Wend. 260; Medbury v. Watson, 6 Met. 246), and that, if such misrepresentation is held to be a fraud, its effect in inducing the [580] payment of a larger price is for the jury. There is certainly no legal relation between the amount of such overstatement and the price the defrauded party is thereby induced to pay; in other words, upon the proof of the misrepresentation a court cannot say, as matter of law, what amount, if anything, the vendee as a consequence consented to pay. There is, therefore, great force to the remarks made in the course of the chancellor's opinion in the same case. He said: "I think the rule laid down, although the proper rule in some cases, is not the rule to be applied in this case. The proper rule, upon principles of equity and justice, to be applied in all cases of

by running and kicking broke the buggy, and he broke one of his legs in jumping to the ground to save himself, he was held entitled to recover among other things for the injuries to himself and to the buggy, if the jury should find that they resulted from the viciousness of the mare and were the probable and natural consequences of the defendant's fraud.[1] The same rule and scope of responsibility is recognized in cases of sales

fraudulent misrepresentations in sales is to assess damages to the amount of the loss that was occasioned by the misrepresentation. In some cases these are the same as the loss in the whole transaction, in others not. They may be less or greater. They may be serious in amount when the whole transaction proves profitable; they may be slight when the loss in the operation is great. If a vendor represents that the assessments on lots sold are all paid, and the representation is false, the purchaser can recover if the assessments are but $500, and he makes a profit of $5,000 on the transaction. The true rule is the loss occasioned by the fraud and falsehood. This is the rule laid down by the supreme court of New York in an able opinion by Justice Cowen in Cary v. Gruman, 4 Hill, 627, and in the opinion of Justice Bronson in Van Epps v. Harrison, 5 Hill, 63, and by the supreme court of Massachusetts in Medbury v. Watson, 6 Met. 257. The rule laid down in many cases of sale that the damages should be the difference in the value of the thing sold as it was represented to be, and the value as it really was at the sale, is upon this principle. Stiles v. White, 11 Met. 358. But that rule will not apply here, nor in many other cases. In this case the land was just as valuable if Binninger paid only the price that he did pay as if he had paid the price he alleged he had paid. The principle is the same in all cases, but the rule or manner of applying it must differ with the circumstances of each case. In this case [581] Crater was willing to go in with Binninger at the cost price. Had Binninger told him truly that the cost was $18,000, he would no doubt have been willing to go in at that price, and would have paid at that rate; and if any subsequent loss was sustained would have had no claim against Binninger; and the true measure of damages appears to me to be the excess which he was induced to pay by the false and fraudulent representation of Binninger. If that was the difference between $18,000 and $28,000, the one-eighth would be $1,250, which, with the interest, would be the real damage. And the plaintiff would be entitled to recover these damages, although he had made double the amount out of the enterprise as clear profits. If, however, the jury should believe that Crater, if he had been told the real price, would not have entered into the transaction at that price, but would have taken a share in the lands only at the higher price, then his embarking in the transaction at all was the result of the fraud of Binninger, and the rule of the judge at the trial was the correct one, but it should have been so stated to the jury." See Rohrschneider v. Knickerbocker L. Ins. Co., 76 N. Y. 216.

[1] Sharon v. Mosher, 17 Barb. 518; Allen v. Truesdell, 135 Mass. 75.

of domestic animals known by the vendor to have a contagious disease, and either warranting them to be sound, or even concealing the fact of their having such disease. The association of such animals with others is a probable consequence of the sale, and the ignorance of the purchaser that they have the disease; and, therefore, such a sale is a fraud, and [582] the vendor is held liable for any loss in respect to the animals sold, as well as by communication of the disease to others.[1] Where the plaintiff had invented a certain medicine, and the defendant prepared an inferior article which he sold as and for the medicine of the plaintiff, it was held to be a fraud for which the plaintiff might maintain an action without proof of special damage.[2] The purchaser of a vessel falsely represented by the seller to be eighteen instead of twenty-eight years old, having sent her to sea before he had knowledge that such representation was false, was held entitled to recover as part of his damages those occasioned by such sending, she having been condemned in a foreign port.[3]

§ **1166. False representations.** A large number of the cases of fraud in which damages are sought are those where the deceit consists of false representations. The principle of compensation for the injury readily adapts itself to each individual case, though the class is of infinite variety; it embraces very obviously the direct and immediate injury; it extends also, as has been shown, to all the natural and proximate consequences, and these are construed to comprehend all those which ensue naturally from the fraud, and could be foreseen as its probable effect according to the usual course of events and the general experience. A count for deceit averring that the defendant, who was employed by the plaintiff to procure a lease, represented that the lessor required a premium of 150*l.*, whereas he in fact only required 100*l.*, whereby the defendant fraudulently obtained from the plaintiff 50*l.*, which he converted to his own use, was held sufficient.[4] A fraudulent

[1] Mullett v. Mason, L. R. 1 C. P. 559; Wintz v. Morrison, 17 Tex. 372; Jeffrey v. Bigelow, 13 Wend. 518; Faris v. Lewis, 2 B. Mon. 375; Bradley v. Rea, 14 Allen, 20; Marsh v. Webber, 13 Minn. 109; S. C., 16 id. 418; Langdon v. Sherrod, 21 Iowa, 518; Johnson v. Wallower, 18 Minn. 288; S. C., 15 Minn. 472; Smith v. Green, 1 C. P. Div. 92.

[2] Thomson v. Winchester, 19 Pick. 214.

[3] Tuckwell v. Lambert, 5 Cush. 23.

[4] Pewtriss v. Austen, 6 Taunt. 522.

misrepresentation may result from a person's conduct as well as be made in words; it is then usually a fraudulent concealment. Thus a vendor is liable in an action for deceit if he sells an article having a secret defect rendering it essentially [583] less valuable than it appears for such price as it is apparently worth. Knowing the defect and not revealing it, and knowing or believing that the purchaser would not buy if he knew of its existence, is a fraud.[1] Wherever confidence is reposed the law exacts frank truthfulness; the truth and the whole truth. In Bench v. Sheldon[2] the court say: "In the case of the sale of property the law presumes that the purchaser reposes confidence in the vendor as to all such defects as are not within the reach of ordinary observation, and therefore it imposes upon the vendor the duty to disclose fully and fairly his knowledge of all such defects."[3] Where one undertakes to recommend another as worthy of credit either voluntarily or in answer to inquiry, even statements which imply only a favorable opinion, if there be a suppression of facts known to the person making such recommendation and material as tending to contradict the opinion, will amount to a fraud if made with intent to deceive and the person relying upon them is injured.[4] So selling a note which the seller had fraudulently procured to be indorsed by a minor is an implied assertion of the liability of such indorser that he is a person who could bind himself. Any person buying the note in reliance upon that indorsement may have an action on the case for the injury he sustains from the falsity of such representation.[5] An action lies for selling land which has no existence.[6]

It was decided long ago in Pasley v. Freeman[7] that a false affirmation made by the defendant with intent to defraud the plaintiff whereby he received damage is the ground of an ac-

[1] Paddock v. Strobridge, 29 Vt. 470; Brown v. Gray, 6 Jones' L. 103. See Paul v. Hadley, 23 Barb. 521.

[2] 14 Barb. 66, 72.

[3] Nickley v. Thomas, 22 Barb. 654; Stevens v. Fuller, 8 N. H. 463; Potter v. Taggart, 59 Wis. 1.

[4] Eyre v. Dunsford, 1 East, 327; Ward v. Center, 3 Johns. 271; Upton v. Vail, 6 Johns. 181; Allen v. Addington, 7 Wend. 9; Corbett v. Gilbert, 24 Ga. 454; Viele v. Goss, 49 Barb. 96.

[5] Lobdell v. Baker, 3 Met. 469; S. C., 1 id. 193.

[6] Wardell v. Fosdick, 13 Johns. 325.

[7] 3 T. R. 51.

tion in the nature of deceit; and that it is not necessary that the defendant should be benefited by the deceit or that he should collude with the person who received the benefit. The doctrine of this case is now universally acknowledged.[1] [584] Where a person falsely pretending to be the agent of the injured party collected money of trespassers, they were held entitled to recover the money so paid.[2] All false affirmations, however, made with such intent, even though relied on and damage results, will not support an action. The representation must be as to a past or existing fact substantially or materially affecting the interests of the other party and relating to a matter as to which he may be presumed to repose confidence and is thereby in fact deceived.[3] The representation must be of facts as contradistinguished from statements of opinion or judgment. The mere affirmation or expression of opinion by a seller in regard to the property he is attempting to sell, or of a purchaser in regard to the value of the property or chose in action he desires the seller to take in payment for property he is attempting to buy, can never be safely relied on by the other party. To such affirmations the maxim *caveat emptor* applies. The party to whom they are made has no right to rely upon them, and though they are false and intended to deceive, he who confides in them is not entitled to relief.[4]

[1] Haycraft v. Creasy, 2 East, 92; Russell v. Clark, 7 Cranch, 69; Upton v. Vail, 6 Johns. 181; Patten v. Gurney, 17 Mass. 182; Medbury v. Watson, 6 Met. 246; Ewins v. Calhoun, 7 Vt. 79; Hubbard v. Briggs, 31 N. Y. 529; De May v. Roberts, 46 Mich. 160.

[2] Wells v. Waterhouse, 22 Me. 131.

[3] Homer v. Perkins, 124 Mass. 431; Hazard v. Irwin, 18 Pick. 105; Benton v. Pratt, 2 Wend. 385; Belcher v. Costello, 122 Mass. 189; Mason v. Raplee, 66 Barb. 182; Vernon v. Keys, 12 East, 632; Matlock v. Reppy, 47 Ark. 148.

[4] Homer v. Perkins, *supra;* Medbury v. Watson, 6 Met. 246; Manning v. Albee, 11 Allen, 520; Veasey v. Doton, 3 Allen, 380.

The rule has its limitations. It does not apply when representations are falsely made concerning the use to which the intending purchaser will put the property if it is sold to him, and such statements are made to induce its sale. Henderson v. Railroad Co., 17 Texas, 580; Greenwood v. Pierce, 58 id. 130. The general rule is that representations made by a vendor to the vendee as to the cost of the property they are negotiating about, though false and made with intent to deceive, do not support an action. Hemmer v. Cooper, 8 Allen, 334; Holbrook v. Connor, 60 Me. 578; Bishop v. Small, 63 id. 12; Nœtling v. Wright, 72 Ill. 390. The result is otherwise if a fiduciary relation exists between the

§ 1167. Same subject; materiality. To entitle a party to maintain an action for deceit by means of false representations he must, among other things, show that the defendant made false and fraudulent assertions in regard to some fact or facts material to the transaction in which he was defrauded by means of which he was induced to enter into it. The misrepresentation must relate to alleged facts, or to the condition of things as then existent. It is not every misrepresentation relating to the subject-matter of the contract which will render it void, or enable the aggrieved party to maintain an action for deceit. It must be as to matters of fact substantially [585] affecting his interests, not as to matters of opinion, judgment, probability or expectation.[1] Representations made in respect to a fact to transpire in the future must be a mere premise or an opinion, and will not of themselves support an action for fraud,[2] though a party may be liable for fraud by obtaining property on promises which he never intends to fulfill.[3] Fraud cannot be predicated of misrepresentations of the law, however false they may be, and whether the deception is by misrepresentation or suppression of the truth. Every person is bound to know the law.[4] If the representations were of such a nature that they will bear either the interpretation that they were intended as a mere expression of opinion, or as a statement of facts, the question of the actual intention must be decided by the jury.[5] But to justify a finding that they were representations of fact they must be statements susceptible of knowledge as distinguished from

parties or if the vendor makes a false statement concerning the cost of property he has bought upon the joint account of himself and his vendee. Hauk v. Brownell, 120 Ill. 161; *ante*, § 1164.

[1] Long v. Woodman, 58 Me. 49.

[2] Gallager v. Brunel, 6 Cow. 347; Markel v. Moudy, 11 Neb. 213.

[3] Oldham v. Bentley, 6 B. Mon. 430; Schufeldt v. Schintzler, 21 Hun, 462; Johnson v. Monell, 2 Keyes, 663; Eaton, etc. Co. v. Avery, 83 N. Y. 31; Burrill v. Stevens, 73 Me. 395; Durell v. Haley, 1 Paige, 492; Buckley v. Artcher, 21 Barb. 585; Nichols v. Pinner, 18 N. Y. 306; Rawdon v. Blatchford, 1 Sandf. Ch. 344; Morrill v. Blackman, 42 Conn. 324.

[4] Burt v. Bowles, 69 Ind. 1.

[5] Teague v. Irwin, 127 Mass. 217; Litchfield v. Hutchinson, 117 id. 195; Morse v. Shaw, 124 id. 59. When representations of value are not treated as mere expressions of opinion but of a fact. Bacon v. Frisbie, 15 Hun, 56; Nowlin v. Snow, 40 Mich. 699; Dwight v. Chase, 3 Ill. App. 67; Medbury v. Watson, 6 Met. 246.

matters of mere belief or opinion.[1] They must relate to material facts and have been relied upon.[2] What facts are material is matter of law. A misrepresentation of such facts may induce a party to enter into a contract when he would not have entered into it at all if he had known the truth; or the falsehood may have had the effect of enhancing the price, or subjecting him to some specific loss on some detail of the transaction. The nature and effect of the representations in these aspects will be important on the question of damages.[3] It is not necessary that they be the sole inducement to [586] the act of the injured party from which the injury arises.[4] It has been held in Nevada that where misrepresentations made by a seller are shown to be material and false it is for him to prove that the buyer did not rely upon them, and that without them the purchase would have been made.[5]

§ 1168. Same subject; reliance upon representations. It is a question of some importance in all such cases whether the injured party was negligent in not availing himself of other means of information, and whether he exercised due caution in acting upon the representations, and this is generally for the jury.[6] If the facts are unknown to him, and he has not equal means of knowing the truth, there is no legal duty not to rely on the statements of the other party.[7] Where the representations related to the size and location of lots which were the subject of negotiation it was held that the plaintiff could not be charged with negligence for relying on them instead of consulting the recorded plat.[8] In Illinois it was held that where the land relative to which the representations were made was only six miles away the plaintiff

[1] Morse v. Shaw, *supra;* Safford v. Grout, 120 Mass. 20; Litchfield v. Hutchinson, *supra;* Nounnan v. Sutter County Land Co., 81 Cal. 1; Williams v. McFadden, 23 Fla. 143; Parker v. Moulton, 114 Mass. 99.

[2] Dobell v. Stevens, 3 B. & C. 623; Bower v. Fenn, 90 Pa. St. 359; Markel v. Moudy, 11 Neb. 213; McAleer v. Horsey, 35 Md. 439; Stafford v. Maus, 38 Iowa, 133; Crosland v. Hall, 33 N. J. Eq. 111; Stout v. Merrill, 35 Iowa, 47; Matlock v. Reppy, 47 Ark. 148, 165; Enfield v. Colburn, 63 N. H. 218.

[3] Crater v. Binninger, 33 N. J. L. 513, quoted from *ante*, § 1165.

[4] Shaw v. Stine, 8 Bosw. 157.

[5] Fishback v. Miller, 15 Nev. 428.

[6] Roberts v. Plaisted, 63 Me. 335; Savage v. Stevens, 126 Mass. 207; Greene v. Hallenback, 24 Hun, 116.

[7] Id.; Tyner v. Cotter, 67 Wis. 482.

[8] Porter v. Fletcher, 25 Minn. 493.

had a right to rely on them.[1] And so in Massachusetts where the matters were peculiarly, though not exclusively, within the knowledge of the defendant.[2] The purchaser of an interest in goods has the right to rely on the seller's representations that he is the owner; and he is not negligent if he fails to test their correctness.[3] The court say: "We are not inclined to encourage falsehood and dishonesty by protecting one who is guilty of such fraud on the ground that his victim had faith in his word, and for that reason did not pursue inquiries that would have disclosed the falsehood."[4] The constructive notice by the record of a mortgage will not deprive a purchaser of the right to rely on the vendor's positive state- [587] ments fraudulently made that the property is unincumbered, nor will it prevent him from suing for the false representations.[5] These may be shown though the parties contracted in writing, and concerning a matter within the statute of frauds, and the writing is silent on the subject of the representations.[6] The action will lie for false and fraudulent representations whether there is a warranty or not,[7] and though the vendor expressly refused to give a deed with covenants.[8] And damages for such fraud may be recovered whether the agreement is rescinded or not.[9]

§ 1169. Same subject; defendant's belief in representations. To constitute a basis for damages the representations must not only be false but fraudulent. If the person making the representations which are material, and which he intends shall influence another, knows them to be false, the case is

[1] Nolte v. Reichelm, 96 Ill. 425.

[2] Nowlan v. Cain, 3 Allen, 261.

[3] Hale v. Philbrick, 42 Iowa, 81.

[4] Bondurant v. Crawford, 22 Iowa, 40; Van Epps v. Harrison, 5 Hill, 63; Bank of Woodland v. Hiatt, 58 Cal. 234.

[5] West v. Wright, 98 Ind. 335; Weber v. Weber, 47 Mich. 569.

[6] Nowlan v. Cain, 3 Allen, 261; Lumm v. Port Deposit, etc. Ass'n, 49 Md. 233; Dobell v Stevens, 3 B. & C. 623.

[7] Walton v. Jordan, 23 Ga. 420; Cravens v. Gant, 4 T. B. Mon. 126; S. C., 2 id. 117. See Van Vleet v. McLean, 23 Hun, 207.

[8] Tyner v. Cotter, 67 Wis. 482; Haight v. Hoyt, 19 N. Y. 464, 474.

[9] Warren v. Cole, 15 Mich. 265; Mullen v. Old Colony R. Co., 127 Mass. 86; Dayton v. Monroe, 47 Mich. 193; Krumm v. Beach, 25 Hun, 293; Gould v. Cayuga Co. Nat. Bank, 86 N. Y. 75; Allaire v. Whitney, 1 Hill, 484; Whitney v. Allaire, 1 N. Y. 305; Ely v. Mumford, 47 Barb. 629; Sallund v. Johnson, 27 Minn. 455; Miller v. Barber, 66 N. Y. 558; Merrill v. Nightingale, 39 Wis. 237.

clear.[1] Some question has been raised whether positive representations made without knowledge and believed to be true by the party making them will sustain an action in the nature of deceit for damages. But the doctrine which seems supported by the preponderance of authority is that if a person states as of his own knowledge material facts which are susceptible thereof to one who relies and acts upon them as true it is no defense to an action for deceit, if the representations are false, that the person making them believed them to be true.[2] The falsity and fraud consist in representing that he knows [588] the facts to be true of his own knowledge when he has not such knowledge.[3] For false warranty an action in tort for damages will lie, and according to the general course of decis-

[1] Page v. Bent, 2 Met. 374.

[2] West v. Wright, 98 Ind. 335; Holcomb v. Noble, 69 Mich. 396; Totten v. Burhans (Mich.), 51 N. W. Rep. 1119; Litchfield v. Hutchinson, 117 Mass. 195; Milliken v. Thorndike, 103 id. 382; Savage v. Stevens, 126 id. 207; Hazard v. Irwin, 18 Pick. 105; Page v. Bent, 2 Met. 374; Bird v. Kleiner, 41 Wis. 134; Cotzhausen v. Simon, 47 id. 103; Bennett v. Judson, 21 N. Y. 238; Bower v. Fenn, 90 Pa. St. 359; Snyder v. Findley, 1 N. J. L. 48; Buford v. Caldwell, 3 Mo. 477; Eaton v. Winnie, 20 Mich. 156; Hamilton v. Billingsley, 37 id. 107; Baughman v. Gould, 45 id. 481; Beattie v. Ebury, L. R. 7 H. L. 102; Beebe v. Knapp, 28 Mich. 53; Bankhead v. Alloway, 6 Cold. 56; Cabot v. Christie, 42 Vt. 121; Wheelden v. Lowell, 50 Me. 499; Thomas v. McCann, 4 B. Mon. 601; Boyd v. Browne, 6 Pa. St. 310; Lockridge v. Foster, 5 Ill. 56; Van Arsdale v. Howard, 5 Ala. 596; Munroe v. Pritchett, 16 id. 785; Parham v. Randolph, 4 How. (Miss.) 435; Phillips v. Jones, 12 Neb. 213; Bank of Woodland v. Hiatt, 58 Cal. 234; Taylor v. Leith, 26 Ohio St. 428; Duff v. Williams, 85 Pa. St. 490; McKown v. Furgason, 47 Iowa, 636; Dunn v. White, 63 Mo. 181; Wharf v. Roberts, 88 Ill. 426. Some cases in New York do not seem to be fully in accord with the proposition in the text. Craig v. Ward, 3 Keyes, 387; Marsh v. Falker, 40 N. Y. 562; Van Vleet v. McLean, 23 Hun, 206; Meyer v. Camden, 45 N. Y. 169; Oberlander v. Spiers, id. 175. But in Wakeman v. Dalley, 51 id. 27, the court held that an action founded upon the deceit and fraud of the defendant cannot be maintained in the absence of proof that he believed or had reason to believe at the time he made them that the representations made by him were false, and that they were for that reason fraudulently made, or that he assumed or intended to convey the impression that he had actual knowledge of their truth, though conscious that he had no such knowledge. See Stitt v. Little, 63 N. Y. 427; Lindsay v. Mulqueen, 26 Hun, 485; Williams v. McFadden, 23 Fla. 143.

[3] Litchfield v. Hutchinson, 117 Mass. 195; Page v. Bent, 2 Met. 371; Stone v. Denny, 4 Met. 151; Milliken v. Thorndike, 103 Mass. 382; Fisher v. Mellen, id. 503.

ion it is not necessary to allege or prove that the defendant knew the warranty to be false.[1] After full discussion and great conflict of judicial opinion the house of lords has established this rule for the English courts: A false statement made through carelessness and without reasonable ground for believing it to be true may be evidence of fraud, but does not necessarily amount to that. If made in the honest belief that it is true, it is not fraudulent, and does not support an action for deceit.[2]

§ **1170. Same subject; representations need not be made to plaintiff.** It is not necessary that the false representations be made to deceive the plaintiff in particular; nor that the deceiving party obtain for himself the benefit he intended as the result of the deception. C. made a sale of what purported to be certificates of stock in an incorporated company organized for the manufacture of artificial stone. He was aided in making it by circulars, made by the defendants as the officers of the supposed company, falsely stating its incorporation, purposes and prospects. In an action brought by the purchaser against these officers for these misrepresentations, contributing to deceive the plaintiff, and to induce him to make the purchase in the belief, contrary to the fact, that such company had a lawful existence, and for assuming to be and to act as the officers of a duly incorporated company, and in issuing certificates of capital stock, it was held that they were liable [589] for the damages he thereby sustained, though they had no intent to defraud him in particular. And it was held, also, that it was not necessary to show that they were interested in the sale.[3] Where a member of a firm made to a mercantile

[1] Williamson v. Allison, 2 East, 446; Fowler v. Abrams, 3 E. D. Smith, 1; Carter v. Glass, 44 Mich. 154.

[2] Derry v. Peek, 14 App. Cas. 337, reversing Peek v. Derry, 37 Ch. Div. 541. The facts, stated briefly, were that a statute incorporating a tramway company provided that the carriages which should be run on the tramway might be moved by animal power, and, with the consent of the board of trade, by steam power. The defendant issued a prospectus which stated that by the statute the company had the right to use steam power instead of animals. Plaintiff took shares in reliance upon that statement. Consent to the use of steam was refused, and the company was subsequently wound up. See Angus v. Clifford [1891], 2 Ch. 449; S. C., 38 Am. & Eng. Corp. Cas. 79.

[3] Fenn v. Curtis, 23 Hun, 384; Hubbard v. Briggs, 31 N. Y. 518; Mead

agency statements, known by him to be false, as to the capital invested in the firm business with the intent that they should be communicated to persons interested in ascertaining the pecuniary responsibility of the firm, designing thus to procure credits with and to defraud such persons, and such statements were communicated to one who, in reliance thereon, sold goods to the firm upon credit, it was held that an action for deceit could be maintained by such vendor against the partner who made such representations.[1] Chancellor Walworth said upon this point: "It is not necessary that the defendant should have had any particular individual in view as the person who was to be defrauded." And again: "Where a party plans a deliberate fraud, and furnishes the means to another to carry that plan into effect upon some one of a particular class of persons, . . . it is idle to contend that he is not answerable for the consequences because he did not know upon what particular individual of the class the fraud would be perpetrated."[2]

§ 1171. The measure of damages. Following the principle that the recovery should be commensurate with the injury, if one is fraudulently induced to enter into a contract or pursue a course of action from which expenditures have naturally succeeded, or in consequence of which he has been compelled to pay money, these expenditures will be elements of damage.[3] The party guilty of the fraud is to be charged with such damages as have naturally and proximately resulted therefrom.[4] He is to make good his representations as though he had given a warranty to that effect. He is to make compensation

v. Mali, 15 How. Pr. 347; Cross v. Sackett, 6 Abb. Pr. 247; Scott v. Dixon, 29 L. J. (Exch.) 62.

[1] Eaton, etc. Co. v. Avery, 83 N. Y. 31.

Addington v. Allen, 11 Wend. 374; Carvill v. Jacks, 43 Ark. 454.

[3] Crater v. Binninger, 33 N. J. L. 513; Suydam v. Watts, 4 McLean, 162; Carvill v. Jacks, 43 Ark. 439; Sellar v. Clelland, 2 Colo. 532; Smith v. Bolles, 132 U. S. 125; Looff v. Lawton, 97 N. Y. 478; Pryor v. Foster, 130 id. 171.

A contract of partnership was found to have been void in its inception because of the fraud of one of the partners. The award of damages included the repayment of all moneys put into the firm by the plaintiff as his portion of the capital stock and a reasonable compensation for the time he acted as a partner. He was also entitled to indemnity from all liability which might arise out of the business. Richards v. Todd, 127 Mass. 167.

[4] Benton v. Pratt, 2 Wend. 385.

for the difference between the real state of the case and what [590] it was represented to be. Thus, in case of sales where there is a fraudulently false representation of quantity, quality or title, the measure of damages is the difference in value between that which is actual and that which was represented to exist.[1] And interest, at least in the discretion of the jury, on this difference may be added.[2] No distinction is made in the application of this rule as between real and personal property. If the latter is the subject of the action its value is to be ascertained as of the time and place of the transaction.[3] It is not a material objection to the application of the rule in case of a recovery for fraud in selling securities that they have been assigned to a third person.[4] If the defrauded purchaser

[1] Matlock v. Reppy, 47 Ark. 148, 166; Herfoot v. Cramer, 7 Colo. 483, 491; Williams v. McFadden, 23 Fla. 143 (quoting the text); Budlong v. Cunningham, 11 Ill. App. 28; Jackson v. Armstrong, 50 Mich. 65; Ansyln v. Frank, 8 Mo. App. 242; Caldwell v. Henry, 76 Mo. 254, 257; Shinnabarger v. Shelton, 41 Mo. App. 147; Krumm v. Beach, 96 N. Y. 398; Vail v. Reynolds, 118 id. 297; Lunn v. Shermer, 93 N. C. 164; Pierce v. Tiersch, 40 Ohio St. 168; Phinney v. Hubbard, 2 Wash. Ty. 369; Noyes v. Blodgett, 58 N. H. 502; Estell v. Myers, 56 Miss. 800; Gunther v. Ullrich, 52 N. W. Rep. 88 (Wis.); Morse v. Hutchins, 102 Mass. 439; Miller v. Barber, 66 N. Y. 558; Russell v. Clark, 7 Cranch, 69; Sibley v. Hulbert, 15 Gray, 509; Neff v. Clute, 12 Barb. 466; Tackwell v. Lambert, 5 Cush. 23; Burpee v. Sparhawk, 97 Mass. 342; Bean v. Wells, 28 Barb. 465; Rheem v. Naugatuck W. Co., 33 Pa. St. 356; Platt v. Brown, 30 Conn. 336; Quimby v. Carter, 20 Me. 218; Kidney v. Stoddard, 7 Met. 252; Briggs v. Brushaber, 43 Mich. 330; Kendall v. Wilson, 41 Vt. 567; Ferris v. Comstock, 33 Conn. 513; Crosland v. Hall, 33 N. J. Eq. 111; White v. Smith, 54 Iowa, 233; Mason v. Raplee, 65 Barb. 180; Clark v. Baird, 9 N. Y. 183; Clare v. Maynard, 7 C. & P. 743; Ives v. Carter, 24 Conn. 392; Campbell v. Hillman, 15 B. Mon. 508; Page v. Parker, 43 N. H. 363; S. C., 40 id. 47; Fisk v. Hicks, 31 id. 535; Carr v. Moore, 41 id. 131; Stiles v. White, 11 Met. 356; Sollund v. Johnson, 27 Minn. 455; Wright v. Roach, 57 Me. 600; Hiner v. Richter, 51 Ill. 299; Page v. Wells, 37 Mich. 415; Hamilton v. Billingsley, id. 107; Parker v. Walker, 12 Rich. L. 138; Foster v. Kennedy, 38 Ala. 359; Gaulden v. Shehee, 24 Ga. 438; Warren v. Cole, 15 Mich. 265; Brown v. Woods, 3 Cold. 183; Ahrens v. Adler, 33 Cal. 608; Monell v. Colden, 13 Johns. 395; Davis v. Elliott, 15 Gray, 90. See Rice v. White, 4 Leigh, 474.

[2] Wright v. Roach, 57 Me. 600; Morse v. Hutchins, 102 Mass. 439; Budlong v. Cunningham, 11 Ill. App. 28; Snow v. Nowlin, 43 Mich. 383.

One who is fraudulently deprived of his money is entitled to interest from the time he was induced to part with it. Atlantic Bank v. Harris, 118 Mass. 147.

[3] Wynn v. Longley, 31 Ill. App. 616.

[4] Miller v. Zeimer, 12 Daly, 126.

has paid part of the consideration he is entitled to a deduction equal thereto; if he has given his note in part payment, and it is not shown that it has been paid, it will be presumed to have been accepted as payment.[1] Depreciation in the value of the property is not an element of damage under this rule, because the claim therefor rests upon the assumption that the party asking compensation would have sold when he could have realized the highest price.[2] In Arkansas the defrauded party may elect to recover the difference between the actual value of the property and the price paid for it, or the value placed upon it in the transaction.[3]

For fraudulently inducing a person to purchase the note of an insolvent as good he is entitled to recover the full amount payable by its terms.[4] In an action for damages for false representations it appeared that the defendant had sold the plaintiff a lot, knowing that he intended to build a dwelling-house upon it, and had falsely represented that there was a street upon the north side of the lot; that the latter, after purchasing, erected on it a valuable house for a residence, relying upon such representations. It was held that the plaintiff was entitled to recover as special damages, in addition to the difference in the value of the lot, the difference in the market value of the house as a residence with a street as represented and without such street, it appearing that the public records did not show the condition of the property with respect to streets.[5] A purchase was made of land lying near the city of Albany for the declared purpose of laying it out into [**591**] building lots, and the vendor fraudulently represented it to be even and requiring no grading. The property was not adapted by location for the purpose the vendor bought it for, but not having rescinded the contract of purchase on the

[1] Johnson v. Culver, 116 Ind. 278.

[2] Marvin v. Prentice, 94 N. Y. 295; Brisbane v. Pomeroy, 13 Daly, 358.

[3] Matlock v. Reppy, 47 Ark. 148, 166.

[4] Sibley v. Hulbert, 15 Gray, 509; Neff v. Clute, 12 Barb. 466; Slingerland v. Bennett, 65 N. Y. 611. See Clayton v. O'Connor, 35 Ga. 193.

The recovery against the directors of an insolvent bank for false representations which induced the plaintiff to deposit money therein which he lost is measured by the amount deposited with interest thereon, less the value of his claim after the bank's failure. Baker v. Ashe, 80 Texas, 356.

[5] White v. Smith, 54 Iowa, 233.

ground of fraud, the court held that he was entitled to recoup damages.[1] Where one, with intent to cheat and defraud another, induces him by fraudulent means and representations to purchase for value stock which he knows to be worthless, he is liable for the damages sustained, whether the purchase is made from him or from another. The measure is the difference between the value of the stock as the condition of the company issuing it really was, and what it would be if its condition had been as the purchaser was fraudulently induced to believe it to be. The market price of the stock about the time of or soon after the purchase is strong evidence of its value, and in the absence of other proof will control. But where the real pecuniary condition of the company is shown, and it appears that the stock was worthless, such market price is entitled to no weight upon the question of value. The purchaser after discovery of its worthlessness is not bound to mitigate the loss by himself cheating some other ignorant purchaser.[2] Where that measure of redress is obtained the plaintiff cannot also recover assessments paid on the stock, except so far as they were made necessary in consequence of the particular representation or representations which made the defendant liable.[3] A joint-stock company which issues certificates of shares under a forged transfer is liable to their owner to the extent of their value at the time it first refuses to recognize him as a shareholder, with interest from that time.[4] The same rule applies where a corporate officer unau-

[1] Van Epps v. Harrison, 5 Hill, 63. On the question of damages the court say: "The cause must, as far as practicable, be tried just as it would have been tried the day after the contract was made if the question had arisen at that time. The jury must assume, what the parties then believed, that the land was valuable as the site of a town, and then inquire how much less the land was worth for building purposes, taking the surface as it actually existed, than it would have been worth for those purposes had the plaintiff's representations concerning the surface been true. One mode of arriving at the correct result, and perhaps the only one, would be to inquire into the probable expense of reducing and conforming the surface of the ground to a condition corresponding with the plaintiff's representation. This would, I think, give the correct rule of damages."

[2] Hubbell v. Meigs, 50 N. Y. 480. See Redding v. Godwin, 44 Minn. 355.

[3] Bowman v. Parker, 40 Vt. 410.

[4] In re Bahia & San Francisco Ry. Co., L. R. 3 Q. B. 583.

thorizedly issues its stock.[1] In an action by a corporation against the person to whom it had issued a new certificate of stock in reliance upon a forged power of attorney authorizing the transfer of it to him, the damages included the costs and expenses (except counsel fees) of a suit against the plaintiff in this action by the rightful owner of the certificate to compel the issue of new stock to replace that so transferred, the defendant in this action having failed to defend that, as he was requested to do; the amount paid by the plaintiff for stock bought in good faith to replace that transferred, including the advance in price over that prevailing when the forgery was perpetrated, also the dividends upon the stock which were necessarily paid to its rightful owner.[2]

§ 1172. Same subject; another rule. In some cases the rule in question between a defrauded purchaser and the defrauding vendor is stated to be the difference between [**592**] the real value and the amount which the former was induced to pay.[3] Thus, in a late case in the United States supreme court the action being in the nature of one on the case to recover damages suffered by reason of the purchase of stock in reliance on the defendant's false and fraudulent representations, the recovery was limited to the loss sustained, such as the money paid, interest thereon, and other outlays resulting from the wrong.[4] In the renowned case of Peek v. Derry,[5] which, though reversed as to the question of fraud,[6] is apparently unaffected by such reversal as to the rule of damages, it was held that the value of shares of stock purchased under fraudulent representations should be ascertained immediately after

[1] Allen v. South Boston R. Co., 150 Mass. 200.

[2] Boston & A. R. Co. v. Richardson, 135 Mass. 473.

[3] Redding v. Godwin, 44 Minn. 355; Markel v. Moudy, 11 Neb. 213; Greenwood v. Pierce, 58 Tex. 130; Atwater v. Whiteman, 41 Fed. Rep. 427; Glaspell v. Northern P. R. Co., 43 id. 900 (applying the rule to the Dakota code which declares that the measure of damages for the breach of an obligation not arising from contract, except where otherwise provided, is the amount which will compensate for all the detriment proximately caused thereby); Arkwright v. Newbold, 17 Ch. Div. 301; Davidson v. Tulloch, 3 Macq. 783; Twycross v. Grant, 2 C. P. Div. 469, 544; Clayton v. O'Conner, 35 Ga. 193; Hallam v. Todhunter, 24 Iowa, 166; Hiner v. Richter, 51 Ill. 299; Pryor v. Foster, 130 N. Y. 171.

[4] Smith v. Bolles, 132 U. S. 125.

[5] 37 Ch. Div. 541.

[6] Derry v. Peek, 14 App. Cas. 337.

they were procured.[1] If the company which issued them was a good one at that time and the stock had an intrinsic value, no fact subsequently occurring, otherwise than from intrinsic defects in the company, should increase the liability of its directors. But subsequent events, if they show that the company was worthless, may be considered in determining the value of the stock immediately after the shares were sold. In other words, the real, and not the market, value controls in fixing the recovery. If the fraud does not extend to the whole property sold the complaining vendee whose title to a portion of it has failed may recover accordingly.[2] The rule stated is based on the assumption that the amount paid is the measure of the value as fixed by the parties; but a purchaser does not buy to sell again at the same price; and to compel him arbitrarily to accept compensation by that standard is to deprive him of such benefit of his purchase as the state of the market would have enabled him to realize if there had been no fraud.[3] As said by Mr. Justice Gray,[4] "to allow the plaintiff only the difference between the real value of the property and the price which he was induced to pay for it would be to make any advantage lawfully secured to the innocent purchaser in the original bargain inure to the wrong-doer; and, in proportion as the original price was low, would afford a protection to the party who had broken, at the expense of the party who was ready to abide by, the terms of the contract."[5] The amount paid is evidence of the value, but on principle, and according to the general course of decision, it is not conclusive of the value as it was represented to be.[6] Where there is a failure of title on an exchange of property the damages are measured by the actual value of that conveyed by the defrauded party.[7]

[1] Davidson v. Tulloch, 3 Macq. 790.

[2] Reynolds v. Franklin, 44 Minn. 30.

[3] Reggio v. Braggiotti, 7 Cush. 166, 169.

[4] Morse v. Hutchins, 102 Mass. 440.

[5] Herfort v. Cramer, 7 Colo. 483, 491; Krumm v. Beach, 96 N. Y. 398; Brisbane v. Pomeroy, 13 Daly, 358.

[6] Lunn v. Sherman, 93 N. C. 164; Stiles v. White, 11 Met. 356; Cary v. Gruman, 4 Hill, 625; Fisk v. Hicks, 31 N. H. 535; Carr v. Moore, 41 id. 131; Page v. Parker, 40 id. 47; S. C., id. 363; Tuttle v. Brown, 4 Gray, 457; Woodward v. Thatcher, 21 Vt. 580; Sherwood v. Sutton, 5 Mason, 1; Muller v. Eno, 14 N. Y. 597; Drew v. Beall, 62 Ill. 164; Loder v. Kekule, 3 C. B. (N. S.) 128; Dingle v. Hare, 7 id. 145; Jones v. Clarke, 3 Q. B. 194. See Thompson v. Sheplar, 72 Pa. St. 160.

[7] Woolenslagle v. Runals, 76 Mich.

§ 1173. Same subject; other elements of damage. The general rules stated do not embrace all the damages which a defrauded vendee may suffer. In Slingerland v. Bennett[1] the defendant induced the plaintiff to purchase as good a note against an irresponsible party. The purchaser brought suit on the note and obtained judgment, but was unable to collect it. In an action for the fraud it was held that the costs of obtaining this judgment were not proper elements of damage; they were not its proximate result or natural consequence. The correctness of this conclusion may well be doubted. If these costs were incurred judiciously and in good faith to enforce the demand as being such as it was represented to be, certainly they were the natural and probable effect of [**593**] the sale of a note as good against a debtor unable to pay. A warranty of title justifies a suit or a defense to maintain it, and if the title fails the costs and expenses are proper items of damage in an action upon the warranty.[2] So where a person falsely pretends to be the agent of the owner of property and makes a contract for the sale of it, the purchaser is entitled to recover the costs of an unsuccessful suit to enforce the contract against the supposed principal.[3] One who has been fraudulently induced to buy animals falsely represented or warranted to be sound, but having disease, may recover as damages for the fraud not only for their loss or depreciation by reason of the disease, but the trouble and expense of attempting their cure; and if in reliance upon the warranty or representation such animals have been associated with and communicated the disease to others, the loss or depreciation of the latter as well as the expense and trouble of their treatment for cure may also be recovered.[4] The recovery may include compensation for personal injuries and incidental expenses where they result from the ordinary use of warranted property and the warranty proves false.[5] Where false representations were made as to the safety of a road over which

545; Reynolds v. Franklin, 44 Minn. 30. Compare Shinnabarger v. Shelton, 41 Mo. App. 147.

[1] 66 N. Y. 611.

[2] Vol. 1, §§ 84, 85; vol. 2, § 669.

[3] Vol. 1, § 84.

[4] Sherrod v. Langdon, 21 Iowa, 518; Marsh v. Webber, 16 Minn. 418; Wintz v. Morrison, 17 Tex. 372; Johnson v. Wallower, 18 Minn. 288; Brown v. Wood, 3 Cold. 182; Rose v. Wallace, 11 Ind. 112; Pinney v. Andrus, 41 Vt. 631.

[5] Sharon v. Mosher, 17 Barb. 518;

plaintiffs made a contract to draw freight, the following instruction was sustained: "If the plaintiffs' cattle sickened and died, and their sickness and death are attributable to the former presence of Texas cattle upon the same trail, you may allow to the plaintiffs the reasonable value of such cattle at the time of the loss. If plaintiffs were, from the same cause, delayed and hindered in their journey, and so were put to expense in employing and boarding their servants, which they would otherwise not have incurred, you may allow them for this. If, also, they expended money, or transferred and exchanged other property for cattle in the Indian nation with which to continue their journey, and owing to the sparsity of settlements there, or the absence of a market, the plaintiffs were under the necessity to pay for the cattle so bought more than the same were worth, and if a man of ordinary prudence would have acted as plaintiffs did, if placed in the like circumstances, then you may allow the plaintiffs for the difference between the amount so necessarily expended in the purchase of cattle and the reasonable value of such cattle at the time of the purchase thereof."[1] If property for future delivery is purchased because of false representations made by the vendor as to the quantity he will put upon the market in a given time, the diminution in the price caused by putting a much larger quantity upon the market measures the damages. The price prevailing at the time delivery is made to the purchaser is to be regarded.[2]

§ **1174. Same subject.** In New York one who has been induced by fraudulent representations to become the purchaser of property may elect either of three remedies. He may rescind the contract absolutely and sue at law for the consideration paid thereon, if he has restored or offered to restore to the other party whatever he has received from him by virtue of the contract.[3] He may bring an action in equity to rescind the contract and obtain full relief therein.[4]

George v. Skivington, L. R. 5 Exch. 1; Thomas v. Winchester, 6 N. Y. 397; Pryor v. Foster, 130 id. 171.

[1] Sellar v. Clelland, 2 Colo. 532, 550.

[2] Cooper v. Schlesinger, 111 U. S. 148.

[3] Gould v. Cayuga Co. Nat. Bank, 86 N. Y. 75; Vail v. Reynolds, 118 id. 297; Pryor v. Foster, 130 id. 171. The rescission must be made promptly on discovering the fraud. Strong v. Strong, 102 id. 69, distinguished in Pryor v. Foster, *supra*.

[4] Allerton v. Allerton, 50 N. Y. 670.

"Such an action is not founded upon a rescission, but is maintained for a rescission, and it is sufficient, therefore, for the plaintiff to offer in his complaint to return what he has received and make tender of it on the trial."[1] Or he may retain what he has received and bring an action at law to recover the damages sustained. In such an action an offer to restore the property received does not affect the damages.[2] Generally there are at least two courses open to the injured party: he may on discovery of the fraud restore what he has received, rescind the contract and recover what he has paid or sue for damages.[3] If he affirms the contract and sues for the fraud he is not necessarily entitled to recover for all he has done or paid on it, for he may have derived some benefit therefrom. But when the contract is repudiated on account of the fraud, the defrauded party is entitled to be put in *statu quo*, and where this cannot be literally accomplished it may be done by damages. Thus, a defendant represented the water-power connected with his tannery to be sufficient to work it continuously throughout the year, and the plaintiff having no knowledge of the premises, and relying [**594**] upon this representation, was thereby induced to purchase; thereupon after taking a bond for it and giving his notes for the price he entered into possession, and under the advice of the defendant expended large sums in repairs. The water failing, he abandoned the property and notified the defendant that he considered the contract of purchase rescinded. The defendant resumed possession and had the benefit of the repairs. And it was held that *assumpsit* would lie to recover for such repairs; that the law would under such circumstances imply a promise to pay for them.[4] Where the plaintiff

[1] Vail v. Reynolds, 118 N. Y. 297, 302.

[2] Id.

[3] Warren v. Cole, 15 Mich. 265; Atlanta, etc. R. Co. v. Hodnett, 29 Ga. 461; Hauk v. Brownell, 120 Ill. 161; Potter v. Taggart, 59 Wis. 1.

[4] Farris v. Ware, 60 Me. 482.

One who obtains title by fraud cannot, on a rescission of the contract, recover for repairs or improvements made or for incumbrances removed while he was in possession. Railroad Co. v. Soutter, 13 Wall. 517; Mosely v. Miller, 13 Bush, 408. On the contrary he is chargeable for rents during that time. Mosely v. Miller, *supra*. It is held in Texas that there cannot be a recovery for improvements made by one who purchases property, there being fraudulent misrepresentations as to the title, unless

was fraudulently induced to take an endowment policy of insurance and to pay the premium thereon, he was entitled to recover in an action brought before the second premium became due the amount paid, the defendant having been notified of the purpose to cancel the policy. This rule of damages was not inapplicable because the company was solvent, the policy a valid one, and the rate of premium fair. The rule contended for by the defendant was the difference in the money value between what plaintiff got and what he would have got had the representations been true. But this was inapplicable because the contract was executory and was rescinded. The contention that the cancellation of the policy was the cause of the loss of the premium was considered a refinement which would lead to unjust results.[1] The right to recover the purchase-money and interest on the failure of title is not affected by the fact that the purchaser has cut timber from the land and sold it, he being liable to account to the owner of the land for it; neither is the defendant liable for the expense of such cutting so long as the plaintiff has not been compelled to respond to the owner.[2] The defrauded purchaser is not bound to purchase the outstanding title and thus mitigate the liability of his vendor.[3] For the fraud of falsely representing a third person to be worthy of credit, whereby the person deceived has been induced to sell goods to such third person he being insolvent, the vendor is entitled to recover the value of the

it is shown that the purpose to improve was known to the vendor at the time of the sale. A claim for attorney's fees in prosecuting the suit to recover damages was also denied and the recovery was limited to the consideration paid and interest thereon. Haddock v. Taylor, 74 Tex. 216. But in Arkansas a purchaser who relies upon fraudulent representations made by his vendor as to the state of the title may, upon eviction by the holder of the superior title, recover the purchase-money and interest and for improvements made upon the property. He is not bound to resort to the vendor's warranty, nor restricted to the measure of recovery which an action thereon would afford. Carvill v. Jacks, 43 Ark. 439; S. C., id. 454. See Pitcher v. Livingston, 4 Johns. 1.

[1] Hedden v. Griffin, 136 Mass. 229.

One who is induced by fraudulent representations to take a membership in a mutual benevolent society can only recover such sum as he has expended by reason thereof; not the amount he would have received if the representations were true. May v. New York, etc. Society, 14 Daly, 389.

[2] Tyner v. Cotter, 67 Wis. 482.

[3] Id.

goods sold.[1] If a debtor fraudulently settles with his creditor for fifty per cent. of the latter's claim, the creditor being induced thereto by fraudulent representations that other creditors had made such settlements, a suit by him in *assumpsit* while retaining the amount is in affirmation of the contract and the balance cannot be recovered.[2] But in an action for the fraud such amount may be recovered as would have been received if no fraud had been committed.[3] A creditor who fraudulently colludes with his insolvent debtor and receives property from him in excess of the debt is liable to other creditors for the value of such property at the time it was transferred to him, and not for the sum realized from a subsequent sale of it.[4]

§ 1175. Remote and contingent damages. Only such damages are recoverable as are shown with reasonable certainty to have been sustained. Remote, contingent and conjectural losses will not be considered. A vendor who seeks to set aside a contract for the sale of property because of fraud cannot recover for anxiety, worry and embarrassment resulting from the defendant's conduct, nor for expenses incurred in caring for the property sold.[5] A trustee who colludes with the remainder-man and with the tenants of the *cestui que trust*, the latter holding a life estate, and causes his ejection and loss of rents, is not responsible for losses resulting from the subsequent insolvency of the tenants.[6] One who is fraudulently led to purchase the interest of retiring partners in a firm and to execute a note in the name of the new firm for a sum in excess of the invoice price of the property received cannot recover more than such excess, although he is obliged to pay the whole amount of such note because of the subsequent insolvency of his partners.[7] For the fraud of inducing by false representation the payee of a note secured by mortgage to in-

[1] Viele v. Goss, 49 Barb. 96; Bean v. Wells, 28 id. 466; Rheem v. Naugatuck W. Co., 33 Pa. St. 356.

[2] Jewett v. Petit, 4 Mich. 514; Walsh v. Sisson, 49 id. 423; Grabenheimer v. Blum, 63 Tex. 369.

[3] Id.; Page v. Wells, 37 Mich. 421; Bowman v. Parker, 40 Vt. 413; Foster v. Kennedy's Adm'r, 38 Ala. 359; Moberly v. Alexander, 19 Iowa, 164; Reynolds v. Cox, 11 Ind. 266.

[4] Oppenheimer v. Halff, 68 Tex. 409.

[5] Newman v. Smith, 77 Cal. 22.

[6] Kaye v. Powel, 1 Ves. Jr. 403; Fox v. Mackreth, 2 Cox, 320; Franklin v Greene, 2 Allen, 579; Squier v. Plunkett, 11 Gray, 11.

[7] Schwabacker v. Riddle, 84 Ill. 517.

dorse it in blank, by means whereof it has got into the hands of a *bona fide* holder, there can be no recovery until such indorser has actually paid the note. Until then he will suffer no injury. The mortgage debt may be made out of the security or the maker of the note.[1] But all such liability to loss from fraud as a ground of damage is not rejected as conjectural and contingent. It has been held in New York[2] that if a vendor fraudulently represents goods sold to be his own, when he knows them to belong to a stranger, an action on the case lies to recover damages therefor, though the real owner has not recovered the property nor the vendee suffered any actual damage. A recovery was had on the basis of an unsatisfied liability in Kenyon v. Woodruff,[3] and upon very safe principles. The defendants by fraud induced the plaintiff innocently to take and remove and thereby convert the property of a third person for their benefit. They took upon themselves [595] the defense of an action of trover brought against him by the true owner, and judgment therein was recovered, which he had abundant property to satisfy. They were held liable to him for the amount of that judgment, and interest upon it, though it had not been collected or paid. The court held that there was no analogy between the relations of these parties and those which exist between principal and surety. Graves, J., said: "The relation of principal and surety grows out of the consent of all the parties, and the principles which belong to it in regard to the right of recovery over can have no necessary application to a case where the relation does not arise by consent, but is caused by a positive wrong committed by one against another. It would be very unreasonable to hold that where one is drawn by the fraud of another to perform an act which gives a third party a right of action against him, and which has eventuated in a judgment which is indisputably collectible of him, the wrong-doer may still insist that his responsibility to the party he has by his fraud caused to be accountable to the third party is required to be governed by those rules which naturally and justly apply where one by choice assumes a relation of accountability on behalf of one to another." It has recently been ruled in New York after a

[1] Freeman v. Venner, 120 Mass. 424; Alden v. Wright, 47 Minn. 225.

[2] Case v. Hall, 24 Wend. 102.

[3] 33 Mich. 310.

full examination of the adjudications there, that the directors of a corporation who fraudulently issue in its name and transfer to *bona fide* holders for value notes which purport to be its valid obligations are liable to the corporation as soon as its liability attaches by their transfer of the paper. Neither the right to sue the directors nor the measure of their liability is affected by the fact that the notes remain unpaid. In the absence of evidence of circumstances diminishing its value the face of the paper measures the liability of the wrong-doer.[1]

§ 1176. Same subject. In an Iowa case[2] the defendants sold and assigned to the plaintiff for a money consideration a bond of the school fund commissioner for a deed to a tract of school land. It appeared that the interest for one year had not been paid by them, although they so represented when they assigned the bond to the plaintiff. The trial court found that the plaintiff had not paid that year's interest, but paid the defendants that amount more than was due according to their agreement, and that the county held their note, which contained their obligation to pay the interest. It was ruled that the plaintiff was not entitled to recover for that interest because he had not paid it; he had not yet suffered any damage by means of the defendants' representations. The court say: "He has not yet paid the money due the school fund, nor is it alleged that the defendants are insolvent or unable to pay the same. Their note is with the proper officer, and the defendants are liable to an action [**596**] thereon at any time. The plaintiff's recovery in this case would not prevent the school fund from suing and recovering at any time for the same interest. The defendants should not be made twice liable for the same debt." It may be observed in respect to this case that the defendants could have protected themselves from this double liability by paying the interest in question to the school fund, even after this action was brought, and therefore they were not, except by their own fraud and negligence, placed in peril of a double recovery. They having received from the plaintiff an amount equal to that interest, on their false representation that they had paid it, it would seem just that he should recover damages to an

[1] Metropolitan E. Ry. Co. v. Kneeland, 120 N. Y. 134.

[2] Kimmans v. Chandler, 13 Iowa, 327.

equal amount, since the defendants, on the action being brought, persisted in the wrong by defending instead of making their representation good by immediate payment to the school fund.[1] In Bradley v. Fuller[2] the court held that a false and fraudulent representation by which a creditor was induced to abandon an intention to sue out an attachment against his debtor, followed by the loss of his debt in consequence of other creditors attaching all his property, is not actionable; that he, on that state of facts, had suffered no legal damage; that it must necessarily be uncertain whether he would have attached the property and applied it to the debt if the alleged representation had not been made.[3] It is not easy to perceive why the execution of such an intention might not be proved with sufficient certainty. It might almost be presumed under the circumstances stated because of the interest of the creditor to secure his debt. Readiness to perform a contract is sufficient to evince the intention of a party to fulfill it, so that if the other by any act or omission prevent its performance the former may recover damages estimated on the assumption that he would have proceeded. In Remington Sewing Machine Co. v. Kezertee,[4] where a surety was drawn into the execution of a contract by false representations or suppression of the truth, it was held that the testimony of the surety was admissible [597] that he would not have become such if he had known the facts concealed. In a late Georgia case the holder of a deed tainted with usury stated at a sheriff's sale of the land that he held an equitable mortgage on the premises for $1,500, and the purchaser would buy subject to that incumbrance. He bid in the land himself, knowing that $500 of the $1,500 secured by his deed was for one year's interest on the remaining $1,000. On evidence that another would have given $500 more for the land at the sale had the truth been told the mortgagor was held entitled to recover that sum from the buyer.[5] In Benton v. Pratt[6] it was held that where a contract would have been fulfilled but for the false and fraudulent representations of a third person an action would lie against

[1] See Dunne v. Thorpe, B., D. & O. 128; Barmon v. Lithauer, 4 Keyes, 317.

[2] 118 Mass. 239.

[3] See vol. 1, § 30, note; vol. 2, § 965.

[4] 49 Wis. 409.

[5] Denham v. Kirkpatrick, 64 Ga. 71.

[6] 2 Wend. 385.

such person for the fraud, although the contract could not have been enforced by action.[1] A creditor at large who has taken no proceedings against his debtor to acquire a lien upon his property cannot maintain an action against a person who takes possession or converts the debtor's property under a conveyance or transfer which is made to hinder, delay and defraud his creditors.[2] But it is otherwise if the creditor has a lien, and it is reduced in value by the fraudulent conduct of another;[3] or if its release is procured by fraud.[4] So a creditor may compel the fraudulent grantee of his debtor to account for the property after such creditor has obtained a judgment, and under it a right to resort to the equitable assets of his debtor.[5]

§ 1177. Expenses of litigation. It is settled in Connecticut that in actions for fraud the successful plaintiff may, in the discretion of the jury, recover, in addition to the actual damages directly resulting, such sum as will reimburse him for the expenses necessarily incurred in obtaining redress.[6]

§ 1178. Exemplary damages. There is not an entire agreement among the authorities on the question whether exemplary damages may be allowed in actions for deceit; nor are the cases numerous in which the point has been considered. On the principle upon which such damages are allowed where the doctrine of punitory damages prevails, it is not easy to see how they are to be excluded as matter of law in cases of wilful and deliberate fraud followed by actual damage.[7]

§ 1179. Parties. Plaintiffs who are jointly interested in the damages sought to be recovered for fraud may join in the action.[8] Where there were two purchasers of land which the vendor fraudulently misrepresented as to quantity and loca-

[1] See Parks v. Alta California Tel. Co., 13 Cal. 422.

[2] Adler v. Fenton, 24 How. (U. S.) 407; Moran v. Dawes, Hopk. Ch. 365; Lamb v. Stone, 11 Pick. 527; Wellington v. Small, 3 Cush. 145; Austin v. Barrows, 41 Conn. 287.

[3] Yates v. Joyce, 11 Johns. 136.

[4] Marshall v. Buchanan, 35 Cal. 264.

[5] Robinson v. Boyd, 17 Mich. 128.

[6] Bennett v. Gibbons, 55 Conn. 450.

[7] Vol. 1, § —: Nye v. Merriam, 35 Vt. 438; Byram v. McGuire, 3 Head, 530; Oliver v. Chapman, 15 Tex. 400; Platt v. Brown, 30 Conn. 336; Ives v. Carter, 24 id. 392; Kelly v. Valentine, 17 Ill. App. 87; Tate v. Watts, 42 id. 103. But see Lane v. Wilcox, 55 Barb. 615.

[8] Medley v. Watson, 6 Met. 257–8; Stiles v. White, 11 Met. 356; Larsen v. Groeschel, 98 Ind. 160.

tion, it was held that such purchasers might join though they have since made partition.[1]

[598] § **1180. Pleading.** Where fraud is the ground of action the plaintiff must allege all circumstances necessary for the support of the action with such certainty that the defendant may know what he is called on to answer.[2] Evidence is admissible only of the false statements alleged in the declaration.[3]

[1] Porter v. Fletcher, 25 Minn. 493. See Patten v. Gurney, 17 Mass. 182.

[2] Duffy v. Byrne, 7 Mo. App. 417.

[3] Jackson v. Collins, 39 Mich. 557.

CHAPTER XXXI.

INFRINGEMENT OF PATENT-RIGHTS.

§ 1181. Statutory remedies.
1182. Same subject; judicial summary.
1183, 1184. Damages recoverable at law.
1185. Same subject; profits as damages.
1186. Same subject; other measures of damage.
1187. Interest on damages.
1188. Exemplary damages.
1189. Compensation in equity.
1190, 1191. Same subject; computation of profits.
1192. Computation to what time made.
1193, 1194. Rule when whole article not patented.
1195. Same subject; ascertainment of profits.
1196. Profits recoverable though no license fee established.
1197. Interest.

§ 1181. Statutory remedies. Pecuniary redress for in- [599] fringement of patent-rights may be obtained pursuant to the legislation of congress by actions at law and by suits in equity. In the former, damages may be recovered in an action on the case in the name of the party interested, either as patentee, assignee or grantee. And whenever in any such action a verdict is rendered for the plaintiff the court may enter judgment thereon for any sum above the amount found by the verdict as the actual damages sustained, according to the circumstances of the case, not exceeding three times the amount found, together with the costs.[1] The legal remedy has been substantially the same since the passage of the act of July 4, 1836.[2] The equitable remedy was enlarged by the act of 1870. It provides that upon a decree being rendered in any such case for an infringement the complainant shall be entitled to recover, in addition to the profits to be accounted for by the defendant, the damages sustained thereby; and the court shall assess the same, or cause the same to be assessed under its direction; and shall have the same power to increase such damages in its discretion as is given to increase the damages found at law.[3]

[1] Act of July 8, 1870; § 4919, R. S. of U. S.

[2] 5 Stats. at Large, 123, sec. 14.

[3] § 4921, R. S. of U. S.

§ 1182. **Same subject; judicial summary.** Mr. Justice Clifford, in a late case,[1] thus summarized the legal and equitable remedies for this wrong: "Prior to the passage of the act of the 8th of July, 1870, two remedies were open to the owner of a patent whose rights had been infringed, and he had his election between the two; he might proceed in equity and recover the gains and profits which the infringer had made by the unlawful use of his invention, the infringer in such a suit being regarded as the trustee of the owner of [690] the patent as respects such gains and profits; or the owner of the patent might sue at law, in which case he would be entitled to recover as damages compensation for the pecuniary injury he suffered by the infringement, without regard to the question whether the defendant had gained or lost by his unlawful acts,— the measure of damages in such case being not what the defendant had gained, but what the plaintiff had lost.[2] Where the suit is at law the measure of damages remains unchanged to the present time, the rule still being that the verdict of the jury must be for the *actual* damages sustained by the plaintiff, subject to the right of the court to enter judgment thereon for any sum above the verdict, not exceeding three times that amount, together with costs.[3] Damages of a compensatory character may also be allowed to the complainant suing in equity in certain cases where the gains and profits made by the respondent are clearly not sufficient to compensate the complainant for the injury sustained by the unlawful violation of the exclusive right secured to him by the patent. Gains and profits are still the proper measure of damages in equity suits, except in cases where the injury sustained by the infringement is plainly greater than the aggregate of what was made by the respondent; in which event the provision is that the complainant 'shall be entitled to recover, in addition to the profits to be accounted for by the respondent, the damages he has sustained thereby.' Cases occurred under the prior patent act where manifest injustice was done to the complainant in equity suits by withholding from him a just compensation for the injury he sustained by

[1] Birdsall v. Coolidge, 93 U. S. 68.

[2] Curtis on Pat. (4th ed.) 461; 5 Stats. 123.

[3] 16 Stats. 207.

the unlawful invasion of his exclusive rights, even when the final decree gave him all that the law allowed. Examples of the kind may be mentioned where the business of the infringer was so improvidently conducted that it did not yield any substantial profits, and cases where the products of the patented improvements were sold greatly below their just and market value in order to compel the owner of the patent, his assignees and licensees, to abandon the manufacture of the patented product. Courts could not, under that act, augment [**601**] the allowance made by the final decree, as in the case of a verdict of a jury; but the present patent act provides that the court shall have the same powers to increase the decree, in its discretion, that are given by the act to increase the damages found by verdicts in actions at law. Such difficulties could never arise in an action at law, nor can they now, as both the prior and present patent acts authorize the court to enter judgment on the verdict of the jury for any sum above the verdict, not exceeding three times the amount. No discretion is vested in the jury, but they are required to find the *actual damages* under proper instructions from the court." [1]

§ 1183. Damage recoverable at law. Where the plaintiff has sought his profit in the form of a royalty paid by his licensees, and there are no peculiar circumstances in the case, the amount to be recovered will be regulated by that standard,[2] when a sufficient number of licenses or sales have been made to establish a market value.[3] Whenever an inventor finds it profitable to exercise his monopoly by selling licenses to make or use his improvements he has himself fixed the average of his actual damage when his invention has been used without his license. If he claims anything above that amount he is bound to substantiate his claim by clear and distinct evidence.[4] He is, however, entitled to interest on the amount due him from the time payment should have been

[1] Day v. Woodworth, 13 How. 372; Seymour v. McCormick, 16 id. 488.

[2] Philp v. Nock, 17 Wall. 460; Burdell v. Denig, 92 U. S. 716; Seymour v. McCormick, 16 How. 480; Birdsall v. Coolidge, 96 U. S. 64; Tilghman v. Proctor, 125 U. S. 136.

[3] Locomotive Safety T. Co. v. Pennsylvania R. Co., 14 Phila. 432; Packet Co. v. Sickles, 19 Wall. 611; Sickles v. Borden, 4 Blatchf. 14; Suffolk Co. v. Hayden, 3 Wall. 315; Livingston v. Jones, 3 Wall. Jr. 330. See Bussey v. Excelsior Co., 1 McCrary, 161.

[4] Seymour v. McCormick, 16 How. 480, 490.

made.[1] The rule that the damages are measured by the royalty applies regardless of whether the patent infringed upon is a foundation patent or not.[2] If an infringement is deliberately made the defendant may be charged with the full amount of the established license fee although his use of the article wrongfully made may have continued for but a small portion of the time covered by the life of the patent. The effect of the payment will be to vest the right in the infringer to use the article during the life of the patent or until the article made by him is worn out.[3] "In order," says Mr. Justice Field, "that a royalty may be accepted as a measure of damages against an infringer who is a stranger to the license establishing it, it must be paid or secured before the infringement complained of; it must be paid by such a number of persons as to indicate a general acquiescence in its reasonableness by those who have occasion to use the invention; and it must be uniform at the places where the licenses are issued."[4] The payment of a sum in settlement of a claim for an alleged infringement cannot be taken as a standard to measure the value of the improvements in determining the damages in other cases of infringements.[5] Agreements made to secure the introduction of an invention are not such licenses as establish a measure of damages against an infringer.[6] If two prices are agreed upon as a royalty, the lesser depending upon prompt payment, a third party's liability will be measured by it.[7] The general rule is not applicable where the invention infringed upon contains patents which are not appropriated by the infringer. In such a case the nature of the part used must be shown,[8] and the portion of the license fee paid therefor.[9] And so that rule is inapplicable where the only royalty established is for the right to use the patented article, and damages are sought for its wrongful sale. And a payment made for the whole monopoly of selling and man-

[1] Tilghman v. Proctor, 125 U. S. 136.

[2] Timken v. Olin, 41 Fed. Rep. 169.

[3] Stutz v. Armstrong, 25 Fed. Rep. 147.

[4] Rude v. Westcott, 130 U. S. 152.

[5] Id.; Cornely v. Marckwald, 131 U. S. 159; 32 Fed. Rep. 292.

[6] Graham v. Geneva, etc. Manuf. Co., 24 Fed. Rep. 642.

[7] Id.

[8] Wooster v. Simonson, 16 Fed. Rep. 680. See McDonald v. Whitney, 39 id. 466.

[9] Porter Needle Co. v. National Needle Co., 22 Fed. Rep. 829.

ufacturing is not sufficient evidence of the value of the right to make occasional sales in a particular territory; and so a royalty paid for a license to manufacture and sell under a covenant not to sue purchasers from the licensee is not the standard by which to measure the value of an ordinary selling right.[1]

§ 1184. Same subject. The foregoing rule is deemed subordinate to the measure fixed by the statute — the actual damages,— and therefore it will be departed from whenever the court can see that it will give less or more than such damages.[2] There is no rule that will apply equally to all cases. The mode of ascertaining actual damages must necessarily depend on the nature of the monopoly granted,[3] and the character of the infringement. Thus, it was held by Judge Story that if the use of a machine is proven the value of the use would establish the measure of damages; but if the infringement consisted merely in making a machine, and no actual damages were shown to have resulted, only a nominal sum should be awarded.[4] Where it was shown what sum the plaintiff would have obtained from the defendant for a patented machine, and that a sale would have been made to him if he had not used the infringing machine, the recovery was regulated by such amount.[5] In cases where there is no [**602**] established patent or license fee general evidence may be resorted to in order to get at the measure of damages; then, evidence of the utility and advantage of the invention over the old modes or devices that had been used for working out similar results is competent and appropriate.[6] In some cases

[1] Colgate v. Western Electric Manuf. Co., 28 Fed. Rep. 146; La Baw v. Hawkins, 2 Bann. & Ard. 561.

[2] Seymour v. McCormick, 16 How. 480; Birdsall v. Coolidge, 93 U. S. 68; Bates v. St. Johnsbury, etc. R. Co., 32 Fed. Rep. 628; Keller v. Stolzenbaugh, 43 id. 378.

[3] Id.

[4] Whittemore v. Cutter, 1 Gall. 478.

[5] Blake v. Greenwood Cemetery, 21 Blatch. 222. In Blake v. Robertson, 94 U. S. 728, that measure of damages was denied because other patents than that owned by the plaintiff were involved, and their value was not proven.

[6] Suffolk Co. v. Hayden, 3 Wall. 315; Philp v. Nock, 17 id. 460.

The amount paid by the defendant for a license to use another patented invention, which he used after he had ceased to infringe upon the plaintiff's patent, and as a substitute therefor, was held to be the proper measure of the value of the plaintiff's invention to him. Sargent v.

this advantage, or the value of the use of the plaintiff's invention, is adopted as the measure of the actual damages.[1] A man who invents or discovers a new combination of matter, such as vulcanized India rubber or a valuable medicine, may find his profit to consist in a close monopoly, forbidding any one to compete with him in the market, he being himself able to supply the whole demand at his own price. If he should grant licenses to all who should desire to manufacture his composition, mutual competition might destroy the value of each license. This may be the case, also, where the patentee is the inventor of an entirely new machine. If any person could use the invention or discovery by paying what a jury might suppose to be the fair value of a license, it is plain that competition would destroy the whole value of the monopoly. In such case the profit of the infringer may be the only criterion of the actual damage to the patentee. It is, however, only when, from the peculiar circumstances of the case, no other rule can be found that the defendant's profits become the criterion of the plaintiff's loss.[2]

Yale Lock Manuf. Co., 17 Blatchf. 249.

If there is no established license fee and the plaintiff has produced all the evidence of the value of the article he can and the defendant has offered no evidence, the manufacturer's price of the article, the percentage on such price which ordinarily constitutes a fair royalty, the judgment of an expert, and the price paid by an individual for two licenses under the patent, will be considered by the court in assessing damages. McKeever v. United States, 14 Ct. of Cls. 396.

[1] Brodie v. Ophir S. M. Co., 5 Sawyer, 608; Carter v. Baker, 1 id. 527.

This measure applies in an action of *assumpsit* for the use of a patented invention, if there is no established royalty. Deane v. Hodge, 35 Minn. 146.

[2] Seymour v. McCormick, 16 How. 480; Cowing v. Rumsey, 8 Blatchf. 36.

In Packet Co. v. Sickles, 19 Wall. 611, Miller, J., said: "The rule in suits in equity of ascertaining by a reference to a master the profits which the defendant has made by the use of the plaintiff's invention stands on a different principle. It is that of converting the infringer into a trustee for the patentee as regards the profits thus made; and the adjustment of those profits is subject to all the equitable considerations which are necessary to do complete justice between the parties, many of which would be inappropriate in a trial by jury. With these corrective powers in the hands of the chancellor, the rule of assuming profits as the groundwork for estimating the compensation due from the infringer to the patentee has produced results calculated to suggest distrust of its universal application even in courts of equity. Certainly any unnecessary relaxation of the rule we have

§ 1185. Same subject; profits as damages. In cases [603] in which profits made are the proper measure of damages it is the profits which the infringer makes or ought to have made which govern, and not those which the plaintiff shows that he might have made.[1] If there is no established license fee the jury are not to estimate damages for the whole life of the patent, but only for the period of the infringement. In such a case a recovery does not vest the infringer with the right to continue the use of the patented machine or article.[2] It is otherwise at the election of the complainant if such a fee has been established,[3] and where it has not if the patentee does not use the invention himself, but manufactures and sells it at fixed prices, if he recovers the full amount of profits he would have obtained had he made and sold the article in question. It is said that by such claim and recovery he adopts

laid down in courts of law, where the patentee has been in the habit of selling his invention, or licenses to use it, so that a fair deduction can be made as to the value which he and those using it have established for it, does not commend itself to our judgment, nor is it encouraged by our experience. The reason of this rule is still stronger when the use of the patented invention has been with the consent of the patentee, express or implied, without any rate of compensation fixed by the parties."

In the subsequent case of Burdell v. Denig, 92 U. S. 716, the same learned judge said: "Profits are not the primary or true criterion of damages for infringement in actions at law. That rule applies eminently and mainly in cases in equity, and is based upon the idea that the infringer shall be converted into a trustee as to these profits for the owner of the patent which he infringes,— a principle which it is very difficult to apply in a trial before a jury, but quite appropriate on a reference to a master, who can examine the defendant's books and papers, and examine him on oath, as well as all his clerks and employees. On the other hand, as we have repeatedly held, sales of licenses of machines or of a royalty established constitutes the primary and true criterion of damages in an action at law. No doubt, in the absence of satisfactory evidence of either class in the forum to which it is most appropriate, the other may be resorted to as one of the elements on which the damages or the compensation may be ascertained; but it cannot be admitted . . . that in an action at law the profits which the other party might have made is the primary or controlling measure of damages."

[1] Seymour v. McCormick, 16 How. 480; Cowing v. Rumsey, 8 Blatchf. 36; Packet Co. v. Sickles, 19 Wall. 611.

[2] Suffolk Co. v. Hayden, 3 Wall. 315; Spaulding v. Page, 4 Fish. Pat. Cas. 641; S. C., 1 Sawyer, 702.

[3] Stutz v. Armstrong, 25 Fed. Rep. 147; Sickels v. Borden, 2 Blatch. 535, 545; Perrigo v. Spaulding, 13 id. 389; Spaulding v. Page, 4 Fish. Pat. Cas. 641.

the sale made by the defendant, and the right to use the specific article sold by the latter vests in his vendee.[1] But the recovery of merely nominal damages does not work this result, because the payment thereof is not a satisfaction.[2] The patentee may sue at law for the damages which he has sustained, and these he is entitled to recover whether the defendant has made any profits or not. In such an action it is precisely what is lost to the plaintiff, and not what the defendant has gained, which is the measure of the compensation to be awarded.[3]

[604] Where the defendant's profits are sought to be made the measure of the plaintiff's recovery it is a practical question, the solution of which will determine that claim, or the extent to which it may be maintained, whether the defendant has by the infringement diverted the patronage of the plaintiff or diminished his profits from his invention. It was at one time ruled at the circuit that the law would presume that the plaintiff's profits were diminished in proportion to those made by the infringer;[4] but this was held erroneous in Seymour v. McCormick.[5] It is now settled that there is no such legal inference or presumption. Actual damages are required to be proved; they cannot be found unless the plaintiff furnishes the jury some *data* for the computation.[6] He must show his damages by evidence; they must not be left to conjecture; they must be proved, and not guessed.[7] But the general principle stated in another place[8] is not lost sight of in this class of actions where the infringement was wanton, or the evidence which will show more exactly the loss resulting therefrom is peculiarly within the defendant's possession or control. Under such circumstances the defendant ought to be

[1] Spaulding v. Page, 4 Fish. Pat. Cas. 641; S. C., 1 Sawyer, 702. See Steam Stone-Cutter Co. v. Sheldons, 15 Fed. Rep. 608.

[2] Blake v. Greenwood Cemetery, 21 Blatch. 222.

[3] Cowing v. Rumsey, 8 Blatchf. 36.

[4] Wilbur v. Beecher, 2 Blatchf. 132; Buck v. Hermance, 1 id. 398; Hall v. Wiles, 2 id. 194.

[5] 16 How. 480.

[6] Mayor v. Ransom, 23 How. 487; Seymour v. McCormick, 16 How. 480; Blake v. Robertson, 94 U. S. 728; Cowing v. Rumsey, 8 Blatchf. 36; Philp v. Nock, 17 Wall. 460; Ingersoll v. Musgrove, 14 Blatchf. 541; Cornely v. Marckwald, 131 U. S. 159; Bell v. United States Stamping Co., 32 Fed. Rep. 549; Royer v. Shultz Belting Co., 45 id. 51.

[7] Philp v. Nock, 17 Wall. 460.

[8] Vol. 1, § 439.

held to the most rigid accountability, and no intendment made in his favor, founded on the alleged inconclusiveness of the plaintiff's proof of loss. Such proof ought to be considered and interpreted most liberally in his favor within the limit of an approximately accurate ascertainment of his damages.[1] On the trial of an action for infringement of a patent for a writing fluid, no proof was given of the cost of the manufacture of the fluid or of the sale price; but it was shown that sales were highly profitable, and that the defendant had made and sold very large quantities. He gave no evidence of the amount of the manufactures or sales, or of the cost of the article. The jury found a verdict for $2,000 for the [**605**] plaintiff, and it was held that it must stand, not being one of palpable extravagance; that in such cases the plaintiff is not held to the most exact proof of the amount of his damages, and the jury are warranted in exercising a liberal discretion. If the defendant prefers to leave the damages to general inference and the estimate of the jury when he might make the amount reasonably certain by evidence on his part the finding of the jury will not be interfered with except in a case of plain extravagance.[2] The damages will be computed on what the jury find from evidence is the loss the plaintiff has in some way sustained in consequence of the infringement. The profits of the defendant, to the extent that the jury find that they represent a loss of profits or gains which the plaintiff, but for the infringement, would have realized, may be accepted as the measure of his loss, but no further.[3] One who has obtained judgment for lost profits cannot, so long as it is unreversed, prosecute an action at law for other damages caused by the same acts of infringement which were recovered for in the equity suit.[4] After the satisfaction of a decree for the profits of sales there cannot be a recovery against the vendee of the patent of the profits derived by him from its use.[5]

[1] Bigelow Carpet Co. v. Dobson, 13 Reporter, 265; S. C., 10 Fed. Rep. 385 (reversed as to the measure of damages in Dobson v. Hartford Carpet Co., 114 U. S. 439); Creamer v. Bowers, 35 Fed. Rep. 206.

[2] Stephens v. Felt, 2 Blatchf. 37.

[3] Id.; Pitts v. Hall, 2 Blatchf. 229; Ingersoll v. Musgrove, 14 id. 541; Carter v. Baker, 1 Sawyer, 527.

[4] Child v. Boston & F. Iron Works, 19 Fed. Rep. 258.

[5] Steam Stone-Cutter Co. v. Sheldons, 21 Fed. Rep. 875.

§ 1186. Same subject; other measures of damage. Where the infringement is confined to a part of the thing used or sold by the infringer the recovery will be limited accordingly. It cannot be as if the entire thing were covered by the patent, or, where that is the case, as if the infringement were as large as the monopoly.[1] The plaintiff is entitled to recover in respect of any loss by reduction of the price of the article containing his invention in consequence of the infringement.[2] But it was held in Ingersoll v. Musgrove[3] that where the patentee claims damages for a reduction of his price caused by the defendant infringing the patent he must establish by satisfactory evidence not only that the reduction was caused by the infringement, but how much such reduction was; the extent to which it was occasioned by the acts of the defendant, and that it was made because the infringing article contained the invention. Such evidence must not be estimate, conjecture and opinion, but must be such as to afford a sound and safe basis of calculation.[4] The only persons who can be [606] held for damages for the infringement of a patent are those who own, or have some interest in, the business of making, using or selling the thing which is an infringement. An action at law cannot be maintained against the directors, shareholders or workmen of a corporation which infringes a patented improvement.[5] Demands for damages and for profits for past infringements are assignable, and an assignee may recover for infringements which occurred when he was not the owner of the patent.[6] The vendor of a machine which is known to be the invention of another person is not liable for sales made before the inventor applied for a patent.[7]

§ 1187. Interest on damages. The damages in these cases being unliquidated, interest is not generally allowed.[8] In one case the jury were permitted to add interest from the com-

[1] Philp v. Nock, 17 Wall. 460.

[2] Carter v. Baker, 1 Sawyer, 527.

[3] 14 Blatchf. 541.

[4] See Buerk v. Imhaeuser, 14 Blatchf. 19.

[5] United Nickel Co. v. Worthington, 13 Fed. Rep. 392.

[6] Consolidated Oil Well Packer Co. v. Eaton, 12 Fed. Rep. 865; Dibble v. Augur, 7 Blatchf. 86; Gordon v. Anthony, 16 id. 234.

[7] Lyon v. Donaldson, 34 Fed. Rep. 789.

[8] Parks v. Booth, 102 U. S. 96; Silsby v. Foote, 20 How. 378; Littlefield v. Perry, 21 Wall. 205, 229; Mowry v. Whitney, 14 id. 620.

mencement of the action,[1] and in another to add it in their discretion, without restriction, to the time of commencing the action.[2] If, however, the amount of the royalty charged by the patentee is fixed by him before the infringement occurs the damages are so far liquidated that interest follows as compensation for delay in making payment.[3]

§ **1188. Exemplary damages.** The jury are required to find the actual damages, and have and can be allowed no discretion to go beyond that measure,[4] nor allow counsel fees as part of such damages.[5] The power to inflict exemplary damages is committed to the discretion and judgment of the court within the limit of trebling the actual damages found by the jury.[6] It is only exercised where special reasons are shown, such as malice, insufficiency of the verdict, or the like.[7] It is a power to be used in view of the circumstances of the case. It may be exercised to remunerate parties who have been driven to litigation to sustain their patents by wanton and persistent [**607**] infringement.[8] It will not be exercised in favor of the mere assignee of a right of action;[9] nor where the defense, though active and annoying, has not been legally wanton or unjustifiable.[10] The statute which authorizes courts of equity to treble the damages does not empower them to allow an increase in the recovery of profits.[11]

§ **1189. Compensation in equity.** As has been stated, the present patent law gives to the successful plaintiff in an equity suit for an infringement the damages which he has sustained in addition to the profits to be accounted for by the defendant. As interpreted, this statute does not, in every case, entitle the plaintiff to such damages; but only when they are

[1] Pitts v. Hall, 2 Blatchf. 229.

[2] Tatham v. Le Roy, 2 Blatchf. 478.

[3] Tilghman v. Proctor, 125 U. S. 136, 143; Locomotive Safety T. Co. v. Pennsylvania R. Co., 14 Phila. 432.

[4] Day v. Woodworth, 13 How. 372; Birdsall v. Coolidge, 93 U. S. 64; Seymour v. McCormick, 16 How. 480, 489; Buck v. Hermance, 1 Blatchf. 398.

[5] Philp v. Nock, 17 Wall. 460; Day v. Woodworth, *supra*.

[6] Id.

[7] Schwarzel v. Holenshade, 2 Bond, 29; S. C., 3 Fish. Pat. Cas. 116; Lyon v. Donaldson, 34 Fed. Rep. 789; Morss v. Union Form Co., 39 id. 468.

[8] Brodie v. Ophir S. M. Co., 5 Sawyer, 608.

[9] Schwarzel v. Holenshade, 2 Bond, 29; S. C., 3 Fish. Pat. Cas. 116.

[10] Welling v. La Bau, 35 Fed. Rep. 302.

[11] Campbell v. James, 5 Fed. Rep. 807; Covert v. Sargent, 42 id. 298.

necessary to give him adequate compensation. If it appears that the injuries which he sustained are greater than the gains and profits realized by the defendant, then the plaintiff is entitled to recover compensation in the form of damages for the excess of the injuries sustained beyond the gains and profits received by the defendant.[1] Where the infringement is not wilful it is only compensation for actual loss that can be recovered in any event or form.[2] There was nothing in the statutes relating to patents before the act of 1870 providing expressly for the recovery of the gains and profits of an infringement of a patent by suit in equity. The right must have been derived from the application of the general principles of justice as administered in courts of equity to the relations between the owners of patents and infringers created by the patent laws. The patentee owns the monopoly of the patented invention. When an infringer converts any part of the monopoly into money, or into anything else, the owner has the right to follow his property in its new form. The person in whose hands it is becomes his trustee; not because he was ever a trustee of the invention or monopoly, or had any right whatever to dispose of it for the owner, but because he had the money or other thing in his hands which the owner of the invention had the right to claim because the invention brought it. It is what is received for the invention that belongs to the owner of the patent, and when that is not [608] mixed with what is received for anything else there can be no difficulty about how much the owner of the patent is entitled to; when it is, the difficulty is wholly in making the separation.[3] "The general rule," said Gray, J., "has been sometimes said to be based upon the theory that the infringer is converted into a trustee for the owner of the patent, as regards the profits made by the use of his invention. But, as has been recently declared by this court, upon an elaborate review of the cases in this country and in England, it is more

[1] Buerk v. Imhaeuser, 14 Blatchf. 19; Carew v. Boston Elastic F. Co., 3 Cliff. 356, 370; Birdsall v. Coolidge, 93 U. S. 64.

[2] Buerk v. Imhaeuser, *supra*.

[3] Steam Stone-Cutter Co. v. Windsor Manuf. Co., 17 Blatchf. 24, 36; S. C., 18 id. 47; Littlefield v. Perry, 21 Wall. 205; Burdell v. Denig, 92 U. S. 716; Packet Co. v. Sickles, 19 Wall. 611; Livingston v. Woodworth, 15 How. 546; Williams v. Rome, etc. R. Co., 18 Blatchf. 181.

strictly accurate to say that a court of equity which has acquired, upon some equitable ground, jurisdiction of a suit for the infringement of a patent, will not send the plaintiff to a court of law to recover damages, but will itself administer full relief by awarding as an equivalent or substitute for legal damages a compensation computed and measured by the same rule that courts of equity apply to the case of a trustee who has wrongfully used the trust property for his own advantage."[1] It is held in the same case that the liability of an infringer for the profits made is not limited as to time because during a portion of the period he was doing the patentee a wrong an erroneous decision as to the scope of the patent was made in favor of another infringer in no way connected with the defendant.[2]

§ **1190. Same subject; computation of profits.** The profits made in violation of a patent-right within the meaning of the law are to be computed and ascertained by finding the difference between cost and yield. In estimating the cost the elements of price of materials, interest, expenses of manufacture and sale and other necessary expenditures, if there be any, and bad debts are to be taken into account, but usually nothing else. The calculation is to be made as a manufacturer calculates the profits of his business. Profit is the gain made upon any business or investment when both the receipts and payments are taken into account. The rule is founded in reason and justice. It compensates one party and punishes the other. It makes the wrong-doer liable for actual, not possible, gains. The controlling consideration is that he shall not profit by his own wrong. A more favorable rule would give a premium for dishonesty and invite to aggression.[3] Losses incurred by the defendant in consequence of his wrongful invasion of a patent are not chargeable to the plaintiff, nor can their amount be deducted from the compensation which he is entitled to.[4] A decree enjoining infringement and for account of profits does not subject the defendant to liability for more

[1] Tilghman v. Proctor, 125 U. S. 136, 148, referring to Root v. Railway Co., 105 id. 189, 214.

[2] Tilghman v. Proctor, *supra*.

[3] Rubber Co. v. Goodyear, 9 Wall. 788, 804. Compare Crosby Valve Co. v. Safety Valve Co., 141 U. S. 441.

[4] Crosby Valve Co. v. Safety Valve Co., 141 U. S. 441, 457.

than the profits he has actually realized; it cannot be made to embrace others which he by diligence might have realized.[1] If the infringement is of a patent covering a process, in determining the gains and profits made by the infringer the

[1] Livingston v. Woodworth, 15 How. 546. In this case Mr. Justice Daniel, delivering the opinion of the court, said: "In the instructions to the master it will be seen that he is ordered 'to ascertain and report the amount of profits which may have been, or with due diligence and prudence might have been, realized by the defendants for the work done by them, or by their servants, by means of the machines described in the complainants' bill, computing the same upon the principles set forth in the opinion of the court, and that the account of such profits commence from the date of the letters patent issued with the amended specification.' The master, in his report, made in pursuance of the instructions just adverted to, admits that the account is not constructed upon the basis of actual gains and profits acquired by the defendants by the use of the inhibited machine, but upon the theory of awarding damages to the complainants for an infringement of their monopoly. He admits, too, that the rate of profits assumed by him was conjectural, and not governed by the evidence; but he attempts to vindicate the rule he had acted upon by the declaration that he was not aware that he had 'infused into the case any element unfavorable to the defendants. That by the decision of the court they were trespassers and wrong-doers in the legal sense of these words, and consequently in a position to be mulcted in damages greater than the profits they have received; the rule being, not what benefit they have received, but what injury the plaintiffs have sustained.' To what rule the master has reference in thus stating the grounds on which his calculations have been based, we do not know. We are aware of no rule which converts a court of equity into an instrument for the punishment of simple torts; but upon this principle of chastisement the master admits that he has been led in contravention of his original view of the testimony, and upon conjecture as to the reality of the facts and not upon facts themselves, to double the amount which he had stated to be a compensation to the plaintiffs below, and the compensation prayed for by them, and the circuit court has, by its decree, pushed this principle to the extreme, by adding to this amount the penalty of interest thereon from the time of filing the bill to the date of the final decree.

"We think the second report of the master, and the final decree of the circuit court, are warranted neither by the prayer of the bill, by the justice of the case, nor by the well established rules of equity jurisprudence. If the appellees, the plaintiffs below, had sustained an injury to their legal rights, the courts of law were open to them for redress, and in those courts they might, according to a practice which, however doubtful in point of essential right, is now too inveterate to be called in question, have claimed not compensation merely, but vengeance, for such injury as they could show that they had sustained. But before a tribunal which refuses to listen even to any save those whose acts and motives

expense of using the process in question is to be ascertained by the manner in which it has in fact been used; and the comparison is not necessarily to be made with the cost at which the defendant used the process theretofore employed by him. He may show that other persons engaged in the same business used such process at less cost than he did.[1] Where contractors laid a pavement for a city which [609] infringed the patent of N. and the city paid them as much therefor as it would have had to pay N. had he done the work, thus realizing no profits from the infringement, it was held that in a suit in equity to recover profits against the city and the contractors the latter alone were responsible, although the former might have been enjoined before the com- [610] pletion of the work and perhaps would have been liable in an action for damages.[2] If an infringer has not realized profit from the use of the invention he cannot be called upon to

are perfectly fair and liberal, they cannot be permitted to contravene the highest and most benignant principle of the being and constitution of that tribunal. There they will be allowed to claim that which, *ex æquo et bono*, is theirs, and nothing beyond this. In the present case it would be peculiarly harsh and oppressive, were it consistent with equity practice, to visit upon the appellants any consequences in the nature of a penalty. It is clearly shown that the appellants, in working their machine, were proceeding under an authority equal to that (the same, indeed) which bestowed on Woodworth and his assignees the right to their monopoly. The appellants were using a machine patented by the United States to Hutchinson, and might well have supposed that the right derived to them from such a source was regular and legitimate. They were, then, in no correct sense, wanton infringers upon the rights of Woodworth or of those claiming under him. So soon as the originality and priority of the Woodworth patent was ascertained by law, the appellants consented to be perpetually enjoined from the use of their machine (the Hutchinson machine), and account for whatever gains and profits they had received from its use. Under these circumstances, were the infliction of damages by way of penalty ever consistent with the practice of courts of equity, there can be perceived in this case no ground whatever for the exercise of such a power. On the contrary, those circumstances exhibit in a clearer light the propriety of restricting the account, in accordance with the prayer of the bill, to the actual gains and profits of the appellants (the defendants below) during the time their machine was in operation, and during no other period." Dean v. Mason, 20 How. 198; Burdell v. Denig, 92 U. S. 716; Packet Co. v. Sickles, 19 Wall. 611.

[1] Tilghman v. Proctor, 125 U. S. 136, 151.

[2] Elizabeth v. Pavement Co., 97 U. S. 126.

respond for profits;[1] the patentee in such a case is left to his remedy for damages. A patentee is entitled to recover the profits that have been actually realized from the use of his invention, although from other causes the general business of the defendant in which the invention is employed may not have resulted in profits,— as where it is shown that his invention produced a definite saving in the process of a manufacture. On the contrary, though the defendant's general business be ever so profitable, if the use of the invention has not contributed to the profits none can be recovered.[2] And if other methods in common use produce the same results with equal expedition and without increased cost, if there is no established license fee for the use of the patented invention, only nominal damages can be recovered.[3] Where the suit was for the infringement of a patent for a design for carpets, and it was not established that the defendant had made profit, it was held error to allow the complainant as damages in respect of the yards of infringing carpets made and sold by the former the sum per yard which was the profit of the latter in making and selling carpets with such design, there being no evidence as to the added value of the carpet because of the appropriation of the design.[4] The case was held to be, in the absence of such evidence, one for nominal damages only. The opinion approvingly quotes language used in Garretson v. Clark:[5] "The patentee must in every case give evidence tending to separate or apportion the defendant's profits and the patentee's damages between the patented features and the unpatented features, and such evidence must be relia-

[1] Mere proof that the patented article could be made at less expense than those previously used to accomplish the same purpose does not establish that the infringer made profits unless it is shown that he was under obligation to make the older articles or would have made them if he had not manufactured the patented one. Bell v. United States Stamping Co., 32 Fed. Rep. 549.

[2] Elizabeth v. Pavement Co., 97 U. S. 126; Mowry v. Whitney, 14 Wall. 434; Cawood Patent, 94 U. S. 695; Tilghman v. Proctor, 125 U. S. 136, 146; Celluloid Manuf. Co. v. Cellonite Manuf. Co., 40 Fed. Rep. 476.

[3] Black v. Thorne, 111 U. S. 122.

[4] Dobson v. Hartford Carpet Co., 114 U. S. 439, reversing Bigelow Carpet Co. v. Dobson, 10 Fed. Rep. 385; Dobson v. Dornan, 118 U. S. 10. See 24 Stats. 387, as to liability for infringing patents for designs. As to liability for the penalty under that statute, see Anderson v. Pittsburgh L. Co., 47 Fed. Rep. 67.

[5] 111 U. S. 127; S. C., 15 Blatch. 70.

ble and tangible and not conjectural or speculative; or he must show by equally reliable and satisfactory evidence that the profits and damages are to be calculated on the whole machine, for the reason that the entire value of the whole machine as a marketable article is properly and legally attributable to the patented feature." This principle was overlooked in a case in which a carpet manufacturer used patented looms. He was held liable for the net profits realized upon the number of yards of carpet made by the use of the invention in excess of the quantity that could have been made by the use of non-patentable looms.[1] Wallace, J., clearly shows that this is wrong because it ignores all the expense of the processes which the raw material of which the carpet is composed undergoes before it is ready for the loom. He applied a more just rule — the difference between the cost of weaving the carpet on the non-infringing and the infringing looms.[2] If, however, the patent is complete in itself, the fact that it can only be used in connection with something else, as a grate which is adaptable to a large variety of stoves, all the profits are recoverable.[3] And it has been held by Judge Coxe that under the act of congress of 1887 the infringer of a design patent is liable for all the profit made on the article which embodies the design.[4]

§ 1191. Same subject. Interest on capital stock and "manufacturer's profits" are rejected as not entering into the cost; but wear and tear and repairs, and the value of the use of such real and personal estate belonging to the infringer, such as shops, fixtures and machinery employed in making the infringing machines, may properly be compensated as part of the cost.[5] And so of the expense of advertising the

[1] Webster v New Brunswick Carpet Co., 2 Ban. & Ard. 67.

[2] Webster Loom Co. v. Higgins, 43 Fed. Rep. 673.

[3] Keep v. Fuller, 42 Fed. Rep. 896.

[4] Untermeyer v. Freund, 50 Fed. Rep. 77. The act provides: "And in case the total profit made by him [the infringer] from the manufacture or sale aforesaid of the article or articles to which the design or colorable imitation thereof has been applied exceeds the sum of two hundred and fifty dollars, he shall be further liable for the excess of such profit over and above the said sum of two hundred and fifty dollars." That measure of liability applied to suits instituted when the law went into effect. Untermeyer v. Freund, *supra*.

[5] Rubber Co. v. Goodyear, 9 Wall. 788, 804; Steam Stone-Cutter Co. v.

business and the amount paid as royalty for another patent which infringed upon plaintiff's, if the payment therefor was made in good faith.[1] The amount paid for insurance, it [611] being for the safety of the property generally and not for the benefit of the manufacturer of the infringing machines, will not be allowed as an item of their cost; nor the amount paid for local taxes on such property.[2] The infringer being a corporation may employ stockholders in the infringing work or business, and their wages or salaries paid in good faith for services actually rendered, and not for the purpose of dividing or concealing profits, will be allowed as part of the deductions to arrive at net profits.[3] So if the defendant has cheapened the cost of producing the infringing device by an improvement of his own, he is entitled to a corresponding credit in the ascertainment of the profits.[4] It is not the profits of the infringer's business, as a business, that are to be considered, but the advantage derived by him in the diminished cost of carrying it on by the use of the invention. Thus, in the case of the Cawood Patent,[5] it was urged against the recovery of the profits found from the defendants' infringing use of the plaintiff's patented invention for mending the crushed and exfoliated ends of railroad rails, that it would have been better for the defendants if, instead of repairing such rails, they had cut off the ends and relaid the sound parts, or had caused the rails to be rerolled. Mr. Justice Strong, delivering the opinion, thus answered this exception: "Experience, it is said, has proved that repairing worn-out ends of rails is not true economy, and hence it is inferred that defendants have derived no profits from the plaintiff's invention. The argument is plausible, but it is unsound. Assuming that experience has demonstrated what is claimed, the defendants undertook to repair the injured rails. They had the choice of repairing them on the common anvil or on the complainant's machine. By selecting the latter they saved a large

Windsor Manuf. Co., 17 Blatchf. 24; Am Ende v. Seabury, 43 Fed. Rep. 672.

[1] La Baw v. Hawkins, 2 Ban. & Ard. 561.

[2] Steam Stone-Cutter Co. v. Windsor Manuf. Co., 17 Blatchf. 24.

[3] Id. The fact that salaries were paid must be shown. Am Ende v. Seabury, 43 Fed. Rep. 672.

[4] Mason v. Graham, 23 Wall. 261.

[5] 94 U. S. 710.

part of what they must have expended in the use of the former. To that extent they had a positive advantage growing out of their invasion of the complainant's patent. If their general business was unprofitable, it was the less so in consequence of their use of the plaintiff's property. They gained, therefore, to the extent that they saved themselves from [612] loss. In settling an account between a patentee and an infringer of the patent the question is not what profits the latter has made in his business or his manner of conducting it, but what advantage he has derived from his use of the patented invention."[1] The making and selling articles or machines which are an infringment are so far separable that, if there is a benefit on one portion and loss on another, the owner of the patent may claim the profits on those infringing machines which yielded a profit, without any deduction for the losses sustained by the infringer on others.[2] It is no rea-

[1] Knox v. Great Western Q. M. Co., 6 Sawyer, 430.

Where profits are recovered for sales of an infringing article, the thing sold must be parted *solutio pretii emptionis loco habetur*. 2 Kent Com. 387. The recovery of such profits, especially if followed by satisfaction, will preclude the owner of the patent from any action against the purchaser of the infringing article, and will prevent the original vendor, when sued for the profits, from availing himself of any supposed liability to such purchasers to enhance the cost or diminish the profits. Steam Stone-Cutter Co. v. Windsor Manuf. Co., 17 Blatchf. 24.

[2] In Steam Stone-Cutter Co. v. Windsor Manuf. Co., *supra*, Wheeler, J., thus explains this point: "Here the Windsor Manufacturing Co. made eleven sales of eleven infringing machines, for profit; and, whatever of that profit arose from the appropriation of those patented inventions by the making and selling those machines, the orator is entitled to here, and no more. Other machines were made by the defendant, embodying the invention, which have been disposed of without profit, or are still on hand and cannot be disposed of, and which, as they are left, involve serious loss to the defendant; but these facts do not vary the amount received for those sold on which the profit was made. The defendant did not make nor sell any of them for the orator. The whole was done on its own account, as part of its own business, exclusively. Each infringement was separate, and no claim accrued in favor of the defendant against the orator on account of any of them. The losses of unfortunate attempts were the defendant's own losses, and there is nothing to set off against the orator's right to the avails of the successful attempts. If the defendant had been acting for the orator, and the whole enterprise, in connection with making this kind of machines, had been the enterprise of the orator, the net result would have been what the orator would have to stand to; but the enterprise was an enter-

son for refusing to allow a patentee damages that the infringer might have sold the ingredients of which the patented article is composed at a larger profit than was realized for it.[1]

It has been ruled by Justice Harlan that in estimating the profits resulting from the infringement of a patent the comparison must be made between the patented invention and what was known and open to the use of the public at and before the date of the patent. The case involved the Cawood patent. The defendant claimed the right to use another patented device subsequent in date to that, and that such device produced equally as good results at less expense. The court said: The company had the right to use the subsequent device and take to itself all savings or profits derived from its use. "But it had no right to use the Cawood machine and enjoy the savings derived from said use, simply because it *may* have made the same profits at less expense from another machine, patented subsequently, which it was *at liberty* to use but chose *not* to use. . . . The owner of each invention is entitled to be protected in the exclusive enjoyment of his patent for the term prescribed by law. If the position of defendants' counsel be tenable, a prior patent may be practically destroyed and the owner be deprived of all profits arising therefrom by obtaining from a junior patentee a license to use his invention. If the latter be equally useful with the former the claim of the prior patentee for profits realized from the actual use of his invention by an infringer can always be defeated by showing that the infringer was *at liberty* to use, although he did not use, the subsequent invention, and might

prise of the defendant; none of the machines were made by the defendant for the orator; neither has the orator adopted the making or selling any machine as having been done for itself. It had nothing to do with any of the machines except as they included the patented invention, nor with the sale of any of the machines except as the sale included so much of the invention, and, as to that, it only claims what the invention brought, which is the same as if anything else belonging to the orator had been put into and sold with the machines, and the orator claimed what that brought. The orator waives the tort and proceeds for the money arising from the tort. The money arising here is what would be left, after deducting the cost of the machines which the defendant furnished, from the avails of the sales of the machines, including the invention that belonged to the orator." See S. C., 18 Blatchf. 47.

[1] Am Ende v. Seabury, 43 Fed. Rep. 672.

have made thereby the same or greater profit at less cost. Indeed, upon the principle or theory asserted by defendants' counsel, the junior patentee may himself use the invention of a prior patentee without liability to the latter for profits, provided he show that had he used his own invention he would have accomplished the same or better results at the same or less cost. I do not believe such to be the law, although in several cases cited by counsel there are general expressions which seem to sustain that view. But, after close study of those cases, I am of opinion that in no one of them was the precise point now under consideration in the mind of the court or necessarily involved in the decision."[1] In a case at law Judge Woods charged that the value of the invention at the time it is appropriated by the defendant is to be regarded as the basis upon which to calculate damages.[2]

§ 1192. Same subject; computation, to what time made. The account for profits of the infringement is not lim- [613] ited to the commencement of the suit nor the date of the decree, unless the complainant limits the period within which he asks for damages.[3] Otherwise it is held proper to extend the account down to the accounting unless the infringement has ceased before that time. The rights of the parties are settled by the decree, and nothing remains but to ascertain the damages and adjudge their payment. This practice saves a multiplicity of suits, time and expense, and promotes the ends of justice.[4] In a late case, tried and decided in the district of California, one exception to the master's report was that he should have limited his accounting to one furnace which contained the patented invention and was constructed prior to the commencement of the suit, and not extended it to two furnaces erected and used at the same mine pending the suit; that as to the latter the cause of action had not arisen; that it was not therefore involved in that accounting. But the court overruled the exception. Sawyer, J., said: "The suit is

[1] Turrill v. Illinois C. R. Co., 20 Fed. Rep. 912. See McCreary v. Pennsylvania Canal Co., 141 U. S. 459, 466.

[2] National Car Brake Shoe Co. v. Terre Haute Car & Manuf. Co., 19 Fed. Rep. 515.

[3] Creamer v. Bowers, 35 Fed. Rep. 206.

[4] Rubber Co. v. Goodyear, 9 Wall. 800.

for an infringement of complainant's patent by the use of his invention. It is not a matter of any moment by what particular machine defendant accomplished the infringement. He was infringing at the commencement of the suit, which is to obtain an account of profits resulting from the infringement and an injunction against further infringement. Defendant continued the infringement by using the same furnace then in use and by constructing and using others at the same mine. The profits resulting from the infringement in the use of the invention are sought to be recovered. The supreme court has held that the accounting should be continued down to the time of taking the account; and if so, I see no reason why it should not cover the profits of the entire use of the invention by whatever machine effected as well as the profits resulting from the use of the particular machine used at the [614] time of the commencement of the suit. If the infringement is by the manufacture and sale of the invention the accounting must necessarily extend to all sales to the time of the accounting, or the accounting must stop at the commencement of the action; for the same machine cannot well be made and sold before the bringing of the suit and again after its commencement. I can perceive no reason for applying a different rule in the case of the use of an invention from that applicable to its manufacture and sale. Besides, an injunction would certainly not be limited to the machine in use before or at the time of the institution of the suit. I think the accounting properly embraced all the machines containing the invention used by the defendant at its mine down to the time of accounting."[1]

§ 1193. Rule when whole article not patented. As we have had occasion to state heretofore, in cases where the patent is for a distinct improvement, separable from the rest of the article, and not embracing the whole,[2] or is an inseparable improvement of it,[3] the profits must be limited accordingly.[4]

[1] Knox v. Great Western Q. M. Co., 6 Sawyer, 430.

[2] Buerk v. Imhaeuser, 14 Blatchf. 19; Tremolo Patent, 23 Wall. 518; Mason v. Graham, id. 261.

[3] Goulds' Manuf. Co. v. Cowing, 14 Blatchf. 315; Jones v. Morehead, 1 Wall. 155.

[4] Philp v. Nock, 17 Wall. 460; Seymour v. McCormick, 16 How. 480, 490; Jones v. Morehead, *supra;* Ingels v. Mast, 1 Flip. 424; Buerk v.

The profits recoverable are only those which have accrued from the use of the patented improvement; in such case the owner of the patent is not entitled to all the profits made from the entire article,[1] and has the burden of showing what portion thereof was derived from the use of the patented part.[2] It is as true of a process invented as an improvement in a manufacture as it is of an improvement in a machine, that an infringer is not liable to the extent of his entire profits in the manufacture. The question is what advantage did the defendant derive from using the plaintiff's invention over what he had in using other processes then open to the public and adequate to enable him to obtain an equally beneficial result? The fruits of that advantage are his profits.[3] In Mowry v. Whitney[4] the defendant was charged by the master with $91,000 as profits arising from the plaintiff's patent in [615] manufacturing car wheels, which was the profit obtained from the manufacture of the entire wheel. Mr. Justice Strong, in delivering the opinion, said: "It is clear that Whitney is not entitled to recover more than the profits actually made in consequence of the use of his process in the manufacture of nineteen thousand eight hundred and nineteen wheels. It is the additional advantage the defendant derived from the process — advantage beyond what he had without it — for which he must account; . . . but the master charged the profit obtained from the entire wheel instead of that resulting from the use of Whitney's invention in a part of the manufacture."

Imhaeuser, 14 Blatchf. 19; Gould's Manuf. Co. v. Cowing, 12 id. 243; S. C., 14 id. 315; Black v. Munson, id. 265; McCreary v. Pennsylvania Canal Co., 141 U. S. 459.

[1] Id.; Calkins v. Bertrand, 8 Fed. Rep. 755.

[2] Dobson v. Hartford Carpet Co., 114 U. S. 439; Reed v. Lawrence, 29 Fed. Rep. 915; Fay v. Allen, 30 id. 446; Roemer v. Simon, 31 id. 41; Everest v. Buffalo L. Oil Co., id. 742.

If, however, the defendant claims that any distinct part of the profits realized by him from the sale of the infringed article was the result of an improvement made by him, he has the burden of establishing his allegation. Marrs v. Union Form Co., 39 Fed. Rep. 468.

[3] Garretson v. Clark, 111 U. S. 120; S. C., 15 Blatch. 70; Shannon v. Bruner, 33 Fed. Rep. 871; Tomkinson v. Willets Manuf. Co., 34 id. 536; Crosby Valve Co. v. Safety Valve Co., 141 U. S. 441; Mowry v. Whitney, 14 Wall. 620; Littlefield v. Perry, 21 Wall. 205; Knox v. Great Western Q. M. Co., 6 Sawyer, 430; Sessions v. Romadka, 145 U. S. 29; § 1190, *ante*.

[4] 14 Wall. 620.

In Goulds' Manufacturing Co. v. Cowing[1] the master reported that the profits resulting from the patented portion of the pump could not be separated from those resulting from any other part of it; because making a comparison between the machine as it stands with its patented improvements and what would be left of it if these improvements were taken away, the machine would be valueless, and would, in fact, be no machine at all. Therefore he reported as profits to be recovered the entire profits of the pump. This was held erroneous. The court observed that pumps have been in use since the earliest ages of the world. After adverting to the part covered by the patent, Hunt, J., said: "The portion of the pump in question which belongs to or is included in the improvement of the plaintiffs is very small, and a machine constructed upon other known principles and devices applicable to pumps, omitting the plaintiffs' improvement, would include nearly everything useful that is to be found in the present machine. . . . The patentee takes the well known portions of a pump used in pumping gas-oil, with passages, valves, piston, chambers, openings, etc., as ordinarily made and used, and adds a chamber of an important construction as it is alleged, and a combination with certain other parts described. Now if this addition is not a new and useful improvement no damages can be claimed for its use. If it is such an improve- [616] ment, the improvement in its nature and by law is and must be capable of being described and pointed out and must be described and pointed out. Every skilful mechanic must be able to learn from the patent itself precisely what the monopoly covers.[2] If this alleged improvement is so confounded with portions of the machine which are the subjects of other patents, or which, from long continued use, are open to the public, that it cannot be separated from them, or if, when so separated, it has no value, it is not a patentable invention, and no damages are due for its use. The decree in this case has adjudged the patent in this case to be valid. In its nature, therefore, it is and must be capable of separation and distinction from other portions of the machine." On appeal[3] the

[1] 12 Blatchf. 243.

[2] Act of July 8, 1870, 16 U. S. Stats. at Large, 201.

[3] 105 U. S. 253.

supreme court reversed the decree on the accounting, and held that the rule laid down in Mowry v. Whitney[1] was applicable. That rule gave the patentee the fruits of the advantage which the defendant derived from using his invention over what he had in using other processes open to the public and adequate to enable him to obtain an equally beneficial result. "It does not necessarily follow," Waite, C. J., said, "that where the patent is for one of the constituent parts, and not for the whole of a machine, the profits are to be confined to what can be made by the manufacture and sale of the patented part separately. If, without the improvement, a machine adapted to the same uses can be made which will be valuable in the market, and salable, then, as was further said in that case, the inquiry is, 'What was the advantage in cost, in skill required, in convenience of operation or marketability,' gained by the use of the patented improvement? If the improvement is required to adapt the machine to a particular use, and there is no other way open to the public of supplying the demand for that use, then it is clear the infringer has by his infringement secured the advantage of a market he would not otherwise have had, and that the fruits of this advantage are the entire profits he has made in that market. Such we think is this case. Pumps for all ordinary and many extraordinary uses were very old; but in the new developments of business something was wanted to take gas from the casing of [617] an oil well and conduct it safely to the furnace of the engine. 'With that special purpose in view' this inventor took the well-known parts of an ordinary double-action pump, changed some of them slightly in form, added a new device, and produced something which would do what was wanted. While nominally he only made an improvement in pumps, he actually made an improved pump. For ordinary uses the improvement added nothing to the value of the old pump, but for the new and special purpose in view the old pump was useless without the improvement. The testimony shows that there was no market for pumps adapted to this particular use except in the oil-producing regions of Pennsylvania and Canada. The demand was limited as well as local. Less than a thousand pumps actually supplied all who wanted them. But

[1] 14 Wall. 620.

for that particular use no other pump could at the time be sold. If the appellants kept the control of its monopoly under the patent it alone had the advantage of this market. Unless the appellees got the improved pump they could not become competitors in that field; and just to the extent they got into the field they drove the appellant out. Through their infringement they got the advantage of selling the pumps that had upon them the patented improvement. Without it no such sales would have been effected. The fruits of the advantage they gained by their infringement were therefore necessarily the profits they made on the entire sale. This is an exceptional case. A limited locality required a particular kind of pump to be used only in that locality for a special purpose. The market was not only limited to a particular locality, but it was unusually limited in demand. A single manufacturer, possessing the facilities the appellants had, could easily and with reasonable promptness fill every order that was made. There was no other pump that could successfully compete with that controlled by the patent. Under these circumstances it is easy to see that what was the appellees' gain in this business must necessarily have been the appellant's loss, and consequently the appellant's damages are to be measured by the appellees' profits from their business in that special and limited market. This, as it seems to us, is the logical result [618] of the rule which has been stated. By infringing on the plaintiff's rights the appellees obtained the advantage of the increased marketability of their pump. The action of the court below, therefore, limiting the field of inquiry as to damages cannot be sustained."[1] Where this rule applies and the infringing machine or appliance contains the improvements covered by the complainant's patents, the profits will not be diminished because he did or did not use the invention: nor will any allowance be made the defendants for the value of improvements covered by subsequent patents owned and used by him; nor for machines made and destroyed before sale or thereafter and exchanged for other machines which are not stated in the account on either side; nor will a credit will be allowed him for such machines against the profits realized on others.[2]

[1] Fifield v. Whittemore, 33 Fed. Rep. 835; Welling v. La Bau, 34 id. 40.

[2] Crosby Valve Co. v. Safety Valve Co., 141 U. S. 441.

§ 1194. Same subject. In the case of a patent for an ornamental chair as a new article of manufacture, where there is a difference in kind between that patented and prior chairs, and where what was open to the public could not make a chair like the patented article in its peculiar characteristics, the patentee is not, in ascertaining the damages sustained by him by an infringement of his patent, limited to the advantage derived by the defendant from using the peculiar features of the patented chair over what advantage he would have had from using what was so open to the public.[1] The plaintiff is entitled to recover an equivalent for any advantage which the defendant has derived from an unlawful use of the patented invention, and this advantage may be estimated either from profits made therefrom separately or in combination with something else which the patent does not cover. The profits will be computed in the manner best suited to afford the injured party the full benefit of his patent unlawfully used and a just indemnity for the injuries he has thereby sustained.[2] If the improvement is only a constituent of a machine, but required to adapt it to a particular use, and there is no other way open to the public of supplying the demand for that use, then the infringer has, by his infringement, secured the advantage of a market he would not otherwise have had, and the fruits of it are the entire profits made in that market.[3] In response to an order of reference to take an account of the plaintiff's damages and of the defendant's profits by infringement the master reported that there were no damages and no profits, but that the plaintiff was entitled to compensation for the defendant's use of his patent. It appeared that such use restored the salable character of the article the defendant made, and [619] thus saved him from loss. It was held that the money value of this advantage could be recovered as compensation.[4] Remote profits or advantages of the infringement are not taken into account. Where the defendant, by the use of the plaintiff's patented process for preserving fish, was enabled to withdraw fish from the market and thus obtain a higher price for

[1] Mulford v. Pearce, 14 Blatchf. 141.

[2] Mason v. Graham, 23 Wall. 261.

[3] Goulds' Manuf. Co. v. Cowing, 105 U. S. 253.

[4] Sargent v. Yale Lock Manuf. Co., 17 Blatchf. 249.

it unpreserved than he would otherwise have received, it was held that the profits resulting from such increased price were too remote and indirect to be charged to the defendant as profits realized from the infringement.[1]

§ 1195. Same subject; ascertainment of profits. In determining the profits from the infringement of a patent which covers only a part of a machine or article made and sold, a ratable proportion of the cost of production and sale must be taken into the account. In the case of the Tremolo Patent[2] the defendants were vendors of musical instruments, including organs and melodeons, which they purchased from the manufacturers. Some of these contained the tremolo attachment, and others did not. For those containing such attachment they paid an additional price and sold them for an increased price. They were found guilty of infringing the plaintiff's patent in making sales of the organs having that attachment. In the ascertainment of the profits made by the sale of the tremolo attachment the defendants were allowed by the master to prove the general expenses of their business incurred in effecting the sales of all musical instruments, and to deduct a ratable proportion from the profits made by the sale of those with that attachment. It was contended in behalf of the plaintiff that the patent infringed was not the tremolo itself, but for the combination of the organ and tremolo, and that if the defendants obtained an extra price for the organ combined with the tremolo without incurring any additional expense, the whole of that extra price was obtained from the addition of the combination; also, that the true rule in such a case was that if the infringing device is an integral part of the whole instrument, without which it is incapable of use and for which a single charge is made, then in ascertaining [620] profits on a part of the organization general expenses should be apportioned according to the cost, or by some other equitable rule. But when the infringing device is an optional one, used or not at pleasure, and an extra price is charged and received for it when used, the true profit made is the extra sum received for the addition, deducting only such expenses as are incurred by reason of it. In answer to this argument the court say: "We think such a rule, even if it sometimes

[1] Piper v. Brown, 1 Holmes, 196. [2] 23 Wall. 518.

may be just, is inapplicable to the present case. We cannot see why the general expenses incurred by the defendants in carrying on their business, such expenses as store rent, clerk hire, fuel, gas, porterage, etc., do not concern one part of their business as much as another. It may be said that the selling a tremolo attachment did not add to their expenses, and therefore that no part of those expenses should be deducted from the price obtained for such an attachment. This is, however, but a partial view. The store rent, the clerk hire, etc., may, it is true, have been the same if that single attachment had never been bought or sold. So it is true that the general expenses of their business would have been the same if instead of buying and selling one hundred organs they had bought and sold only ninety-nine. But will it be contended that because buying and selling an additional organ involved no increase of the general expenses the price obtained for that organ above the price paid was all profit? Can any part of the whole number sold be singled out as justly chargeable with all the expenses of the business? Assuredly no. The organ with the tremolo attachment is a single piece of mechanism, though composed of many parts. It was bought and sold as a whole by the defendants. It may be said the general expenses of the business would have been the same if any one of these parts had been absent from the instrument sold. If, therefore, in estimating profits every part is not chargeable with a proportionate share of the expenses, no part can be. But such a result would be an injustice that no one would defend. We think it very plain, therefore, that there was no error in the rule adopted for the ascertainment of the profits made by the defendants out of their infringement of the complainant's patent."[1]

§ 1196. Profits recoverable though no license fee established. The owner of the patent is entitled in equity [621] to recover profits made by the infringer though the former was exercising his monopoly by granting licenses. He is not

[1] See Steam Stone-Cutter Co. v. Windsor Manuf. Co., 18 Blatchf. 47. In Zane v. Peck, 13 Fed. Rep. 475, the amount paid for clerk hire, storage, freight, etc., was not deducted in estimating the cost of manufacture and sale. Because the items would aggregate but a trifling sum the court refused to order a re-accounting.

limited in that forum to license fees, though such profits exceed in amount what he would have realized in such fees for what was done by the infringer. By the express provisions of the statute the plaintiff is entitled to recover in addition to the profits to be accounted for by the defendant "the damages sustained by the infringement."[1] This shows that in contemplation of law the profits actually realized by the infringer belong to the patentee, and that when the profits will not compensate for the damages sustained, as they may not in many cases, he is entitled to damages beyond.[2] The right given by the statute to recover in equity damages besides profits is not intended to give the owner double compensation; but the net profits made from the unlawful use of his invention, and such supplemental damages proved as will make the decree on the whole a full compensation. If the business of the infringer is so improvidently conducted that he makes no substantial profits the owner of the patent may have his compensation calculated on the basis of a license fee. In the ascertainment of such damages there is required the same certainty of proof as at law. Where there is a loss of profits in the plaintiff's business by a diversion of his customers by the defendant's sale of an infringing article or machine, or a reduction of price from the same cause, damages may be recovered therefor.[4] It will not be presumed as matter of law, but must be established as a fact, that because the defendant has sold an infringing article there has been a corresponding or any falling off of the plaintiff's business.[5] In one case[6] the court said: "It was not made to appear that the plaintiff could have sold his watches to the persons who purchased from the [622] defendants. The watches have been adjudged to be

[1] R. S., § 4921. Independently of statute both profit and damages cannot be recovered. United Horse Shoe & Nail Co. v. Stewart, 13 App. Cas. 401; Neilson v. Betts, L. R. 5 H. of L. 1.

[2] Wooster v. Taylor, 14 Blatchf. 403; Carew v. Boston, etc. Co., 3 Cliff. 356; Williams v. Rome, etc. R. Co., 18 Blatchf. 181.

[3] Marsh v. Seymour, 97 U. S. 348; Birdsall v. Coolidge, 93 id. 64.

[4] Buerk v. Imhaeuser, 14 Blatchf. 19; Carter v. Baker, 1 Sawyer, 527; Birdsall v. Coolidge, *supra;* Zane v. Peck, 13 Fed. Rep. 475; Am Ende v. Seabury, 43 id. 672; Yale Lock Manuf. Co. v. Sargent, 117 U. S. 536; United Horse Shoe & Nail Co. v. Stewart, 13 App. Cas. 401; American Braided Wire Co. v. Thompson, 44 Ch. Div. 274.

[5] Boesch v. Graff, 133 U. S. 697.

[6] Buerk v. Imhaeuser, *supra.*

identical in principle, but they differ in structure and appearance; and it cannot be known that those who bought the infringing article would have bought the plaintiff's watches under any circumstances. The difference in structure, as well as the difference in price, enter into that question, and no means are afforded for determining it by proofs." [1] Where the infringer originally bought large numbers of a patented article from the patentee and subsequently began its manufacture himself, but did not wholly cease buying, it was held reasonable to believe that had he not manufactured he would have purchased as large a number as he made and used.[2] If machines are substantially alike and are made in the same locality for a similar market, the profits made by one manufacturer furnish a sufficiently reliable basis upon which to estimate those made by another, especially if the defendant refuses to disclose his profits.[3]

§ 1197. Interest. Profits when recovered being regarded as unliquidated damages, interest is not usually allowed until they have been judicially liquidated.[4] It may be refused altogether, or allowed after interlocutory or after final decree, according to the circumstances of the case. If a reference is made to a master interest is not usually to be allowed before the date of the submission of his report, and only upon the amount shown thereby and by the accompanying evidence to be due.[5] It is properly allowed from that time.[6]

[1] Smith v. Pryor, 2 Sawyer, 461; Carter v. Baker, 1 id. 512; Seymour v. McCormick, 16 How. 480; Ingersoll v. Musgrove, 14 Blatchf. 541.

[2] Creamer v. Bowers, 35 Fed. Rep. 206.

[3] Adams v. Keystone Manuf. Co., 41 Fed. Rep. 595.

[4] Mowry v. Whitney, 14 Wall. 653; Parks v. Booth, 102 U. S. 96; Steam Stone-Cutter Co. v. Windsor Manuf. Co., 17 Blatchf. 35; S. C., 18 id. 47; Littlefield v. Perry, 21 Wall. 205, 229. See Silsby v. Foote, 20 How. 378.

[5] Tilghman v. Proctor, 125 U. S. 136.

[6] Crosby Valve Co. v. Safety Valve Co., 141 U. S. 441.

CHAPTER XXXII.

INFRINGEMENT OF COPYRIGHT.

§ 1198. Copyright is statutory.
1199. Compensatory and penal recoveries.

[623] **§ 1198. Copyright is statutory.** The law recognizes and protects literary property, which is the right of the owner to possess, use and dispose of intellectual productions.[1] It is a property which does not come into being until some mental conception has been embodied in written or spoken language, or otherwise signified as an intellectual creation in such manner as to be capable of recognition and identification. It includes copyright, playright and original proprietorship in works of art.[2] It is property held by a peculiar tenure. Whatever may have been the original common law, it seems to have been long settled on both sides of the Atlantic, that beyond an absolute right to such productions before publication, the author or his assigns has only such special right in them afterwards as is granted by statute.[3] An author has the same

[1] Drone on Copyright, 97.

[2] Lord Mansfield, in Millar v. Taylor, 4 Burr. 2396, said: "I use the word 'copy' in the technical sense in which that name or term has been used for ages to signify an incorporeal right to the sole printing and publishing of somewhat intellectual, communicated by letters."

The intellectual productions to which the law extends protection are of three classes: First, writings or drawings capable of being multiplied by the arts of printing and engraving; second, designs of form or configuration capable of being reproduced upon the surface or in the shape of bodies; third, inventions in what are called the useful arts. To the first class belong books, maps, charts, music, prints, and engravings; to the second class belong statuary, bas-reliefs, designs for ornamenting any surface and configuration of bodies; the third class comprehends machinery, tools, manufactures, compositions of matter, and processes or methods in the arts. According to the practice of legislation in England and America, the term *copyright* is confined to the exclusive right secured to the author or proprietor of a writing or drawing which may be multiplied by the art of printing in any of its branches. Property in other classes of intellectual objects is usually secured by letters patent, and the interest is called patent-right. But the distinction is arbitrary and conventional. Bouv. L. Dic.

[3] Turner v. Robinson, 10 Irish Ch. (N. S.) 121, 501; Oliver v. Oliver, 11 C. B. (N. S.) 139; Prince Albert v.

right to his unpublished manuscripts as to any other [624] property, and may resort to the same legal and equitable remedies in case of actual or threatened infractions in one case as in the other. He may publish his productions or not as he chooses, and may prevent their publication without his consent. But when he has published them he is supposed to have thereby obtained remuneration, and thenceforth has no special property in them; he then has no exclusive right to multiply copies or to control the subsequent issue of copies by others. The right to multiply copies to the exclusion of others is the copyright, and is restricted and governed by the statutes on that subject.[1]

§ 1199. Compensatory and penal recoveries. The [625] present statute, enacted by congress, provides a distinct remedy for infringement in respect to the different classes of literary property, and according to the nature of the wrong.[2]

Strange, 1 MacN. & G. 25; Wheaton v. Peters, 8 Pet. 656; Boucicault v. Wood, 2 Biss. 33; Crowe v. Aiken, id. 208; Wall v. Gordon, 12 Abb. (N. S.) 349; Palmer v. Dewitt, 47 N. Y. 532; Stevens v. Gladding, 17 How. (U. S.) 447; Little v. Hall, 18 id. 165. See Donaldson v. Beckel, 4 Burr. 2408.

[1] Id.; Short's Law of Literature, 48; Parton v. Prang, 3 Cliff. 537; Bartlette v. Crittenden, 4 McLean, 300; Paige v. Banks, 13 Wall. 608; Carter v. Bailey, 64 Me. 458; Banker v. Caldwell, 3 Minn. 94; Kiernan v. Manhattan Q. T. Co., 50 How. Pr. 194. See Drone on Copyright, p. 100.

[2] § 4964. Every person who, after the recording of the title of any book as provided by this chapter, shall within the term limited, and without the consent of the proprietor of the copyright first obtained in writing, signed in presence of two or more witnesses, print, publish or import, or knowing the same to be so printed, published or imported, shall sell or expose to sale any copy of such book, shall forfeit every copy thereof to such proprietor, and shall also forfeit and pay such damages as may be recovered in a civil action by such proprietor in any court of competent jurisdiction.

§ 4967. Every person who shall print or publish any manuscript whatever, without the consent of the author or proprietor first obtained, if such author or proprietor is a citizen of the United States or resident therein, shall be liable to the author or proprietor for all damages occasioned by such injury.

§ 4965. If any person, after the recording of the title of any map, chart, musical composition, print, cut, engraving, or photograph or chromo, or of the description of any painting, drawing, statue, statuary, or model or design intended to be perfected and executed as a work of the fine arts, as provided by this chapter, shall, within the term limited, and without the consent of the proprietor of the copyright first obtained in writing, signed in the presence of two or more witnesses, engrave, etch, work, copy, print,

After the title page has been deposited the author can maintain an action for an infringement or violation of his rights.[1] [626] But after publication it must be shown as a condition of recovery that within ten days from publication he delivered at the office of the librarian of congress, or deposited in the mail properly addressed to that officer, two copies of such copyright book.[2] The forfeitures declared in the statute can only be recovered by actions at law.[3] And it is so with regard to the damages, other than profits as such.[4] In this particular the remedy in equity is less comprehensive than that allowed by the statute for infringement of patent-rights. By the statute[5] jurisdiction is given to the courts of the United States of suits and actions arising under the copyright laws, and power is given them to grant injunctions according to the course and practice of courts of equity, an incident of which is the right to an account of profits.[6] In Stevens v. Gladding the court refer to Colburn v. Simms,[7] in

publish or import, either in whole or in part, or by varying the main design, with intent to evade the law, or, knowing the same to be so printed, published or imported, shall sell or expose to sale any copy of such map, or other article as aforesaid, he shall forfeit to the proprietor all the plates on which the same shall be copied, and every sheet thereof, either copied or printed, and shall further forfeit one dollar for every sheet of the same found in his possession, either printing, printed, copied, published, imported, or exposed for sale; and in the case of a painting, statue or statuary, he shall forfeit ten dollars for every copy of the same in his possession, or by him sold or exposed for sale; one-half thereof to the proprietor and the other half to the use of the United States.

§ 4966. Any person publicly performing or representing any dramatic composition for which a copyright has been obtained, without the consent of the proprietor thereof, or his heirs or assigns, shall be liable for damages therefor, such damages in all cases to be assessed at such sum, not less than one hundred dollars for the first and fifty dollars for every subsequent performance, as to the court shall appear to be just.

[1] Roberts v. Myers, 13 Law Rep. 398; Boucicault v. Wood, 2 Biss. 34.

[2] Merrell v. Tice, 104 U. S. 557. See Callaghan v. Myers, 128 id. 617. The statute is sufficiently complied with if the copies are deposited immediately before the publication of the book. Belford v. Scribner, 144 U. S. 488.

[3] Stevens v. Cady, 2 Curt. 200; Stevens v. Gladding, 17 How. 447; Callaghan v. Myers, 128 U. S. 617.

[4] Chapman v. Ferry, 12 Fed. Rep. 693.

[5] § 4970.

[6] Stevens v. Gladding, *supra;* Chapman v. Ferry, *supra.*

[7] 2 Hare, 554.

which it is said: "It is true that the court does not by an account actually measure the damage sustained by the proprietor of an expensive work from the invasion of his copyright by the publication of a cheaper book. It is impossible to know how many copies of the dearer book are excluded from sale by the interposition of the cheaper one. The court by the account as the nearest approximation it can make to justice takes from the wrong-doer all the profits he has made by his piracy and gives them to the party who has been wronged. In doing this the court may often give the injured party more in fact than he is entitled to, for *non constat* that a single additional copy of the more expensive book would have been sold if the injury by the sale of the cheaper had not been committed. The court of equity, however, does not give anything beyond the account." In Stevens v. Gladding, at the circuit,[1] the court held the owner of a copyright entitled to the profits arising from the sales on commission of pirated copies; that a court of equity may decree an account of such profits, as it would those realized by a partnership.[2] The case [627] of Backus v. Gould[3] arose under the act of 1831, and in the argument of Mr. Bayard is a statement of the English and American statutes on the subject of copyright to that time. Section 6 of that act provided, among other things, that the infringer "shall forfeit and pay fifty cents for every sheet which may be found in his possession, either printed, printing, published, imported, or exposed to sale contrary to the intent

[1] 2 Curt. 608.

[2] In this case Curtis, J., said: "I perceive no sound reasons for restricting those gains to the difference between the cost and the sale price of a map or book, or limiting the right to an account to those persons who have sold the work solely on their own account. He who sells on commission does in truth sell on his own account, so far as he is entitled to a percentage on the amount of sales. What he so receives is the gross profit coming to him from the proceeds of the sale, and what he so receives diminishes the net profit of him who employs him to sell. When the latter is called on to account, he has an allowance for the commissions he has paid, because those sums, though part of the gross profits of the sales, he has not received."

In Pike v. Nicholas, L. R. 5 Ch. 260, note, James, Vice Ch., thus laid down the rule of accounting in equity in case of invasion of a copyright: "The defendant is to account for every copy of his book sold, as if it had been a copy of the plaintiff's, and to pay the plaintiff the profit which he would have received from the sale of so many additional copies."

[3] 7 How. 798.

of this act." It was held that this clause was penal, and should be strictly construed; therefore the penalty was only collectible in respect of sheets found in the possession of the infringer. The corresponding section in the present patent law substitutes for the foregoing clause one for the recovery of damages. But section 4965 contains a similar clause relative to pirated maps, charts,[1] musical compositions, prints, cuts, engravings, photographs or chromos.[2] There are not many decisions in respect to damages at law under the provisions of the statute providing for their recovery. In Boucicault v. Wood[3] the court submitted the question of the amount generally to the jury, stating that it is a question of proof, and upon that the jury were to form their own conclusions as to the damages the plaintiff had actually sustained. It is believed that the same considerations that govern in legal actions for infringement of patent-rights would apply. The injury is similar, and such cases would appear to be analogous. The view thus expressed in the first edition of this work has been confirmed by the recent case of Callaghan v. Myers.[4] It is there laid down that in ascertaining the profits made by an infringing publisher of several volumes of judicial reports that the cost of stereotyping them, the amount paid to the members of the infringing firm for their services as salaries for conducting the firm business during the time the infringing was done, the cost of producing copies which remained unsold, the amount paid for editorial work in preparing such volumes, is not to be deducted. The infringer is chargeable with the profit made on the resale of volumes originally sold by him as well as with that realized on the first sale. If part of the matter in the volumes, such as the opinions of the court, is not the subject of copyright, but it is useless without the head-notes, statements of fact, arguments of counsel, table of cases and other matter prepared by the reporter who has obtained the copyright, the entire profit on the whole may be recovered.[5] A married woman whose work has been

[1] See Taylor v. Gilman, 24 Fed. Rep. 632.

[2] The statute is penal and must be construed strictly. A principal is not liable for the prescribed penalty or forfeiture because of the acts of his agent done without his knowledge. Taylor v. Gilman, *supra*.

[3] 2 Biss. 34.

[4] 128 U. S. 617; 24 Fed. Rep. 636.

[5] Belford v. Scribner, 144 U. S. 488.

copyrighted by her publisher and who has settled with him from time to time for royalties will be presumed to have conveyed to him the legal title to the copyright so that he may recover the profits made by an infringing publisher, notwithstanding there is no proof that the laws of her domicile have removed her common-law disabilities or that her husband joined in the conveyance of his wife's rights.[1] The printer of an infringing book is liable with the publisher for whom he does the work for the profits realized.[2]

[1] Belford v. Scribner, 144 U. S. 488. [2] Id.

CHAPTER XXXIII.

INFRINGEMENT OF TRADE-MARKS.

§ 1200. Nature of the right to a trade-mark and of the wrong of infringement.
1201, 1202. The measure of damages.

§ 1200. Nature of the right to a trade-mark and of the [628] **wrong of infringement.** This injury is one to the good-will of a business. Redress for it by recovery of damages is founded on the obvious principle that if one by any false pretense draws away another's customers, either with intent to lessen the latter's profits or to unlawfully appropriate them, he commits a wrong for which compensation proportioned to the injury may be recovered. This principle embraces all deceits by which that injurious loss of business is accomplished. Thus a merchant designated his goods by a label which would not be protected as a trade-mark; the words used were not strictly true, though they were not calculated to deceive or injure the public. Another merchant adopted the same label, placed it upon inferior goods, which he put upon the market. It was held that he was liable in an action in the nature of deceit; that specific damage need not be alleged or proved to sustain the action, but the jury might give general damages.[1] Everywhere courts proceed upon the theory that a party has a valuable interest in the good-will of his trade, and in the labels or marks which he adopts to enlarge and perpetuate it.[2] A dealer has a property in his trade-mark. The ownership is allowed him that he may have the exclusive benefit of the reputation which his skill has given to articles made or sold by him that no other person may be able to sell to the

[1] Conrad v. Uhrig B. Co., 8 Mo. App. 277; McLean v. Fleming, 96 U. S. 245; Wotherspoon v. Currie, L. R. 5 Eng. & Ir. App. 508; Rodgers v. Nowill, 6 Hare, 325; S. C., 5 M., G. & S. 109; Lee v. Haley, L. R. 5 Ch. App. 155. See Auburn, etc. P. R. Co. v. Douglass, 12 Barb. 557.

[2] Id.; Amoskeag Manuf. Co. v. Spear, 2 Sandf. 599; Colladay v. Baird, 4 Phila. 139; Partridge v. Menck, 2 Barb. Ch. 101; Walton v. Crowley, 3 Blatchf. 440; Levy v. Walker, 10 Ch. Div. 436; S. C., 27 Moak, 17, note.

public as his that which is not his.[1] And there is no difference between citizens and aliens in respect to their rights [629] in trade-marks and in being entitled to have such rights protected in our courts.[2] The infringement of a trade-mark causes injury by legal presumption as the result of a fraudulent representation that the infringer's use of that mark is the proprietor's use. If it be a label or mark upon goods manufactured or sold there is in the infringer's use of it an implied representation by him that the goods on which he places the label or mark are those of the person who adopted the mark and has been accustomed to designate his goods by it. Such infringement may injure the proprietor of the mark in two ways: By dividing, and to some extent diminishing, the demand upon him for his goods, and by depreciating them by having their merits determined by the deceived consumers of or the dealers in the inferior article.[3] The quality, however, of the simulated article is immaterial except as it affects the amount of the injury. The proprietor of the trade-mark suffers injury, and has an undoubted claim to damages if the natural effect of the transaction of the infringer is to palm off on purchasers a different article from that which they intended to buy, and to interfere with the right of such proprietor to profits to which the reputation of his article justly entitled him.[4] One commits a legal wrong when he adopts a trade-mark which is untrue and deceptive to sell his own goods as the goods of another, for thereby the latter is injured and the public deceived.[5] The infringement is pre-

[1] Clark v. Clark, 25 Barb. 76; Williams v. Johnson, 2 Bosw. 1; Dixon Crucible Co. v. Guggenheim, 2 Brewster, 321; Derringer v. Plate, 29 Cal. 292; Marshall v. Pinkham, 52 Wis. 572; Congress Spring Co. v. High Rock Spring Co., 45 N. Y. 291; El Modello Cigar Manuf. Co. v. Gato, 25 Fla. 886. See Trade-Mark Cases, 100 U. S. 82.

[2] Taylor v. Carpenter, 2 Woodb. & M. 1; Coats v. Holbrook, 2 Sandf. Ch. 586.

[3] Peltz v. Eichele, 62 Mo. 171; Morison v. Salmon, 2 M. & G. 385; Blanchard v. Hill, 2 Atk. 484; Singleton v. Bolton, 3 Doug. 293; Blofield v. Payne, 4 B. & Ad. 410; Southern v. How, Poph. 143; Graham v. Plate, 40 Cal. 593; Taylor v. Carpenter, 2 Woodb. & M. 1; Taylor v. Carpenter, 2 Sandf. Ch. 603, and note to Coats v. Holbrook, id. 599.

[4] Coats v. Holbrook, 2 Sandf. Ch. 586; Taylor v. Carpenter, id. 603, and note to Coats v. Holbrook, id. 599; S. C., 11 Paige, 292.

[5] Newman v. Alvord, 51 N. Y. 195; Morison v. Salmon, 2 M. & G. 385.

sumed to proceed from a fraudulent purpose to induce the public, or those buying the article, to believe that the goods [630] wrongfully designated by it are those made or sold by the owner of the trade-mark, and to supplant him in the good-will of his trade.[1] Damages will be presumed from infringement, and at least a nominal sum can be recovered.[2] Positive proof of fraudulent intent on the part of the infringer is not required where the infringement is clearly shown, as his liability arises from the fact that he is enabled, through the unwarranted use of the trade-mark, to sell a simulated article as and for the one which is genuine.[3] It is sufficient to show the proprietary right of the plaintiff and its actual infringement.[4]

§ **1201. The measure of damages.**[5] The compensation to the owner of a trade-mark for the injury he suffers from a wrongful and unauthorized use of it by another is ascertained and computed on substantially the same principles as damages for infringement of patents and copyrights. In equity, if [631] there is ground for invoking its jurisdiction, and an infringement has been found and decreed, and there has been no unreasonable delay in commencing the suit,[6] an account of

[1] Taylor v. Carpenter, 11 Paige, 292; S. C., 2 Sandf. Ch. 603: McLean v. Fleming, 96 U. S. 245; Marsh v. Billings, 7 Cush. 322; Thompson v. Winchester, 19 Pick. 214; Blofield v. Payne, 4 B. & Ad. 410; Rodgers v. Nowill, 5 M., G. & S. 109; Coffeen v. Brunton, 4 McLean, 516.

[2] Blofield v. Payne, 4 B. & Ad. 410.

[3] McLean v. Fleming, 96 U. S. 253; Wotherspoon v. Currie, L. R. 5 Eng. & Ir. App. 512; Davis v. Kendall, 2 R. I. 566.

[4] Colman v. Crump, 70 N. Y. 578; American Grocer v. Grocer Pub. Co., 25 Hun, 402; Dale v. Smithson, 12 Abb. Pr. 237; Guilhon v. Lindo, 9 Bosw. 605; Kinahan v. Bolton, 15 Ir. Ch. (N. S.) 75; Filley v. Fassett, 44 Mo. 168; Stonebreaker v. Stonebreaker, 33 Md. 252; Holmes v. Holmes, etc. Co., 37 Conn. 278; Edelsten v. Edelsten, 9 Jur. (N. S.) 479.

[5] See Trade-Mark Cases, 100 U. S. 82, declaring the trade-mark legislation of congress unconstitutional.

[6] Harrison v. Taylor, 11 Jur. (N. S.) 408; S. C., 12 L. T. R. (N. S.) 339; Amoskeag Manuf. Co. v. Garner, 4 Am. L. Times (N. S.), 176.

"In England the rule is stringent in trade-mark cases that lack of diligence in suing deprives the complainant in equity of the right either to an injunction or an account. Our courts are more liberal in this respect. A long lapse of time will not deprive the owner of a trade-mark of an injunction against an infringer, but a reasonable diligence is required of a complainant in asserting his rights if he would hold a wrong-doer to an account for profits and damages. This rule, however, applies only to those cases where there has been an acquiescence after a knowledge of

profits will be decreed, which means the net profits the infringer has actually realized.[1] Where a defendant is so ordered to account he cannot be charged with bad debts as profits; and on the other hand, he cannot charge the plaintiff

the infringement is brought home to the complainant." Sawyer v. Kellogg, 9 Fed. Rep. 601; El Modello Cigar Manuf. Co. v. Gato, 25 Fla. 886. If plaintiff remains silent after he has knowledge of the infringement he will be allowed damages only on such sales as are made after his action is begun. Enoch Morgan's Sons Co. v. Troxell, 57 How. Pr. 121.

[1] Frazer v. Frazer Lubricator Co., 18 Ill. App. 450; Avery v. Meikle, 85 Ky. 435, 446; El Modello Cigar Manuf. Co. v. Gato, 25 Fla. 886; Hostetter v. Vowinkle, 1 Dill. 329; Wilder v. Gaylor, 1 Blatchf. 511.

In Hostetter v. Vowinkle, *supra*, the court seemed to limit the profits to those realized on that amount of the infringer's trade which represented the consequent diminution of the plaintiffs'. Dillon, J., said: "From the evidence of one of the defendants I find that he admits sales to the extent of two hundred dozen bottles. The evidence shows that the sales of the plaintiffs in Omaha fell off during the time the defendants were manufacturing and selling their imitation bitters even to a greater amount than this. I am satisfied that the plaintiffs' sales have been lessened at least to the extent of the two hundred dozen bottles, and that their profits would have been on each case of one dozen bottles the sum of four dollars."

If the action is for an injunction and the complainant elects to accept the profits as damages the court will not require him to show affirmatively that he has been damaged, but will assume as matter of law that persons who have purchased simulated goods would have purchased the genuine but for the defendant's wrong. Though damages are prayed for, the election may be made to take the profits if no other special injury is alleged or claimed. Avery v. Meikle, 85 Ky. 435.

It is immaterial to this right of recovery whether the complainant would have realized the profits made by the defendant or not. If the latter made profits by his invasion of the complainant's rights he is entitled to them whether the same profits would have been made by him or not, and not to any more, for the same profits could not be made by both. Atlantic Milling Co. v. Rowland, 27 Fed. Rep. 24.

Interest on profits is not always allowed. Avery v. Meikle, 85 Ky. 435.

In the computation of profits deduction for expenses was refused where the infringing was carried on in connection with the defendant's regular business and without increasing the gross expenses. Societe Anonyme v. Western Distilling Co., 46 Fed. Rep. 921. But see § 1191, *ante*.

One who advertises and sells a proprietary article in a specified territory contrary to the terms of a contract is not liable to the other party to such contract for money expended by the latter in advertising for the purpose of counteracting the effect of such a breach. Application should be made, in the first instance, to the courts for the restraint of the party thus guilty. Equity will not, in a suit for an injunction and an accounting for the violation of such a contract, award anything for losses sustained by the complainant be-

with the cost of manufacturing the goods in respect of which such debts were incurred.[1] There is the same singularity of different modes of estimating and proving compensation in equity and at law as exists in case of infringement of the other rights referred to. The net profits may be recovered in equity as profits made by the use of the plaintiff's property, and the defendant, as constructive trustee, compelled to account for them. But at law only damages can be recovered, and they will be measured by the plaintiff's loss, and not by the defendant's gain; profits are there held not to be the measure of damages, nor an element thereof, where there is any other method of ascertaining and measuring them. Profits may be shown at law when necessary; they do not, however, measure the damages except as they are shown to represent loss to the plaintiff by a corresponding decrease of profits in his own business occasioned by such competition. The defendant's profits, as such, do not at law, as they do in equity, belong to the plaintiff. Nor will the proof of profits [632] warrant a legal presumption that the plaintiff's loss is a corresponding amount. Perhaps the difference comes from a claim made in the one case of damages which is properly cognizable at law, and in the other a claim of profits recoverable as the fruit of a constructive trust cognizable only in equity. On a bill in equity to restrain the infringement of the plaintiff's trade-mark a decree had been obtained for an injunction. A decree for an account of profits had been offered by the court, and refused by the plaintiff, who elected to take in lieu thereof an inquiry as to damages for the defendant's unlawful use of the trade-mark. On that inquiry the plaintiff did not prove direct damages, and could not show to what extent his mark had been used; he claimed damages equal to all the profits made by the defendant on all his sales of the article on which the pirated trade-mark was used, but the court re-

cause of the reduction made by him in the price of his article to meet the competition of the defendant. Where the article has been made by both parties after the same formula the profits will be computed upon the basis of the actual cost to the defendant, regardless of the expense at which it might have been made and sold by the defendant. Interest should be allowed on the profits. Fowle v. Park, 48 Fed. Rep. 789.

[1] Edelsten v. Edelsten, 10 L. T. Rep. (N. S.) 780.

jected this claim, holding that the plaintiff was not so entitled; that on such an inquiry the *onus* lies on him of proving some special damage by loss of custom or otherwise; and that it will not be intended, in the absence of evidence, that the amount of goods sold by the defendant by the fraudulent use of the trade-mark would otherwise have been sold by the plaintiff.[1]

[1] Leather Cloth Co. v. Hirschfield, L. R. 1 Eq. 299; Seymour v. McCormick, 16 How. (U. S.) 480; Ransom v. Mayor, 1 Fish. Pat. Cas. 252; Avery v. Meikle, 85 Ky. 435, 451; Addington v. Cullinane, 28 Mo. App. 238; Atlantic Milling Co. v. Robinson, 20 Fed. Rep. 217. See *ante*, § 1185.

In Peltz v. Eichele, 62 Mo. 171, it appeared that the defendant, who was a manufacturer of and dealer in matches in the city of St. Louis, entered into a contract with the plaintiff for the sale to him, for a certain sum, of his entire factory and stock in trade, together with the goodwill, proprietary stamp, trade-marks, brands, and the use of the names of A. Eichele and A. Eichele & Co. employed by him in such business. This contract contained the following covenant: "Said Eichele, further covenanting, agrees that he will not enter into the manufacture of matches at this or any other place for the term of five years, nor lend his influence, skill, name or countenance to any other party or parties so engaged, to the detriment of the business so transferred." In about a year the defendant erected a new factory in the city of St. Louis, about six blocks from the one he sold to the plaintiff, and at once engaged in the manufacture and sale of matches under the name and style of P. Eichele & Co. The trial court instructed the jury that the measure of damages is not the difference of plaintiff's profits subsequent to the re-entry of defendant into business, but only so much of this difference as was reaped by the defendant, and the proof of how much was thus reaped by defendant devolves on the plaintiff. That while, as part of the circumstantial proof in the cause, plaintiffs have been permitted to show their sales during the several years, the jury are not to adopt as the measure of damages the profits of one year computed on sales compared with those computed on the sales of another year, unless they believe from the evidence that the difference between the sales of the different years had no other cause than that the defendant re-entered into the business. Hence, if the jury believe from the evidence that the customers who left plaintiffs to return to defendant bought not solely of defendant, but of other parties, then the measure of damages would be only upon the sales made by defendant, and proof of this amount devolves on the plaintiff, and the jury, in the absence of proof, cannot presume what amount they were. The plaintiff having obtained a verdict and judgment on the defendant's appeal, the supreme court affirmed the judgment, and Hough, J., said: "We have been referred to a number of cases on the measure of damages in patent and trade-mark cases as containing the true rule for our guidance in the case at bar. These cases are somewhat similar but not analogous to the present one.

[633] § **1202. Same subject.** The jury are to give the actual damages which the plaintiff has sustained,— not vindictive nor speculative damages, but such as his proof has shown [634] to their satisfaction he has actually sustained by the in-

The rule adopted in cases for the infringement of a patent is not strictly applicable to a case for the infringement of a trade-mark; and neither the rule applicable in trade-marks, nor in patent cases, is fully applicable to the case at bar. The good-will of a business as embodied in a firm name, or in the labels used, will be protected on principles analogous to those applied in cases of infringement of trade-marks. It is true that a trade-mark is held by some of the text-writers and, perhaps, in some adjudicated cases, to be a part of the good-will, and necessarily included in the sale thereof. The object in purchasing the good-will undoubtedly was to retain the old customers of A. Eichele & Co., and labels or wrappers bearing the name of the firm, or other brands or marks by which the goods manufactured by that firm might be identified, are *quasi* trade-marks. But there is no allegation that the good-will transferred to the plaintiffs was in any way injured or impaired by defendant having used his trade-mark or labels.

"The profits made by the defendants, therefore, to which the plaintiffs claim they are entitled, are not the profits made on articles the exclusive right to manufacture and sell which belonged to the plaintiffs, nor the profits derived from the use of a label or trade-mark the exclusive right to which was in the plaintiffs, though the exclusive right to make the goods on which it was used was not in the plaintiffs; but the profits realized from the general decline and diversion of the plaintiffs' business occasioned by the defendant. If plaintiffs lost less than the defendant made they cannot recover the whole of defendant's profits; if the plaintiffs lost more than the defendant made they would not be limited to the defendant's profits. What the plaintiffs have lost by the defendant's breach of covenant, and not what the defendant has gained thereby, is the legal measure of damages in this case. If the plaintiffs had manufactured matches to the utmost capacity of their factory, and sold all they made at unreduced prices, notwithstanding the defendant may have, in violation of his covenant, engaged in the same business in St. Louis, and realized large profits, the plaintiffs could only have recovered nominal damages, for, in that case, they would have lost nothing. On the other hand, if the defendant had infringed the exclusive right of the plaintiffs to manufacture and sell a particular article, the defendant, in an action against him for damages, would be held to account to them for all profits made by the manufacture and sale of such article, regardless of the fact whether he thereby interfered in any manner with the plaintiff's business or his customers in any particular place, or whether the product of the plaintiffs' factory and their sales were in any manner affected thereby or not; and this is understood by us to be the rule in patent cases. In such cases the entire profits are taken because the defendant has no right at all to deal in the article, and must account as a kind of trustee for what he has made from another's

fringement.[1] M. agreed with S., the lessee of the Revere House, to keep good carriages, horses and drivers on the arrival of certain specified trains at a railroad station [635] to convey passengers to the Revere House, and in consideration thereof S. agreed to employ M. to carry all the passengers from the Revere House to the station, and authorized him to put upon his coaches and the caps of his drivers as a badge the words "Revere House." A similar agreement, previously existing between S. and B., had been terminated by mutual consent; but B. continued to use the words "Revere House" as a badge on his coaches and on the caps of his drivers, although requested not to do so by S.; and his drivers called "Revere House" at the station, and diverted passengers from M.'s coaches into B.'s. In an action on the case, brought by M. against B. for using said badge and diverting passengers, it was held that M., by his agreement with S., had the exclusive right to use the words "Revere House" for the purpose of indicating that he had the patron-

capital, while in the present case he will be held to respond in damages only for the injury he has inflicted upon the plaintiffs by reason of his dealing in the article at a particular place in violation of his covenant. In ascertaining the amount of this damage the profits made by the defendant constitute an element, but only such profits made by the defendant as the plaintiffs have lost by reason of the wrongful act of the defendant complained of in the petition. In ascertaining the profits lost to the plaintiffs, the profits made by the defendant may properly be given in evidence in connection with the diversion of customers from plaintiffs to defendant, and the amount of their purchases, the product of the plaintiffs' factory, and the amount of their sales, and the reduction in price of the articles sold, if any, in consequence of the unlawful competition of defendant. By the first instruction given at the instance of the defendant, which inaccurately stated the measure of damages by confining it to profits, but of which he has no reason to complain, the burden of proof was declared to be upon the plaintiffs to prove what proportion of the profits received by the defendant they were entitled to recover as a part of their loss; and the only question remaining to be considered in this connection is whether there is any testimony whatever tending to support the verdict. . . . It would be impossible in a case like the present for the plaintiffs to prove with accuracy the damages they have sustained; but the *data* from which the jury might reasonably infer the amount of their loss were in evidence, and it is not for the defendant to say that there was obscurity in matters which it was peculiarly within his power to make plain."

[1] Ransom v. Mayor, etc., 1 Fish. Pat. Cas. 252; Parker v. Hulme, id. 44; Addington v. Cullinane, 28 Mo. App. 238.

age of that house for the conveyance of passengers; that if B. used these words for the purpose of holding himself out as having the patronage and confidence of that establishment, and in that way to induce passengers to go in his coaches rather than in M.'s, this would be a fraud on the plaintiff, and a violation of his rights, for which the action would lie without proof of actual, specific damage, and that M. would be entitled to recover such damages as the jury, upon the whole evidence, should be satisfied that he had sustained, and not merely for the loss of such passengers as he could prove to have been actually diverted from his coaches to the defendant's.[1] It has sometimes been stated and held at law that the proprietor of a trade-mark may recover the value of the illegal user while it continued, or, in other words, the amount of profits.[2] In a comparatively late case in California[3] the court, by Crockett, J., thus vindicates that measure and mode of redress: "It is clearly in proof that the defendant has made a profit of $1,770 by sale of pistols made in imitation of the Derringer pistol, and bearing Derringer's trade-mark stamped thereon without his consent; and the court rendered a judgment for this amount against the defendant. It is in- [636] sisted on behalf of the defendant that the profit realized by him from sale of the spurious article under the simulated trade-mark is not a proper measure of damages. It is conceded that this is the proper rule in an action for damages for the infringement of a patent. It is said that the patentee, having the exclusive right to manufacture and vend the patented article, is entitled, legally and equitably, to all the profits made by any one from the manufacture and sale of it in violation of the rights of the patentee; but one who has acquired an exclusive right to use a particular trade-mark has not thereby acquired an exclusive right to make and vend the commodity to which the trade-mark is affixed; that any one has the right to make and vend the same commodity in exact imitation of that made by the owner of the trade-mark, and that the offense consists, not in imitating the commodity, but the trade-mark only. Hence, it is argued, the profit made by a sale of the commodity ought not to be a measure of the dam-

[1] Marsh v. Billings, 7 Cush. 322.

[2] Taylor v. Carpenter, 2 Woodb. & M. 1; Guyon v. Serrell, 1 Blatchf. 244.

[3] Graham v. Plate, 40 Cal. 593.

ages; but the party is entitled to only such damages as resulted from a piracy of the trade-mark; and the profit realized by a sale of the commodity does not establish the amount of this damage, which may be greater or less than the amount of the profit. It is evident that the profit realized by the wrong-doer is not the *only* measure of damages. The spurious article may have injured the credit of the genuine one, and the profits of the owner of the trade-mark may have been greatly reduced, whilst the wrong-doer has made little or no profit. But whilst the profit made by the latter does not limit the recovery, the owner of the trade-mark is entitled to all the profit which was in fact realized. In sales made under a simulated trade-mark it is impossible to decide how much of the profit resulted from the intrinsic value of the commodity in the market, and how much from the credit given to it by the trade-mark. In the very nature of the case it would be impossible to ascertain to what extent he could have effected sales, and at what prices, except for the use of the trade-mark. No one will deny that on every principle of reason and justice the owner of the trade-mark is entitled to so much of the profit as resulted from the trade-mark. The difficulty lies in ascertaining what proportion of the profit is due to the trade-mark, and what to the intrinsic value of the commodity; and as this cannot be ascertained with any reasonable cer- [637] tainty it is more consonant with reason and justice that the owner of the trade-mark should have the whole profit than that he should be deprived of any part of it by the fraudulent act of the defendant. It is the same principle which is applicable to a confusion of goods. If one wrongfully mixes his own goods with those of another so that they cannot be distinguished and separated he shall lose the whole, for the reason that the fault is his; and it is but just that he should suffer the loss rather than an innocent party who in no way contributed to the wrong." It has been ruled in New York that the plaintiff may recover as damages the amount received by the defendant upon sales made by him, less the sum it would have cost the former to make and sell the quantity made and sold by the defendant in addition to what he made and sold.[1]

[1] Champlin v. Stoddard, 34 Hun, 109.

CHAPTER XXXIV.

SLANDER AND LIBEL.

SECTION 1.

PLAINTIFF'S CASE.

§ 1203. Nature of the wrong.
1204. Accusations actionable *per se*.
1205. Malice the gist of the action.
1206, 1207. General damages, how proven.
1208, 1209. Same subject; aggravation of damages.
1210, 1211. Same subject; wealth and rank of the parties.
1212. Evidence of reputation.
1213. Injuries to business.
1214. Mental suffering.
1215. Special damages.
1216. Exemplary damages.
1217. Damages in discretion of jury.
1218, 1219. Special damages where words not actionable *per se*.
1220. Same subject; injury to feelings.
1221. Same subject; natural consequences.
1222. Criticism of the doctrine last stated.
1223. Slander of title.

SECTION 2.

THE DEFENSE.

1224. Failure of plea of justification.
1225. Same subject; effect of statutes.
1226. Evidence in mitigation; plaintiff's bad character.
1227. Same subject; evidence of common reports as to plaintiff's guilt.
1228, 1229. Same subject; proof of truth of words.
1230. Same subject; effect of statutes.
1231–1233. Evidence in mitigation generally.

SECTION 1.

PLAINTIFF'S CASE.

[638] **§ 1203. Nature of the wrong.** The wrong now to be considered is one by which the wrong-doer injures the reputation of another by maliciously publishing a falsehood concerning him. The extent of the injury, and the consequent right to damages therefor, depends on how good the previous reputation of the injured party was, and the nature of the

false charge made against him. The law presumes, until the contrary is shown, that every person is innocent; that he has done nothing to forfeit the good opinion of the community, and hence enjoys its respect and confidence. It regards this good reputation as valuable to its possessor, and its preservation important to his happiness. The public utterance of a false accusation by which a good name is destroyed or sullied is therefore an injury for which damages may be recovered. Slander and libel are different names for the same wrong committed in different ways. Slander is oral defamation published without legal excuse, and libel is defamation so published by means of writing, printing, pictures, images, or anything that is the object of the sense of sight.[1]

§ **1204. Accusations actionable per se.** Certain vocal utterances are actionable *per se;* an action will lie for them without an allegation or proof of actual damage, because it is legally presumed that they cause injury as a natural and immediate consequence. Other utterances of a defamatory tendency are not so obviously injurious that injury therefrom is presumed. When such defamation is the subject of an action, special injury must be alleged and proved to sustain the action.[2] In the following cases words falsely spoken are [**639**] actionable in themselves: First, where they impute to another the commission of some criminal offense involving moral turpitude, for which, if the charge is true, he may be indicted and punished; or, as the test is more generally stated, where the charge, if true, must subject the party charged to indictment for a crime involving moral turpitude, or subject him to punishment.[3] The injury from such a slander consists not in the exposure to prosecution for the implied crime, but the dis-

[1] Cooley on Torts, 193.

[2] Cooley on Torts, 203.

[3] Pollard v. Lyon, 91 U. S. 225; McCuen v. Ludlum, 17 N. J. L. 12; Brooker v. Coffin, 5 Johns. 188; Anonymous, 60 N. Y. 262; Hoag v. Hatch, 23 Conn. 585; Davis v. Brown, 27 Ohio St. 326; Hollingsworth v. Shaw, 19 id. 430; Dial v. Holter, 6 id. 228; Montgomery v. Deeley, 3 Wis. 709; Filber v. Dautermann, 26 id. 518; Ranger v. Goodrich, 17 id. 78; Miller v. Parish, 8 Pick. 384; Dottarer v. Bushey, 16 Pa. St. 204; Stitzell v. Reynolds, 67 id. 54; De Pew v. Robinson, 95 Ind. 109; Bronson v. Bruce, 59 Mich. 467; Brooks v. Harrison, 91 N. Y. 83; Davis v. Sladden, 17 Ore. 259; Zeliff v. Jennings, 61 Texas, 458; Campbell v. Campbell, 54 Wis. 90; Jones v. Townsend's Adm'x, 21 Fla. 431; Griebel v. Rochester P. Co., 60 Hun, 319.

grace and loss of reputation which the law presumes to result from such imputation.[1] It makes no difference that the person of whom the words were spoken is not in the state where he is punishable; for though the crime have locality, the effect of the imputation has not.[2] Second, where the words falsely spoken of a person impute that he is infected with some contagious disease, when, if the charge is true, it would exclude him from society.[3] The charge must be such as can have the effect mentioned after the words are spoken, and, therefore, must impute the existence of the disease at the present time.[4] Third, where the words falsely spoken of a person impute to him misconduct in an office of profit,[5] or a want of fitness to perform its duties, or those which pertain to his trade or pro- [640] fession.[6] To render defamatory words of this latter class actionable without averment or proof of special damage they must apply to the party defamed in respect to his office or employment, or to his conduct relative thereto, and be calculated to prejudice him in an office of which he is an incum- [641] bent, or a profession or calling in which he is engaged.[7]

[1] Rea v. Harrington, 58 Vt. 181; Cooley on Torts, 200; Davis v. Brown, 27 Ohio St. 326.

[2] Shipp v. McCraw, 3 Murph. 463; 9 Am. Dec. 611.

[3] Pollard v. Lyon, 91 U. S. 225; Feise v. Linder, 3 B. & P. 374, note *a*.

[4] Taylor v. Hall, 2 Str. 1189; Bruce v. Soule, 69 Me. 566; Williams v. Holdredge, 22 Barb. 396; Carslake v. Mapledoram, 2 T. R. 473; Nichols v. Guy, 2 Ind. 82; Kancher v. Blinn, 29 Ohio St. 62; Irons v. Field, 9 R. I. 216.

[5] Alexander v. Jenkins [1892], 1 Q. B. 797.

[6] Pollard v. Lyon, 95 U. S. 225; Camp v. Martin, 23 Conn. 86; Sumner v. Utley, 7 id. 258; Jones v. Diver, 22 Ind. 184; McMillan v. Birch, 1 Bin. 178; 2 Am. Dec. 426; Lewis v. Hawley, 2 Day, 495; 2 Am. Dec. 121; Burtch v. Nickerson, 17 Johns. 217; Hogg v. Dorrah, 2 Port. 212; Hayner v. Cowden, 27 Ohio St. 292; Goodenow v. Tappan, 1 Ohio, 38; Chaddock v. Briggs, 13 Mass. 248; Hartley v. Herring, 8 T. R. 130; Craig v. Brown, 5 Blackf. 44; Gove v. Blethen, 21 Minn. 80; Robbins v. Treadway, 2 J. J. Marsh. 540; Oram v. Franklin, 5 Blackf. 42; Lansing v. Carpenter, 9 Wis. 540; Lindsey v. Smith, 7 Johns. 359; Forward v. Adams, 7 Wend. 204; Secor v. Harris, 18 Barb. 425; Carroll v. White, 33 id. 615; Rice v. Cottrel, 5 R. I. 340; Garr v. Selden, 6 Barb. 416; Ayre v. Craven, 2 Ad. & El. 7; Gallwey v. Marshall, 24 Eng. L. & Eq. 463; Frolich v. McKiernan, 84 Cal. 177; Franklin v. Browne, 67 Ga. 272; Clifford v. Cochrane, 10 Ill. App. 570; Blumhardt v. Rohr, 70 Md. 328; Pratt v. Pioneer Press Co., 32 Minn. 217; Cotulla v. Kerr, 74 Texas, 89; Larrabee v. Minnesota Tribune Co., 36 Minn. 141; Cruikshank v. Gordon, 118 N. Y. 178.

[7] Bellamy v. Burch, 16 M. & W. 590;

The wrong done by libel is like that done by slander; but it is defamation communicated and published in a form and manner which implies more deliberation, and is likely to be more widely disseminated and more lasting in detrimental effect. For this reason there is broader scope of libelous matter which is actionable *per se;* the law will presume damage from less serious matter when thus published than when orally [642] uttered. Though no special damage is alleged, and no averments of such extrinsic facts as might be requisite to make the publication in question import a charge of crime are made, the action is nevertheless maintainable if the published charge is such as, if believed, would naturally tend to expose the plaintiff to public hatred, contempt or ridicule, or deprive him of the benefits of public confidence and social intercourse.[1]

Forward v. Adams, 7 Wend. 204; Edwards v. Howell, 10 Ired. 211; Allen v. Hillman, 12 Pick. 101; Orr v. Skofield, 56 Me. 483; Whittemore v. Weiss, 33 Mich. 348; Backus v. Richardson, 5 Johns. 476.

The test to bring a case within the first class is arbitrary, and appears to have been adopted for the purpose of having a fixed and precise rule. It is worthy of notice that notwithstanding it is desirable to have a definite rule, the law determines the actionable character of other slanders and of libel from their intrinsic nature. The law of libel authorizes the court to hold any matter libelous and actionable *per se* when the imputation is such as, if believed, would naturally tend to expose the plaintiff to public hatred, contempt or ridicule, or exclusion from society. So of other kinds of slander; they are actionable *per se* if injurious to one in his office, trade or profession, or tend to exclude him from society for having an infectious disease. Their intrinsic character and injurious tendency are recognized and determined by the court. But when the words, falsely spoken, impute to him pestilent or flagrant immorality, no matter how gross or outrageous, if not made a crime, indictable and punishable in the temporal courts, they are not legally presumed to be injurious, although the judge who so declares the law, and every juror who must follow it as so declared, knows as a man that the imputation, to the extent that it is believed, will render the defamed party odious, subject him to contempt, and tend to exclusion from decent society. Davis v. Brown, 27 Ohio St. 326, is an illustration of the severe arbitrariness of the test referred to. See Malone v. Stewart, 15 Ohio, 319.

[1] Tillson v. Robbins, 68 Me. 298; State v. Smily, 37 Ohio St. 33; Watson v. Trask, 6 Ohio, 531; Tappan v. Wilson, 7 id. 190; Smart v. Blanchard, 42 N. H. 151; Price v. Whitely, 50 Mo. 439; Lindley v. Horton, 27 Conn. 58; Cary v. Allen, 39 Wis. 481; Atwill v. Mackintosh, 120 Mass. 177; Hand v. Winton, 38 N. J. L. 122; Cramer v. Noonan, 4 Wis. 231; Sanderson v. Caldwell, 45 N. Y. 398; Montgomery v. Knox, 23 Fla. 595; Jones v. Greeley, 25 id. 629.

The nature of the charge must be such that the court can legally presume that the plaintiff has been disgraced in the estimation of his acquaintances, or of the public, or has suffered some other loss either in his property, character or business, or in his domestic or social relations in consequence of the publication.[1] Whether the alleged defamatory matter is actionable *per se* or not is a question for the court.[2]

§ **1205. Malice the gist of the action.** Malice, which is said to be the gist of the action for libel and verbal slander, does not mean malice or ill-will towards the individual affected in the usual sense of the term. In ordinary cases of slander the term maliciously means intentionally and wrongfully, without any legal ground of excuse. Malice is an implication of law from the false and injurious nature of the charge, and differs from actual malice and ill-will towards the individual frequently given in evidence to enhance the damages.[3] If a plaintiff has been injured in his character or feelings by an unauthorized publication it is the duty of a jury to award him full compensation in damages without reference to any particular ill-will entertained against him by the defendant. Actual ill-will or malice will enhance the damages and may be shown for that purpose; but need not be shown to entitle the plaintiff to recover,[4] except in cases in which the communication complained of is privileged, then express malice must be averred and proved.[5]

[643] § **1206. General damages, how proven.** There is no legal measure of damages in actions for these wrongs. The amount which the injured party ought to recover is referred [644] to the sound discretion of the jury. The damages are intended to repair the injury done; and all that the law can determine in a given case is what facts proved may be taken [645] into account, and what are fair considerations to influence the jurors' judgments. They are to consider the plaintiff's injured feelings and tarnished reputation, taking into account

[1] Stone v. Cooper, 2 Denio, 299.

[2] Wagaman v. Byers, 17 Md. 183; Hume v. Arrasmith, 1 Bibb, 165; 4 Am. Dec. 626.

[3] King v. Root, 4 Wend. 113.

[4] Id.; Casey v. Hulgan, 118 Ind. 590; Wabash Printing & P. Co. v. Crumrine, 123 id. 89; Wynne v. Parsons, 57 Conn. 73; Langton v. Hagerty, 35 Wis. 150; Wilson v. Noonan, id. 349; Griebel v. Rochester P. Co., 60 Hun, 319; Morey v. Morning Journal Ass'n, 123 N. Y. 207.

[5] Wilson v. Noonan, 35 Wis. 349.

the nature of the imputation, the extent of its publicity, the character, condition and influence of the parties.[1] Where the publication is actionable *per se* the legal presumption of [646] damage goes to the jury, and they, in view of the particular circumstances of the case, are required, in the exercise of their judgment, to determine what sum will afford proper rep- [647] aration.[2] To enable the jury justly to determine the amount

[1] Belck v. Belck, 97 Ind. 73; Belo v. Wren, 63 Texas, 686, 727; Bradley v. Cramer, 66 Wis. 297; Davis v. Shepstone, L. R. 11 App. Cas. 187; Henderson v. Fox, 83 Ga. 233; Littlejohn v. Greeley, 13 Abb. 41; Fulkerson v. George, 3 id. 75; Flint v. Clark, 13 Conn. 361; Markham v. Russell, 12 Allen, 573.

It is erroneous to give instructions which leave the jury entirely at large on the question of damages, as to direct them to give such as the plaintiff is entitled to. True v. Plumley, 36 Me. 466; Rose v. Story, 1 Pa. St. 190. And also to tell them to arrive at the question by bringing it home to themselves and testing it by the sum they would be willing to take as compensation for such a wrong. Prescott v. Tousey, 50 N. Y. Super. Ct. 12. Proof of malice in fact authorizes an increase of the damages. True v. Plumley, 36 Me. 466.

In Burt v. McBain, 29 Mich. 260, which was slander by imputing to the plaintiff, a female, a want of chastity, these instructions to the jury were approved on error: "You should consider whether there is any evidence showing express, positive malice on the part of the plaintiff. If you were satisfied by the testimony in the case that she was governed in the utterance of these words by actual, existing malice, then the compensation or award of damages should be higher and more severe than if you were satisfied that the words were uttered without any express malice. If they were thoughtlessly uttered, without due consideration of the import of the words, without any intent to injure the plaintiff — if there is no express malice proven in the case to your satisfaction, you should give less damages than you would if it is proved. You should take another matter into consideration in fixing the amount of damages. Satisfy your minds before fixing upon the amount whether this defendant originated this story herself, or whether she simply repeated what she heard. If she originated the story, and it is false; if it was the outgrowth of a wicked heart; if it is the offspring of her own brain; the coinage of her own mind,— her guilt would be greater than it would be if she received it from some one else, and simply gave it further circulation thoughtlessly, without any design to injure, without any intent to wrong. The proof upon this point you should carefully consider, and see to it that your verdict is not as light in the one case as it would be in the other."

[2] Newman v. Stein, 75 Mich. 402; Meyer v. Press Publishing Co., 46 N. Y. Super. Ct. 127; Miles v. Harrington, 8 Kan. 425; Pool v. Devers, 30 Ala. 672; Alley v. Neeley, 5 Blackf. 200; Herrick v. Lapham, 10 Johns. 281.

If the libel is against the official character of the plaintiff the damages may include compensation for all injury proximately resulting to

of damages it is important to know what effect can and should be given to the speaking or publishing the same defamatory charges at other times than those stated in the declaration. Such unalleged repetitions are generally allowed to be proved;[1] but in certain states it is held that they are to be considered only as evidence of malice in the speaking or publication charged, and cannot themselves be the ground of additional damages except as they increase the injury by showing greater malice than would otherwise be implied.[2] For this purpose it is held no objection to the proof of words not charged in the declaration that they have been charged and recovered for [648] in a previous action,[3] are words for which an action is barred by the statute of limitations,[4] or were spoken after the commencement of the action.[5]

him as an officer, but not for consequences disconnected from his official character. Cotulla v. Kerr, 74 Tex. 89.

Where the slander imputed want of chastity to a woman and the words were spoken in the presence of but four persons, all members of the plaintiff's family, the court refused to disturb a verdict for nominal damages. Estes v. Estes, 75 Me. 478.

[1] Leonard v. Pope, 27 Mich. 148; Barlow v. Brands, 15 N. J. L. 248; Cavanagh v. Austin, 42 Vt. 576; Stearns v. Cox, 17 Ohio, 590; State v. Jeandell, 5 Harr. 475; Elliott v. Boyles, 31 Pa. St. 65; Johnson v. Brown, 57 Barb. 118; Alpin v. Morton, 21 Ohio St. 536; Delegall v. Highley, 8 C. & P. 444; Perry v. Breed, 117 Mass. 155; Severance v. Hilton, 32 N. H. 289; Hansbrough v. Stinnett, 25 Gratt. 495; Harman v. Cundiff, 82 Va. 239, 245; Preston v. Frey 91 Cal. 107.

[2] Ward v. Dick, 47 Conn. 300; McAlmont v. McClelland, 14 S. & R. 359; Robbins v. Fletcher, 101 Mass. 115; Meyer v. Bohlfing, 44 Ind. 238; McGlemery v. Keeler, 3 Blackf. 488; Vanderveer v. Sutphin, 5 Ohio St. 294; Baldwin v. Soule, 6 Gray, 321; Hinkle v. Davenport, 38 Iowa, 355; Ellis v. Lindley, id. 461; Beardsley v. Bridgman, 17 id. 290; Chamberlin v. Vance, 51 Cal. 75; Parmer v. Anderson, 33 Ala. 78; Trabue v. Mays, 3 Dana, 138; Adkins v. Williams, 23 Ga. 222; Symonds v. Carter, 32 N. H. 458; Markham v. Russell, 12 Allen, 573; Casey v. Hulgan, 118 Ind. 590; Negley v. Farrow, 60 Md. 158; Hastings v. Stetson, 130 Mass. 76; Lanius v. Druggist Pub. Co., 20 Mo. App. 12; Zeliff v. Jennings, 61 Tex. 458; Letton v. Young, 2 Met. (Ky.) 558; Grace v. McArthur, 76 Wis. 641, 651; Rea v. Harrington, 58 Vt. 181; Larrabee v. Minnesota Tribune Co., 36 Minn. 141.

[3] Swift v. Dickerman, 31 Conn. 285.

[4] Harmon v. Harmon, 61 Me. 233; Throgmorton v. Davis, 4 Blackf. 174; Lincoln v. Chrisman, 10 Leigh, 338.

[5] Beardsley v. Bridgman, 17 Iowa, 290; Schrimper v. Heilman, 24 Iowa, 505; Parmer v. Anderson, 33 Ala. 78; Hinkle v. Davenport, 38 Iowa, 355; Bodwell v. Swan, 3 Pick. 376; Ellis v. Lindley, 38 Iowa, 461; McAlmont v. McClelland, 14 S. & R. 359; Smith v. Wyman, 16 Me. 13;

§ **1207. Same subject.** In Connecticut it is also held that of this nature is the allegation in the plea of the truth of the charge by way of justification made for the purpose of spreading and perpetuating the slander; it is only to be considered as so much more evidence of malice in the original speaking.[1] On this theory each utterance or publication of the same charge must be regarded as a distinct wrong; but in practice it must be difficult, where there is a succession of suits, to prevent double recoveries for the same wrong if all the repetitions of the same charge may be proved in each case. In other states and in England such testimony is admitted without restriction to increase damages. All the utterances of the same charge constitute one slander, as all the copies of a newspaper containing a libel constitute one publication. The frequency of the utterances or the number of the issues of a newspaper may be shown to prove the extent of publicity given to the defamatory charge, and only one recovery is allowed.[2] In one case[3] a newspaper containing a libel had been published more than six years before suit, and the case was made out by the purchase of a single copy within that period, and the court refused to confine the damages to the injury arising out of the publication of that copy. In Barwell v. Adkins[4] suit was brought on a libelous article published in a newspaper, and on the trial the judge allowed proof of a second article published afterwards, reasserting the same charges, and told the jury to take both paragraphs with them, "and give the plaintiff such damages as they considered he was entitled to under [**649**] the circumstances."[5] In Root v. Lowndes[6] Bronson, J., said: "When the plaintiff does not go beyond the words laid in the declaration I see no reason why he may not show that these words have been spoken on a dozen different occasions, although there may be but one count in the declaration. If the defendant has told twenty persons at as many different times

Norris v. Elliott, 39 Cal. 72; Baldwin v. Soule, 6 Gray, 321; Thompson v. Bowers, 1 Doug. (Mich.) 321; McIntire v. Young, 6 Blackf. 496.

[1] Ward v. Dick, 47 Conn. 300.

[2] Fry v. Bennett, 28 N. Y. 324; Gathercole v. Miall, 15 M. & W. 319; Defries v. Davis, 7 C. & P. 112; Rosewater v. Hoffman, 24 Neb. 222; Whitney v. Moignard, 24 Q. B. Div. 630; Bigelow v. Sprague, 140 Mass. 425.

[3] Brunswick v. Harmer, 14 Q. B. 185.

[4] 1 Man. & Gr. 807.

[5] Leonard v. Pope, 27 Mich. 148, 149.

[6] 6 Hill, 518.

that the plaintiff is a thief, it cannot be necessary to insert twenty counts, precisely alike, for the purpose of enabling the plaintiff to prove all the conversations, allowing the proof can work no injury to the defendant. He is advised by the declaration what words the plaintiff intends to give in evidence; and whether all the different occasions of speaking them are proved or not the judgment will be a bar to another action."[1] An action for libel was held barred by a judgment in an action for malicious prosecution, where the arrest was made under papers containing the libelous matter.[2] The legal theory is that a verdict for the plaintiff vindicates his character; hence where injury thereto is the only ground of damage there cannot be a recovery for prospective damage which may be claimed as the result of the words which formed the basis of the action.[3]

§ 1208. Same subject; aggravation of damages. Repetitions of the same slander or libel are so far distinct wrongs that if repeated after suit brought a new action lies as for a fresh injury; and such repetitions are not admissible for any purpose in the first action.[4] Nor are other slanders or libels [650] than those alleged in the declaration provable for the purpose of showing malice, even with a caution not to allow additional damages for them, for they would imperceptibly

[1] Campbell v. Butts, 3 N. Y. 174; Howard v. Sexton, 4 id. 157; Wallis v. Mease, 3 Bin. (Pa.) 546; Kean v. McLaughlin, 2 S. & R. 469; Hansbrough v. Stinnett, 25 Gratt. 495.

[2] Rockwell v. Brown, 36 N. Y. 207. In Leonard v. Pope, *supra*, Campbell, J., said: "This principle appears just and sensible, and avoids the difficulty of drawing intangible distinctions which no jury can appreciate, between allowing testimony of repetition of wrongs to bear upon an important element in a case, and yet not allowing damages except for the original wrongful act independent of the wrong done by the repetition. Such niceties are not to be favored, and should not be introduced where they can be avoided. It was only the accident of calling one witness before another that would have prevented any one of the slanders proven to have stood as the one to which the defendant claims the recovery should be confined. Any one of them would have made out a cause of action under the declaration. A justification of one would have answered them all. A future action for any of them is therefore barred."

[3] Bradley v. Cramer, 66 Wis. 297; Halstead v. Nelson, 24 Hun, 395.

[4] Frazier v. McCloskey, 60 N. Y. 337; Daly v. Byrne, 77 id. 182; Woods v. Pangburn, 75 id. 495; Keenholts v. Becker, 3 Denio, 346; Howell v. Cheatham, Cooke, 247.

influence the judgment of the jury, and thus the defendant might be twice subjected to damages for the same wrong.[1] But it has been held that the fact that the defendant, after he had once been sued for slander and admitted its falsity and consequent liability for it by settling the suit, deliberately uttered it again is strong evidence to warrant giving punitive damages, if the jury think proper to award them.[2] Damages will be increased by every circumstance which aggravates the wrong and adds to the injury. Repetition of a slander does this in two ways: by giving larger publicity to defamation, and by evincing greater malice. There is a conclusive presumption of malice from falsely speaking words actionable in themselves unless a legal justification or excuse is shown. The malicious intent of a slander or libel is not a question of fact; it is a conclusion of law; being so, the plaintiff is not re- [**651**] quired to prove it except by showing the publication of the defamatory matter; nor can the defendant deny or disprove it as a separate element of the wrong.[3] This is malice in law,

[1] Root v. Lowndes, 6 Hill, 520, 521; Thomas v. Croswell, 7 Johns. 264; Finnerty v. Tipper, 2 Camp. 72.

In Howard v. Sexton, 4 N. Y. 161, Gardiner, J., said: "It has sometimes been argued that proof of this character shows general malice upon the part of the defendant, which may properly enhance the damages against him. So would evidence that he had set fire to the house of the plaintiff, or committed battery upon his person, furnish stronger proof of general malice than mere words, however opprobrious. The principle does not stop with proof of different words, but extends to the whole conduct of the defendant. Some of the adjudged cases certainly seem to go this length. Finnerty v. Tipper, 2 Camp. 72; 2 Stark. Ev. 635, note A. And if the proposition we are considering is sound they were rightly decided. But the modern, and I think the better, doctrine is that the action for slander was not designed to punish the defendant for general ill-will to his neighbor, but to afford the plaintiff redress for a specific injury. To constitute that injury malice must be proved, not mere general ill-will, but malice in the special case set forth in the pleadings to be inferred from it and the attending circumstances. The plaintiff may show a repetition of the charge for which the action is brought, but not a different slander for any purpose; and if such evidence is received without objection, with a view to establish malice, the plaintiff may, notwithstanding, bring a subsequent action for the same words, and recover. Root v. Lowndes, 6 Hill, 519; Campbell v. Butts, 3 N. Y. 174." Medaugh v. Wright, 27 Ind. 137; Fry v. Bennett, 28 N. Y. 328; Barr v. Hack, 46 Iowa, 308.

[2] Glanders v. Graff, 25 Hun, 553.

[3] Fry v. Bennett, 1 Code Rep. (N. S.) 243; 5 Sandf. 54; Littlejohn v.

but it is nevertheless a bad intent assumed to exist in fact. As the injury will be aggravated by showing more malice than the law implies from mere proof of the defamation alleged, the plaintiff may prove any circumstances which tend to magnify the malice; they will tend not only to confirm as true in fact what the law so presumes, but they may also show that the wrong and injury did not result from mere heedless and aimless gossip, but a malevolent eagerness to inflict pain and destroy reputation by originating or giving currency to a conscious fabrication.[1]

The true rule seems to be that when the words are actionable in themselves and are not uttered upon a lawful occasion, and with justifiable motives, the law will infer malice so as to enable the plaintiff to recover damages although none be proved. But of this technical or legal malice, as it may be termed, there may be various degrees as indicated by the manner in and the circumstances under which the slanderous charges are made. And other circumstances may exist which show not merely technical malice, but actual hatred and revengeful feelings, the malignant design of the slanderer to do the utmost possible injury. For acts done or words uttered under such different circumstances, and with such variant motives and purposes on the part of the slanderer, the same measure of damages cannot be properly awarded.[2]

§ **1209. Same subject.** Actions for such wrongs are designed not only to furnish some indemnity, so far as money [652] can do it, for the injury inflicted, but to vindicate the character of the person unjustly assailed, and to protect against a repetition of the outrage. It is right that juries

Greeley, 13 Abb. 55; Weaver v. Hendrick, 30 Mo. 502; Sanderson v. Caldwell, 45 N. Y. 308; Dexter v. Spear, 4 Mason, 115; Mason v. Mason, 4 N. H. 110; Wilson v. Noonan. 35 Wis. 321; Bodwell v. Osgood, 3 Pick. 379; Harwood v. Keech, 4 Hun, 389; Daly v. Byrne, 1 Abb. N. C. 150; Fox v. Broderich, 14 Irish L. (N. S.) 453; Gilmer v. Eubank, 13 Ill. 271; Negley v. Farrow, 60 Md. 158; Blumhardt v. Rohr, 70 id. 328; Bronson v. Bruce, 59 Mich. 467; Pratt v. Pioneer Press Co., 32 Minn. 217; Neeb v. Hope, 111 Pa. St. 145; Barr v. Moore, 87 id. 385.

[1] Welch v. Ware, 32 Mich. 84; Detroit Daily Post v. McArthur, 16 Mich. 447; Fry v. Bennett, 28 N. Y. 324; McDonald v. Woodruff, 2 Dill. 244; Sawyer v. Hopkins, 22 Me. 268; Shilling v. Carson, 27 Md. 175; Townshend on Sland. & L., § 392.

[2] Symonds v. Carter, 32 N. H. 467.

should make a discrimination in the damages they award according to the circumstances, position, conduct, motives and purposes of the slanderer as disclosed in the proofs; and they may rightfully award more severe damages for the wilful, designed, malicious and mischievous repetition of a story known to be false, and repeated with a design to injure, than for the idle and garrulous repetition of a tale supposed, or even believed without examination, to be true. If the defendant has indicated his intention to injure by his direct declarations, by repetitions of the slander, or other acts having a tendency to show malice in its common acceptation of personal ill-will, that may be shown in evidence.[1] And so may the fact that the defendant knew the charge to be false when he uttered it, for the necessary inference from such proof must be hatred and malignity.[2] To show that the defendant knew of the falsity of a charge of theft from the person, published by him, it was allowed to be proved by the plaintiff that, after the stated time of the theft, the defendant continued upon friendly terms with him.[3] So where the defendant made the defamatory charge professedly on information stated by him to be derived from certain named persons who were witnesses of the crime charged, evidence by such persons that they had given no such information was received to show actual malice.[4] Preferring a bill of indictment against the plaintiff which is ignored by the grand jury may be shown to prove malice.[5] The refusal of the editor of a newspaper to publish a retraction of a libel published in his paper does not tend to prove his *animus* to have been malicious,[6] but such refusal is admissible for the purpose of enhancing damages;[7] and so is the refusal to retract a verbal slander.[8] In an action for slander in

[1] Jones v. Greeley, 25 Fla. 629, 642; Cruikshank v. Gordon, 118 N. Y. 178; Symonds v. Carter, 32 N. H. 467.

[2] Plummer v. Johnsen, 70 Wis. 131; Stow v. Converse, 3 Conn. 325; Harwood v. Keech, 4 Hun, 389; Bullock v. Cloyes, 4 Vt. 304; Sexton v. Brock, 15 Ark. 345; Farley v. Ranck, 3 W. & S. 554; Fountain v. Boodle, 3 Q. B. 5. But see Hartranft v. Hesser, 34 Pa. St. 117.

[3] Burton v. March, 6 Jones' L. 409.

[4] Harwood v. Keech, 4 Hun, 389.

[5] Tolleson v. Posey, 32 Ga. 372.

[6] Bradley v. Cramer, 66 Wis. 297.

[7] Edsall v. Brooks, 2 Robt. 414; Pratt v. Pioneer Press Co., 35 Minn. 251; Barnes v. Campbell, 60 N. H. 27; Malloy v. Bennett, 15 Fed. Rep. 371.

[8] Klewin v. Bauman, 53 Wis. 244.

[653] charging an infant with larceny, evidence of a previous quarrel between defendant and plaintiff's father and next friend is inadmissible to prove malice in the defendant towards the plaintiff.[1] The plaintiff may give in evidence any expressions of the defendant, oral or written, which indicate spite or ill-will, for the purpose of showing the temper and disposition with which he made the publication complained of.[2] The style and character of the language are also circumstances which may be left, with others, to the consideration of the jury on the question whether the words were spoken maliciously, and especially when the question is if they were maliciously uttered under color of privilege.[3] The manner in which the publication is made may offer in itself strong evidence of malice. The transmission unnecessarily of libelous matter by telegraph or by post-card, when it might be sent by letter, is evidence of malice.[4] Where the defamatory matter is published upon a lawful occasion, that is, upon an occasion which furnishes *prima facie* a legal excuse for it, as where it is done in the discharge of some public or private legal or moral duty, or in the conduct of the defendant's own affairs, in matters where his interest is concerned,[5] it is said to be conditionally a privileged communication or publication. The legal excuse for the publication rebuts the presumption of malice from the falsity of the communication; and where such matter is the subject of an action the plaintiff must show malice to maintain it.[6]

§ 1210. Same subject; wealth and rank of the parties. The plaintiff may prove in aggravation of damages his rank and condition in society.[7] Thus, where the charge was that a

[1] York v. Pease, 2 Gray, 282.

[2] Folkard's Stark. on Slan. & L. 452; Wright v. Woodgate, 2 C., M. & R. 573.

[3] Toogood v. Spyring, 1 C., M. & R. 181; Fryer v. Kennersley, 15 C. B. (N. S.) 422; Cooke v. Wildes, 5 E. & B. 328; Jones v. Greeley, 25 Fla. 629, 642.

[4] Williamson v. Freen, L. R. 9 C. P. 393. The jury may consider what the defendant's conduct has been before action, after action, and in court during the trial. Praed v. Graham, 24 Q. B. Div. 53.

[5] Toogood v. Spyring, 1 C., M. & R. 181.

[6] Cockayne v. Hodgkisson, 5 C. & P 543; Servatius v. Pichel, 34 Wis. 292; Townshend on S. & L., pp. 248, 249. See Howard v. Keech, 4 Hun, 389.

[7] Klumph v. Dunn, 66 Pa. St. 141; Smith v. Lovelace, 1 Duv. 215; Bodwell v. Swan, 3 Pick. 376; Howe v. Perry, 15 id. 506; Justice v. Kirlin,

criminal offense had been committed, it was held that, inasmuch as mental suffering is an element of damages, and the extent of such suffering may be heightened and the damages consequently increased by the disgrace that the plaintiff's family will suffer, it was proper to show that he had a wife and child.[1] There is a conflict of authority on the question, but it is believed that the better opinion is that the [654] rank, condition and wealth of the defendant may be shown for the same purpose, that is, to affect as well compensatory

17 Ind. 588; Hosley v. Brooks, 20 Ill. 115; Peltier v. Miet, 50 Ill. 511; Tillotson v. Cheetham, 3 Johns. 56; Larned v. Buffinton, 3 Mass. 546; Clements v. Maloney, 55 Mo. 352; Harman v. Cundiff. 82 Va. 239; Palmer v. Haskins, 28 Barb. 90. See Prescott v. Tousey, 50 N. Y. Super. Ct. 12.

Evidence of the plaintiff's pecuniary condition is not competent to affect punitory damages; but it may be to show actual damage. Reeves v. Winn, 97 N. C. 246. *Contra*, Perrine v. Winter, 73 Iowa, 645.

In a recent Irish case it is said: "The character, reputation and position of a plaintiff seeking to recover damages for a libel published against him must naturally constitute a material element for the consideration of a jury in estimating damages in such cases. Accordingly the object of the defendant in the present case has been to vilify the character and reputation of the plaintiff. Now, the plaintiff is a gentleman who for several years acted as a crown solicitor for the government. During that period he has conducted very important criminal cases with great ability, intelligence and integrity, and he was until lately believed, and I believe truly, to occupy a highly respectable position as a landed proprietor in Ireland. But on the other hand, the plaintiff, having tendered himself as witness in this case, has been obliged to admit certain matters made use of for the purpose of damaging his character and reducing the amount of damages. It appears, therefore, that the plaintiff some years ago married as a second wife a lady possessed of a considerable fortune, not of tender years, but rather the reverse, inasmuch as she had attained the mature age of seventy, and being a widow of some years' standing. And it was elicited from the plaintiff that some twelve years ago he had an immoral connexion with a maid servant of his wife. This connexion lasted for about one week and was not afterwards renewed. The plaintiff was then about fifty years of age; he had a wife living and also daughters by his former wife. It must be admitted that this conduct of the plaintiff was highly to be reprobated, but considering the time that has since elapsed and all the circumstances it does not occur to me that any juryman possessing any knowledge of the world, and the unhappy events which so often occur in it, would think it proper to make any very large reduction from any damages which he might otherwise think ought to be awarded owing to this unhappy occurrence." Bolton v. O'Brien, 16 L. R. Ire. 97, 110.

[1] Barnes v. Campbell, 60 N. H. 27.

as punitive damages.[1] The injury will be proportioned to the rank and influence of the defendant in the community where he publishes the defamatory matter. A knowledge of his standing there is important to enable the jury to appreciate the injury resulting from his slanderous declarations; to enable them to determine what the injured party ought to receive for compensation, and, in their discretion, what the defendant, for example and punishment, should pay.[2] The right of the plaintiff to prove his rank and condition in society includes that of showing his good character at and before the time of the publication of the defamatory matter. But it is held in some jurisdictions that the law presumes good character; that the general issue admits the falsity of the imputation, and that until the defendant has attacked it the plaintiff is not entitled to introduce any evidence on that subject. Thus in a Pennsylvania case Strong, J., said: "Evidence of his reputation is important only as affecting the measure of the compensation to which he is entitled. The injury is less

[1] Vol. 1, §§ 404, 405; Johnson v. Smith, 64 Me. 553; Humphreis v. Parker, 52 id. 507, 508; Stanwood v. Whitmore, 63 Me. 209; Barber v. Barber, 33 Conn. 335; Brown v. Barnes, 39 Mich. 211; Buckley v. Knapp, 48 Mo. 152; Bodwell v. Osgood, 3 Pick. 379; Karney v. Paisley, 13 Iowa, 89 (but it is said in Perrine v. Winter, 73 id. 645, 647, that "there are grave doubts whether this reasoning is correct, because it is not universally true that a man possessed of wealth has the confidence and respect of the community in which he lives"); Lewis v. Chapman, 19 Barb. 252; Kniffen v. McConnell, 30 N. Y. 289; Bennett v. Hyde, 6 Conn. 24; Case v. Marks, 20 Conn. 248; McAlmont v. McClelland, 14 S. & R. 359; Adcock v. Marsh, 8 Ired. 360; Wilms v. White, 26 Md. 380; Kunkel v. Markell, id. 390; 2 Greenlf. Ev. 299; Jones v. Greeley, 25 Fla. 629, 641; Binford v. Young, 115 Ind. 174; Reeves v. Winn, 97 N. C. 246; Rea v. Harrington, 58 Vt. 181. But see Storey v. Early, 86 Ill. 461; Myers v. Malcolm, 6 Hill, 292; Palmer v. Haskins, 28 Barb. 90; Morris v. Barker, 4 Harr. 520; Ware v. Cartledge, 24 Ala. 622; Dain v. Wycoff, 7 N. Y. 191; Austin v. Bacon, 49 Hun, 386; Enos v. Enos, 58 id. 45.

The wealth of the defendant is immaterial except so far as it affects vindictive damages. Bradley v. Cramer, 66 Wis. 297; Burckhalter v. Coward, 16 S. C. 435 (*semble*). In Nebraska punitive damages are not recognized, and the wealth of the defendant is not a proper subject of proof to affect compensatory damages. Rosewater v. Hoffman, 24 Neb. 222. In Virginia the defendant's wealth is to be considered only in so far as it tends to show his rank and influence, not as affecting his ability to pay exemplary damages. Harman v. Cundiff, 82 Va. 239.

[2] Cases cited in first paragraph of preceding note.

when his character is bad. In a certain sense, therefore, the character (reputation) of the plaintiff in every such action may be said to be put in issue. The plaintiff offers it to the attack of the defendant. The law presumes that it is good, but the defendant may traverse this presumption. Such a traverse is presented when the defendant offers evidence to show that it is bad. But until then a plaintiff is not at liberty to adduce evidence that his character is good; for, until it is attacked, the law presumes, and the defendant admits, [655] such to be the fact. Until then the defendant has refused to accept the issue tendered. This is an almost universal rule, not only in this state, but in England and in our sister states. Nor does the proof which, under the general issue, may be given of circumstances that may have awakened in the mind of the defendant a suspicion of the plaintiff's guilt, open the door for testimony in support of his character. Evidence of such circumstances is received in mitigation of damages, not because it shows that injury inflicted upon the plaintiff's reputation is any the less, but because it tends to disprove the existence of malice in the defendant. It is, of course, no answer to this to prove that the plaintiff was of good repute. His reputation may have been untarnished, and the circumstances under which the actionable words were spoken may have been such as to indicate that there was very little malice in the defendant. It is therefore only where evidence has been given directly attacking the character of the plaintiff that he is at liberty to introduce proof of his good reputation."[1] The plea of not guilty puts in issue the general reputation of the plaintiff. The amount of his recovery will be affected by any evidence which supports or disparages that reputation. It is presumptively good when the trial begins, and until the presumption is overturned by proof. It is trite to say that what the law presumes, and so long as the presumption continues, need not be proved; but where proof may add to what the law presumes, or make specific what the law presumes only in a general way, and such addition or particularity may legitimately increase damages, it is admissible in the first instance; as is the case on the element of

[1] Chubb v. Gsell, 34 Pa. St. 115.

malice. As the reputation of the plaintiff is in issue by the very nature of the proceeding, if the jury can estimate the damages with a more intelligent appreciation of the injury after they have heard affirmative evidence of the plaintiff's reputation than if the case is submitted to them on the mere supposition which the law raises that it is good, it is reasonable and proper such evidence be received. In Burton v. [656] March[1] it was held not error to receive it. Other cases recognize the propriety of the plaintiff showing affirmatively as part of his case his good reputation.[2]

§ 1211. Same subject. In cases of defamation character is the object of attack, and in actions for that wrong the injury thereto is the *gravamen* complained of, and its vindication the object of the action.[3] It is said in a case in Connecticut[4] that the plaintiff's character is not made the subject of inquiry at the defendant's option, and shut out of view or investigation, as shall best subserve the defendant's pleasure and interest. To a rule so inequitable, for the want of mutuality, the courts of that state have never acceded; but they have recognized and acted on the principle that the final object of the plaintiff's suit is the vindication of his character; and that his reputation, of consequence, is put in issue by the nature of the proceeding itself; he may introduce evidence of his reputation, not only to sustain it from attack, but to prove its excellence. In a late case in Wisconsin[5] the court say: "In actions of slander it is well settled that the plaintiff's general character is involved in the issue; and the evidence showing what it is, and consequently its true value, may be offered on either side to affect the amount of damages.[6] The rule thus stated has frequently received the sanction of this court."[7]

[1] 6 Jones' L. 409.

[2] Bennett v. Hyde, 6 Conn. 24; § 1211.

[3] Bennett v. Hyde, 6 Conn. 24.

[4] Stow v. Converse, 4 Conn. 42.

[5] Campbell v. Campbell, 54 Wis. 97.

[6] Citing 2 Greenl. Ev., § 275; Earl of Leicester v. Walter, 2 Camp. 251; Larned v. Buffinton, 3 Mass. 546; Stone v. Varney, 7 Met. 86; Burnett v. Simpkins, 24 Ill. 264.

[7] Maxwell v. Kennedy, 50 Wis. 645; Wilson v. Noonan, 27 id. 590; B—— v. I——, 22 id. 372; Haskins v. Lumsden, 10 id. 359. The court add: "Whether plaintiff in the first instance, and before his character had been assailed, can give evidence of his own good character, it is not necessary here to decide."

But all cases recognize the right of the plaintiff to answer the defendant's evidence against his general reputation by proof to support it.[1] It was said in a recent case that if the plaintiff has a well-established character so that there is less likelihood of the slander hurting him than there would be if he was a new man starting in the effort to build up a reputation, that fact may be proved and considered.[2] If this be the rule, taken in connection with the principle which allows damages to be mitigated if the plaintiff's character is bad, it leaves the recovery of substantial damages for slander to that class of people whose characters are neither good nor bad. There is, however, nothing in the doctrine of the case stated which is inconsistent with the fundamental principle of the law of damages — compensation for the injury suffered.

§ 1212. Evidence of reputation. The evidence in regard to the plaintiff's reputation must be directed to his general reputation, or to his general reputation in regard to the [657] trait involved in the imputation.[3] Particular acts to affect it cannot be proved.[4] Where his reputation is consequentially attacked by proving the truth of the imputation, it is held that he is not entitled to answer it by proving his good reputation; in other words, he is not entitled to prove his good reputation to countervail the evidence of the specific act or acts shown to establish the plea of justification. In criminal

[1] Harding v. Brooks, 5 Pick. 244; Byrket v. Monohon, 7 Blackf. 83; Smith v. Lovelace, 1 Duv. 215; Waters v. Jones, 3 Port. 442; Seymour v. Merrills, 1 Root, 459; Sheahan v. Collins, 20 Ill. 325; Moyer v. Moyer, 49 Pa. St. 210.

[2] Broughton v. McGrew, 39 Fed. Rep. 672, 679, per Woods, J.

[3] Lambert v. Pharis, 3 Head, 622; Maynard v. Beardsley, 7 Wend. 560; B——— v. I———, 22 Wis. 372; Birchfield v. Russell, 3 Cold. 228; McAlexander v. Harris, 6 Munf. 465; Steinman v. McWilliams, 6 Pa. St. 170; Brunson v. Lynde, 1 Root, 354; Sheahan v. Collins, 20 Ill. 325; Burton v. March, 6 Jones' L. 409; Moyer v. Moyer, 49 Pa. St. 210; Powers v. Presgroves, 38 Miss. 227; Bennett v. Matthews, 64 Barb. 410; Leonard v. Allen, 11 Cush. 241; Shilling v. Carson, 27 Md. 175; Wright v. Schroeder, 2 Curtis, 548; Fountain v. West, 23 Iowa, 9; Lamos v. Snell, 6 N. H. 413; Warner v. Lockerby, 31 Minn. 421; Lowe v. Herald Co., 6 Utah, 175. The last case holds that in an action for charging rape the defendant's reputation as a business man may be proved, as well as his reputation for chastity and virtue.

[4] Andrews v. Vanduser, 11 Johns. 38; Swift v. Dickerman, 31 Conn. 285; Lamos v. Snell, 6 N. H. 413; Burke v. Miller, 6 Blackf. 155; Parkhurst v. Ketchum, 6 Allen, 406; Hallowell v. Guntle, 82 Ind. 554.

cases defendants are permitted to give evidence of general character to repel the charge upon the ground that a presumption of innocence arises from former conduct in society as evidenced by such character, since it is not probable that a person of known probity or humanity would commit a dishonest or outrageous act in the particular instance.[1] But this species of evidence is not available in civil actions for torts generally, nor to rebut evidence that alleged slanderous words were true.[2]

§ **1213. Injuries to business.** Language may be actionable *per se* though it does not impute any crime. It is so if by it one is charged with having either of certain diseases.[3] So if one is disparaged in his office, profession, trade or business in such manner as that by natural and proximate consequence he will be prevented from deriving therefrom that pecuniary reward which probably he might otherwise have obtained.[4] [658] The special character in respect of which such imputations will be actionable may be any lawful employment in which a livelihood may be gained or from which emoluments are derived. The language must be such as, if true, would disqualify or render him less fit to fulfill the duties of the special character he has assumed.[5] To charge a partnership with insolvency;[6] a chief engineer of a city fire department with being drunk at a fire;[7] saying a school mistress is a dirty slut,[8] insane,[9] or wanting in chastity;[10] that a blacksmith keeps false books;[11] that a shop-keeper had nothing but rotten goods in his shop,[12] — is to utter actionable words. It is

[1] 2 Stark. Ev. 365.

[2] Matthews v. Huntley, 9 N. H. 146; Severance v. Hilton, 24 id. 147; Shipman v. Burrows, 1 Hall, 399; Wright v. Schroeder, 2 Curt. 548; Stow v. Converse, 3 Conn. 325; Bamfield v. Massey, 1 Camp. 460; Haun v. Wilson, 28 Ind. 296; Miles v. Van Horn, 17 id. 245; Rhodes v. Ijames, 7 Ala. 574; Holley v. Burgess, 9 id. 728.

[3] Townshend on S. & L., § 175.

[4] Foulger v. Newcomb, L. R. 2 Ex. 327; Babonneau v. Farrell, 15 C. B. 360; Pratt v. Pioneer Press Co., 35 Minn. 251; Missouri P. Ry. Co. v. Richmond, 73 Texas, 568; De Pew v. Robinson, 95 Ind. 109.

[5] Townshend on S. & L., § 190.

[6] Titus v. Follett, 2 Hill, 318.

[7] Gottbehuet v. Hubachek, 36 Wis. 515.

[8] Wilson v. Runyon, Wright, 651.

[9] Morgan v. Lingen, 8 L. T. R. (N. S.) 800.

[10] Bodwell v. Osgood, 3 Pick. 379.

[11] Burtch v. Nickerson, 17 Johns. 217.

[12] Burnett v. Wells, 12 Mod. 420. For other illustrations see Townshend on S. & L., ch. 8.

not enough that the language tends to injure the person in his office, profession or trade; it must be published of him in his official or business character.[1] Where, however, one is in business, words spoken of him in his private character may be actionable on account of their necessary effect to injure him in his business; as any words affecting the credit of a man who is a merchant, or pursues any business in which pecuniary credit is important.[2] When the words spoken have such a relation to the profession or occupation of the plaintiff that they directly tend to injure him in respect to it, or to impair confidence in his character or ability; when, from the nature of the business, great confidence must necessarily be reposed, they are actionable, though not applied by the speaker to the profession or occupation of the plaintiff; but when they convey an imputation upon his character equally injurious to every one of whom they might be spoken, they are not actionable, unless such application be made.[3] In an action for libel the fact that the words used had reference to the profession or business of the plaintiff is not the [659] substantive ground of the action. Their actionable quality does not in any case depend upon that consideration. And the plaintiff in such a case is entitled to recover for damages to him in his profession by reason of the libel without specific proof in regard to them.[4] In this respect, as has been before remarked, there is a distinction between libel and verbal slander. A charge of drunkenness against one who is a minister;[5] or a master mariner in command of a vessel;[6] or a female,[7] is actionable.

§ **1214. Mental suffering.** For such actionable words spoken or libelous matter published, the damages are left to

[1] Van Tassel v. Capron, 1 Denio, 250; Worten v. Searing, 1 Vic. Law Rep. 122; Redway v. Gray, 31 Vt. 292; Buck v. Hersey, 31 Me. 558; Doyley v. Roberts, 3 Bing. N. C. 835.

[2] Jones v. Littler, 7 M. & W. 423; Fowler v. Bowen, 30 N. Y. 23; Lewis v. Hawley, 2 Day, 495; 2 Am. Dec. 121; Starr v. Gardner, 6 Up. Can. Q. B. (O. S.) 512; Hogg v. Dorrah, 2 Port. 22; Davis v. Ruff, 1 Cheves, 17.

[3] Sanderson v. Caldwell, 45 N. Y. 405.

[4] Id.

[5] McMillen v. Birch, 1 Bin. 178; 2 Am. Dec. 426; Chaddock v. Briggs, 13 Mass. 248. But see Tighe v. Wicks, 33 Up. Can. Q. B. 479.

[6] Irwin v. Brandwood, 2 H. & C. 960.

[7] Brown v. Nickerson, 5 Gray, 1.

the discretion of the jury upon the particular facts. Compensatory damages may properly include recompense for the loss of patronage;[1] and where the imputation is actionable because of its necessary operation to cause such injury, and is of a want of personal fitness, or of any necessary moral trait, or is an imputation of gross dereliction in professional practice, injury to the feelings, mental anxiety and suffering may be taken into consideration.[2] In a Connecticut case[3] the defamatory words spoken of a practicing physician were such as to imply that he was so ignorant and unskilful that most of his patients lost their lives by following his prescriptions; and upon this point Sanford, J., said: "It is true that the words spoken relate only to the plaintiff's professional character and are aimed especially at his pecuniary interest dependent upon his professional calling and employment. But the natural, if not the necessary, effect of professional degradation and disgrace is personal anxiety and suffering on account of it. And that anxiety and suffering were proper subjects for compensation to the plaintiff and ought to be atoned for by the defendant. There is and there ought to be no other rule upon the subject than that a tort-feasor shall be held responsible in damages for the full amount of all the immediate injury caused by his wrongful acts. This rule was [660] adopted by the superior court, and sanctioned by this court in the recent case of Lawrence v. Housatonic R. R. Co.,[4] in that of Seger v. Barkhamsted[5] and in many other cases. It is difficult to conceive how a member of either of the learned professions can be injured in his professional character without being at the same time subjected to anxiety and mental suffering,— suffering on account of professional dishonor, to be followed as it naturally and almost necessarily is and *always ought to be* by social degradation and disgrace, and the ultimate loss of professional employment with its honors and emoluments. Bodily pain comprises but a very small part of the suffering endured by rational beings, and the

[1] Weiss v. Whittemore, 28 Mich. 353; Blumhardt v. Rohr, 70 Md. 328; Bergmann v. Jones, 94 N. Y. 51.

[2] Welker v. Butler, 15 Ill. App. 209; Stallings v. Whittaker, 55 Ark. 494.

[3] Swift v. Dickerman, 31 Conn. 294.

[4] 29 Conn. 390.

[5] 22 Conn. 290.

injuries which the calumniator inflicts act, often entirely and always immediately, upon the mental sensibilities of his victim. Mental suffering then constitutes an important element in the calculation of compensation to be made for such an injury." Independently of injuries to business interests, there is no dissent from the proposition that mental suffering is an element of damages in actions of this class. Where the words employed are actionable *per se* damages for such suffering are not special.[1] Malice is not essential to the right to recover for mental distress.[2] Wounded feelings, enfeebled health and incapacity to perform labor, if these result from words slanderously spoken, are elements which require compensation.[3] But it is held in Vermont that loss of time, physical pain and expense do not constitute elements of damage, though they may be proved to show the severity of mental suffering.[4]

§ 1215. Special damages. If the defamed party suffers a particular injury which the jury would not be entitled to consider as the necessary result of the actionable publication, but which is a natural and proximate consequence thereof, it may be made the subject of additional compensation. Consequential, as distinguished from direct and necessary, damages are generally special.[5] What are special damages distinctively is very clearly stated in a Maryland case,[6] in which the court held that whether the words in themselves are actionable, or only become so because of some special damage, no evidence of any particular loss or injury caused by the words spoken is admissible, unless such loss or injury is particularly alleged in the declaration. In certain actions special damages for defamation are essential to be shown in order to their maintenance. This is the case in all actions for language not actionable *per se*. And the special damages which must be shown in such cases may be alleged and proved, besides the necessary or general damages in the class of cases which have been

[1] Chesley v. Tompson, 137 Mass. 136.

[2] Malloy v. Bennett, 15 Fed. Rep. 371; Shattuc v. McArthur, 29 id. 136; Dufort v. Abadie, 23 La. Ann. 280; Lombard v. Lennox, 155 Mass. 70; 28 N. E. Rep. 1125; Warner v. Press Publishing Co., 132 N. Y. 181.

[3] Zeliff v. Jennings, 61 Texas, 458.

[4] Read v. Harrington, 58 Vt. 181. *Contra*, as to expense, Shattuc v. McArthur, 29 Fed. Rep. 136.

[5] Vol. 1, §§ 417–420.

[6] Dicken v. Shepherd, 22 Md. 399.

considered, and they cannot otherwise be recovered.[1] If al-
[661] leged and not proved the action may still be maintained and substantial damages recovered.[2] The desertion of a husband by his wife is not such a natural and proximate consequence of a slander which accuses him of larceny and adultery as to entitle him to special damages therefor. It might be otherwise if the charge was made for the purpose of accomplishing that result.[3]

§ **1216. Exemplary damages.** Wherever such damages are recoverable at all for malicious wrongs they may be recovered for libel and slander. But to justify the finding of any sum beyond fair compensation for the injury, in order to punish the defendant, the nature of the defamation and circumstances of the case should be such as to satisfy the jury that there was actual malice, or a recklessness equivalent thereto.[4] The falsity of a publication which is libelous *per se* is sufficient proof of malice to sustain an award of exemplary damages.[5] Where the matter is of that character injury to the plaintiff's feelings may be considered in awarding such damages.[6] In Connecticut the jury may allow them in view of the counsel fees the plaintiff has incurred on account of the wrong done

[1] Id.; Shipman v. Burrows, 1 Hall, 399; Harcourt v. Harrison, id. 474; Servatius v. Pichel, 34 Wis. 294; Rummell v. Otis, 60 Mo. 365; Price v. Whitely, 50 Mo. 439; McDuff v. Detroit Evening Journal Co., 84 Mich. 1.

If the plaintiff claims damages in consequence of the defendant's act, as for loss of time, the fact that his employer made no deduction from his wages on that account does not relieve the defendant. Elmer v. Fessenden, 154 Mass. 427; 28 N. E. Rep. 298. But see § ——.

[2] Weiss v. Whittemore, 28 Mich. 353; Wier v. Allen, 51 N. H. 181; Smith v. Thomas, 2 Bing. N. C. 380.

[3] Georgia v. Kepford, 45 Iowa, 48.

[4] Tillotson v. Cheetham, 3 Johns. 56; Taylor v. Church, 8 N. Y. 452; Symonds v. Carter, 32 N. H. 458; Cramer v. Noonan, 4 Wis. 231; Klinck v. Colby, 46 N. Y. 427; Kendall v. Stone, 2 Sandf. 269; Gilreath v. Allen, 10 Ired. 67; Bonnin v. Elliott, 19 La. Ann. 322; Kinney v. Hosea, 3 Harr. 397; Montgomery v. Knox, 23 Fla. 595; De Pew v. Robinson, 95 Ind. 109; Newman v. Stein, 75 Mich. 402; Lanius v. Druggist Pub. Co., 20 Mo. App. 12; Sowers v. Sowers, 87 N. C. 303; Reeves v. Winn, 97 id. 246; Klewin v. Bauman, 53 Wis. 244; Shattuc v. McArthur, 29 Fed. Rep. 136; Orth v. Featherly, 87 Mich. 315.

[5] Bergmann v. Jones, 94 N. Y. 51; Samuels v. Evening Mail Ass'n, 75 id. 604; Warner v. Press Publishing Co., 132 id. 181; Morning Journal Ass'n v. Rutherford, 51 Fed. Rep. 513. See Stallings v. Whittaker, 55 Ark. 494.

[6] Brooks v. Harrison, 91 N. Y. 83.

him.[1] It is held in New York that a husband's liability for punitive damages, where he is a defendant simply because of his wife's wrong, is not so broad as that of an actual wrongdoer.[2] But in Texas the husband and his wife are equally liable for her torts, and a general judgment may be rendered against them both; it may, however, require that her separate estate be exhausted before resort can be had to their common property or that owned by the husband alone.[3] The general principles of exemplary damages and of the liability thereto of principals for the acts of their agents are elsewhere considered. It may be convenient to note here a few recent cases bearing upon the liability of publishers for the malice and acts of their reporters and correspondents. A newspaper proprietor is not subject to vindictive damages because of the publication of libelous matter without his knowledge or consent unless proof is made from which his approval thereof may be legally inferred. The absence of proof of reproach administered to the employee who inserted the article or of his discharge does not establish a ratification of his act.[4] In the absence of negligence the owner of a newspaper is not chargeable with the express malice of an employee, if he had no knowledge that the false accusation was to be made;[5] but if the employee stands in the place of the employer and has entire control of a paper or a portion of it, he is thereby practically authorized to write and publish therein anything he may choose; and the latter cannot claim exemption from any of the legal consequences of the former's acts, whether they are the result of negligence or wilfulness.[6] A publication made with intent to injure the plaintiff's feelings and to degrade him in the estimation of the public does not justify the imposition of punitory damages.[7]

§ 1217. Damages in discretion of jury. The amount of damages in these cases, both compensatory and exemplary, is in the discretion of the jury; and being so, the verdict

[1] Wynne v. Parsons, 57 Conn. 73, and cases cited p. 84.

[2] Upton v. Upton, 51 Hun, 184.

[3] Zeliff v. Jennings, 61 Texas, 458.

[4] Haines v. Schultz, 50 N. J. L. 481.

[5] Detroit Post Co. v. McArthur, 16 Mich. 447; Scripps v. Reilly, 38 id. 10; Robertson v. Wylde, 2 Moody & R. 101; Eviston v. Cramer, 57 Wis. 570.

[6] Bruce v. Reed, 104 Pa. St. 408; Malloy v. Bennett, 15 Fed. Rep. 371.

[7] Eviston v. Cramer, 57 Wis. 570; Templeton v. Graves, 59 id. 95.

must be palpably and grossly excessive to induce the court to set it aside.[1]

§ 1218. Special damages where words not actionable per [662] se. Defamatory language from the false speaking or

[1] Jones v. Greeley, 25 Fla. 629, 645; Blakeman v. Blakeman, 31 Minn. 396; Lanius v. Druggist Pub. Co., 20 Mo. App. 12; Templeton v. Graves, 59 Wis. 95; Grace v. McArthur, 76 id. 641; Malloy v. Bennett, 15 Fed. Rep. 371; Shattuc v. McArthur, 29 id. 136; Praed v. Graham, 24 Q. B. Div. 53; Lowe v. Herald Co., 6 Utah, 175; Douglass v. Tousey, 2 Wend. 352; King v. Root, 4 id. 113; Sanders v. Johnson, 6 Blackf. 50; Bell v. Howard, 4 Litt. 117; Riley v. Nugent, 1 A. K. Marsh. 431; Ross v. Ross, 5 B. Mon. 20. In Newell on Defamation, pp. 912–927, is a collection of cases in which verdicts have been sustained or set aside because the damages awarded were not excessive or were so. See Harris v. Arnott, 26 L. R. Ire. 55.

The result of adjudications in Michigan is thus stated in Scripps v. Reilly, 38 Mich. 23: "1. In any injury entitling the party to redress, damages to the person, property and reputation, together with such special damage as may be shown, are recoverable. 2. Where the act done is one which from its very nature must be expected to result in mischief, or where there is malice, or wilful or wanton misconduct, carelessness or negligence so great as to indicate a reckless disregard of the rights or safety of others, a new element of damages is allowed, viz.: for injury to the feelings of the plaintiff. 3. Damages for injuries to feelings are only allowed for those torts which consist of some voluntary act or very gross neglect, and depend in amount very much upon the degree of fault evinced by all the circumstances. 4. Where the tort consists of some voluntary act, but no element of malice is shown to have existed, but the wrong was done in spite of proper precaution, the damages to be awarded on account of injured feelings will be reduced to such sum as must inevitably have resulted from the wrong itself. 5. Where, however, the elements exist in a case entitling a party to recover damages for injured feelings, the amount to be allowed for shame, mental anxiety, insulted honor, and suffering and indignation consequent on the wrong, may be increased or aggravated by the vindictive feelings, or the degree of malice, recklessness, gross carelessness or negligence of the defendant, as the injury is much more serious where these elements, or either of them, are shown to have existed. 6. This increase of damages dependent upon the conduct of the defendant must be considered in this state as actual damages, although usually spoken of as exemplary, vindictive or punitory, and the amount thereof to be recovered, where recoverable at all, as they are incapable of ascertainment by any other known rule, must rest in the fair and deliberate judgment and discretion of the jury acting upon their own sense of justice in view of all the circumstances, both mitigating and aggravating, appearing in the case, and which can fairly be said to give color to or characterize the act, aided, however, by such instructions from the court as will tend to prevent the allowance of damages merely fanciful, or so remote as not fairly resulting from the injury. 7. So far as these

publication of which damage is not inferred may be the basis of an action if injury results.[1] The injury must be of a pecuniary nature, or cause detriment to important temporal interests; and must appear to be the natural and proximate consequence of the publication. This kind of slander is only actionable in respect of some special damage proceeding [663] from it; such damage is the gist of the action, and must be specially alleged and proved or the action will fail.[2] There is some contrariety of decision as to what will constitute special damage sufficient to support an action. There is none, however, where the direct or necessary consequence is confessedly

damages are concerned, the fact that an indictment may or may not be pending or threatened for the same wrong is wholly immaterial, as they are allowed by way of remuneration for the injury sustained. If this allowance also operates by way of punishment, this is an indirect result equally applicable to damages allowed for injuries to person or property. 8. In cases of libel the publication is always considered a voluntary act, and is presumed to have proceeded from malicious motives. The actual motive may, however, be shown either in aggravation or reduction of damages to the feelings of the person injured. In other words, the spirit and intention of the defendant in publishing the libel may be considered by the jury in estimating the injuries done to the plaintiff's feelings. 9. Want of proper precaution in the employment of agents or assistants, or of proper care in the conduct of the paper, or the retention of improper employees after ascertaining their incompetency, carelessness or negligence, may be shown to increase the damages to wounded feelings; but express malice in the employees would not be admissible for such purpose, where the act was done without the knowledge or consent of the defendant, when proper care had been exercised in their employment and retention. Detroit Daily Post Co. v. McArthur, 16 Mich. 447; Welch v. Ware, 32 Mich. 77, and authorities cited on p. 86; Elliott v. Van Buren, 33 Mich. 56; Livingston v. Burroughs, 33 Mich. 511; Friend v. Dunks, 37 Mich. 25."

[1] Terwilliger v. Wands, 17 N. Y. 54.

[2] Achorn v. Piper, 66 Iowa, 694; Woodruff v. Bradstreet Co., 35 Hun, 16; Chamberlain v. Boyd, 11 Q. B. Div. 407; Dominion Tel. Co. v. Silver, 10 Can. Sup. Ct. 238; Dwyer v. Meehan, 18 L. R. Ire. 138; Keenholts v. Becker, 3 Denio, 346; Terwilliger v. Wands, 17 N. Y. 61; Beach v. Ranney, 2 Hill, 309; Hallock v. Miller, 2 Barb. 630; Herrick v. Lapham, 10 Johns. 281; Hersh v. Ringwalt, 3 Yeates, 508. See Missouri P. Ry. Co. v. Richmond, 73 Texas, 568, 576.

In Cook v. Cook, 100 Mass. 194, the court say: "To sustain the action on this ground it is necessary that the declaration should set forth precisely in what way such special damages resulted from the words relied on. It is not sufficient to allege generally that the plaintiff has suffered special damages, or that he has been put to great costs and expenses thereby. . . . It must be made to appear, by proper averments, how these spe-

a pecuniary loss. Strong, J., in Terwilliger v. Wands,[1] said: "The action for slander is given by law as a remedy for injuries affecting a man's reputation or good name by malicious, scandalous words, tending to his damage and derogation.[2] It is injuries affecting the reputation only which are the subject of the action. In the case of slanderous words actionable *per se*, the law, from their natural and immediate tendency to produce injury, adjudges them to be injurious, though no special loss or damage can be proved. But with regard to words that do not apparently, and upon the face of them, import such defamation as will of course be injurious, it is necessary that the plaintiff should aver some particular damage to have happened.[3] As to what constitutes special damage, Starkie mentions the loss of a marriage, loss of hospitable gratuitous entertainment, preventing a servant or bailiff from getting a [664] place, the loss of customers by a tradesman;[4] and says that, in general, whenever a person is prevented by the slander from receiving that which would otherwise be conferred upon him, though gratuitously, it is sufficient.[5] In Olmsted v. Miller[6] it was held that the refusal of civil entertainment at a public house was sufficient special damage. So in Williams v. Hill[7] was the fact that the plaintiff was turned away from the house of her uncle and charged not to return

cial damages were occasioned by the words alleged to have been uttered falsely or maliciously." Walker v. Tribune Co., 29 Fed. Rep. 827; Pollard v. Lyon, 91 U. S. 225.

[1] 17 N. Y. 54.

[2] 3 Black. Com. 123; Stark. on Sland. Prelim. Obs. 22–29; id. 17, 18.

[3] 3 Black. Com. 124.

[4] Townshend on S. & L., § 198. Special damage consists in, among other things, the loss of marriage, loss of *consortium* of husband and wife (Lynch v. Knight, 5 L. T. R. (N. S.) 291; 9 House of L. Cas. L. 577; Parkins v. Scott, 6 L. T. R. (N. S.) 394; 1 Hurl. & C. 153; Roberts v. Roberts, 33 L. J. (Q. B.) 249; 5 B. & S. 384; and see Pasman v. Fletcher, Clayton, 73); loss of emoluments, profits, customers, employment, gratuitous hospitality (Moore v. Meagher, 1 Taunt. 39; Williams v. Hill, 19 Wend. 305); or by being subjected to any other inconvenience or annoyance occasioning or involving an actual or constructive pecuniary loss. Woodbury v. Thompson, 3 N. H. 194; Kelly v. Partington, 3 Nev. & M. 116; Keenholts v. Becker, 3 Denio, 346; Foulger v. Newcomb, L. R. 2 Exch. 330; Hartley v. Herring, 8 T. R. 130. The special damage must be the loss of some material temporal advantage. Loss of *consortium vicinorum* is not sufficient. Roberts v. Roberts, 33 L. J. (Q. B.) 250; Beach v. Ranney, 2 Hill, 309.

[5] Citing Stark. on Sland. 195, 202; Cook's Law of Def. 22–24.

[6] 1 Wend. 506.

[7] 19 Wend. 305.

until she had cleared up her character. So in Beach v. Ranney [1] the circumstance that persons who had been in the habit of doing so refused longer to supply fuel, clothing, etc.[2] . . . It would be highly impolitic to hold all language wounding the feelings, and affecting unfavorably the health and ability to labor of another, a ground of action; for that would be to make the ground of action depend often upon whether the sensibilities of a person spoken of are easily excited or otherwise; his strength of mind to disregard abusive, insulting remarks concerning him; and his physical strength and ability to bear them. Words which would make hardly an impression on most persons, and would be thought by them, and should be by all, undeserving of notice, might be exceedingly painful to some, occasioning sickness and an interruption of ability to attend to their ordinary avocations. There must be some limit to liability for words not actionable *per se*, both as to the words and the kind of damages; and a clear and wise one has been fixed by the law. The words must be defamatory in their nature; and must in fact disparage the character; and this disparagement must be evidenced by some positive loss arising therefrom directly and legitimately as a fair and natural result." It is therefore generally held that mere injury to the feelings, though resulting in sickness and inability to labor, is not such special damage as will support the action for defamatory words not actionable in themselves.[3] [665] Nor will the allegation that the plaintiff has fallen into disgrace, contempt and infamy, and has lost his or her credit, reputation and peace of mind.[4] Being shunned by [666] neighbors and turned out of a moral reform society does not constitute special damage.[5]

§ 1219. Same subject. The loss of a marriage to a party of either sex is sufficient special damage. If the words spoken

[1] 2 Hill, 309.

[2] 2 Stark. on Sland. 872, 873.

[3] Prince v. Eastwood, 45 Iowa, 648; Wilson v. Goit, 17 N. Y. 442; Bedell v. Powell, 13 Barb. 183; Samuels v. Evening Mail Ass'n, 6 Hun, 5; Allsop v. Allsop, 5 H. & N. 534. But see Olmsted v. Brown, 12 Barb. 657; Bradt v. Towsley, 13 Wend. 253; Fuller v. Fenner, 16 Barb. 333; Underhill v. Welton, 32 Vt. 40; McQueen v. Fulghan, 27 Tex. 463.

[4] 1 Saund. 243, note 5; Beach v. Ranney, 2 Hill, 309; Bassett v. Elmore, 48 N. Y. 561; Woodbury v. Thompson, 3 N. H. 194; Roberts v. Roberts, 5 B. & S. 384; Rea v. Harrington, 58 Vt. 181.

[5] Id.

were defamatory, as that a female plaintiff has had an illegitimate child, or is wanting in chastity;[1] or, if spoken of a man, that he is a whore-master or the like;[2] or of one who is a widower, that he had kept his wife basely, and starved or denied her necessaries;[3] or to say of one he is a bastard,[4] and it is shown to be followed with the loss of marriage as a consequence, the action will lie. But a loss of suitors is not special damage to a female.[5] The judges in England were not agreed in Lynch v. Knight[6] that a wife may maintain an action against a slanderer for words not actionable in themselves based on the loss of her husband's society as special damage, he having deserted her in consequence of the words spoken; but she was held entitled to recover in respect of her loss of maintenance by him for such cause. Loss of employment, of customers, or of any position from which the defamed party derived support or any substantial or pecuniary advantage is so manifestly special damage that it is unnecessary to state the [667] cases in detail.[7] In such actions where loss of trade or customers is relied upon, if the plaintiff intends to show particular instances he must allege them;[8] in other words, where he alleges by way of special damages the loss of customers in the way of his trade, the loss of marriage, or of service, the names of such customers, the name of the person with whom marriage would have been contracted, or service performed, should be stated.[9] But the rule is relaxed when the individuals may be supposed to be unknown to him, or it is impossible

[1] Restor v. Pomfreich, Cro. Eliz. 639; Shepard v. Wakeman, 1 Sid. 79; Davis v. Gardiner, 4 Coke, 16; Matthews v. Cross, Cro. Jac. 323.

[2] Matthews v. Cross, Cro. Jac. 323; Taylor v. Tully, Palmer, 385; Southold v. Daunston, Cro. Car. 269.

[3] Wicks v. Shepherd, Cro. Car. 155.

[4] Nelson v. Staff, Cro. Jac. 422.

[5] Barnes v. Prudlin, 1 Sid. 396.

[6] 9 H. of L. Cas. 577.

[7] Campbell v. White, 5 Ir. C. L. (N. S.) 312; Corcoran v. Corcoran, 2 id. 272; Moore v. Meagher, 1 Taunt. 39; Hartley v. Herring, 8 T. R. 130; Peaks v. Oldham, 1 Cowp. 277; Bignell v. Buzzard, 3 H. & N. 217; Sterry v. Foreman, 2 C. & P. 592; Evans v. Harries, 1 H. & N. 25; Knight v. Gibbs, 3 Nev. & M. 467; 1 A. & E. 43; Shipman v. Burrows, 1 Hall, 399; Williams v. Hill, 19 Wend. 305; Wemhak v. Morgan, 20 Q. B. Div. 635.

[8] Rose v. Groves, 5 M. & G. 618; Trenton Mut. L. & F. Ins. Co. v. Perrine, 23 N. J. L. 402; Moore v. Meagher, 1 Taunt. 39; Shipman v. Burrows, 1 Hall, 399; Tobias v. Harland, 4 Wend. 537; Hallock v. Miller, 2 Barb. 630; Townshend on S. & L., § 345; 1 Stark. on Sland. 203.

[9] Id.

to specify them, or they are so numerous as to excuse a specific description on the score of inconvenience.[1]

§ 1220. Same subject; injury to feelings. There [668] ought to be no difference, and in principle there is none, be-

[1] Trenton Mut. L. & F. Ins. Co. v. Perrine, 23 N. J. L. 402; Hartley v. Henning, 8 T. R. 130; Hargrave v. Le Breton, 4 Burr. 2422; Westwood v. Cowne, 1 Stark. 172; 2 Saund. 411; Riding v. Smith, 1 Exch. Div. 91. See Hewit v. Mason, 24 How. Pr. 366.

In Weiss v. Whittemore, 28 Mich. 373, the publication was actionable *per se*, and had reference to the plaintiff in his business as a dealer in Steinway pianos. The declaration alleged that prior to the time of the publication he had been and was carrying on the business of the agency, "and had in the way of his aforesaid trade and business, as agent for the sale of the Steinway pianos, acquired great gains and profits, and was up to that time daily and honestly acquiring great gains and profits to himself, as such agent in the sale thereof." It was further alleged that by means of the publication the plaintiff had been and is greatly injured in his said trade and business, and has lost and been deprived of divers great gains and profits in his said business, which would but for such publication have arisen and accrued to him. It was objected that these allegations were too general; that the plaintiff should have shown how he had suffered the damage, the particular amount, and the particular sales the publication had prevented him from making. But the court, by Christiancy, J., said: "The case is not like that of Shipman v. Burrows, upon which the defendants rely, where the plaintiff, a shipmaster, alleged generally that in consequence of the publication, etc., certain insurance companies refused to insure any vessel commanded by him, or any goods on board, etc., without setting forth any particular application to or refusal by any such company. In that case, whether correctly decided or not, the plaintiff must have known and could therefore easily have set forth the particular instance of refusal. But how could the plaintiff thus know and specify the particular instances here where parties simply omitted to call for the purchase of these pianos? Had he been in the habit of carrying them around to supply customers, perhaps the case might have been analogous to that of the shipmaster; but this does not appear. Nor is this like the loss of trade from such a cause in many other cases, where the same customers are in the habit of resorting to the same shop for dry goods or groceries frequently needed; pianos are not bought at frequent but at very distant intervals by the same person. Almost every customer must, in the nature of things, be a new one. And yet when the injury complained of is a loss of trade, in ordinary cases, from slander or a libel, it seems to be settled upon authority, and we think upon sound principle, that the names of the customers driven away or lost need not be mentioned; but the general loss of trade is sufficient, and the declaration may be supported by evidence of such general loss. See Evans v. Harries, 38 Eng. L. & Eq. 347; Hartley v. Herring, 8 T. R. 130; Ashley v. Harrison, 1 Esp. 48; Trenton, etc. Ins. Co. v. Perrine, 23 N. J. L. 402." See § 1223.

tween words actionable in themselves and other defamatory words followed by actual injury beyond the change in the burden of proof. In the former case the injury is presumed; in the latter it must be alleged and proved. The intrinsic nature of the wrong and injury is the same in both cases. What the jury may take into consideration, without proof in the one case, in the assessment of damages ought, when proved in the other, to sustain the action and be considered in the award thereof. Where the words relate to persons, and not exclusively to things, and impute a crime involving moral turpitude or punishment, they are in themselves actionable. The law conclusively presumes damage if they are false and the publication was not privileged. This damage is assessable by a jury, and no legal standard for measuring it exists. This, however, does not imply, nor is it true, that the law does not define the nature of the injury and decide what elements may enter into compensation for it. The injury is a malicious one to reputation,[1] and pecuniary loss, in theory at least, the gist of the action for its redress.[2] This loss is presumed; and also injury to the feelings because the dissemination of the scandal has a tendency, more or less strong according to the nature of the imputation and the standing and influence of the traducer, to exclude the person to whom it refers from society and the [669] confidence and respect of the community; there is in fact, and by implication of law, mental suffering at once upon knowledge of the defamatory publication. The law authorizes the jury to consider upon their knowledge of the general experience that the false and malicious imputation, however limited the publication, causes injury of which mental suffering is an ingredient; that suffering ensues from the shock of the disparagement to the mental sensibilities of one who has a consciousness of innocence, and from the natural apprehension that his reputation will suffer by a popular belief or suspicion that the imputation is true. This injury to the feelings is not the principal ingredient for which the law affords redress; it is incidental to and dependent on other phases of the wrong; it is generally rather an aggravation than a substantive and independent ground of recovery. If the law would sus-

[1] Terwilliger v. Wands, 17 N. Y. 54. [2] Townshend on S. & L., § 57.

tain an action and allow the recovery of damages for every word or act which in fact causes injury to feelings, it would thereby, in the language of Crompton, J.,[1] "encourage actions which ought not to be brought." Therefore, in actions for words not actionable in themselves special damage of a nature corresponding to the damages which are presumed to result principally from language actionable *per se* must be alleged and proved; and it is only when, in addition to such loss, the words are of such a nature as to injure reputation that injury to the feelings or mental suffering may be incidentally considered.[2] A mere apprehension of loss or of ill consequences will not constitute special damages to support an action for slanderous words not actionable. It is insufficient to allege that in consequence of the words discord happened between husband and wife, and that plaintiff was in danger of being divorced; or that the words exposed the plaintiff to the displeasure [670] of her parents, and she was in danger of being put out of their house.[3]

§ 1221. Same subject; natural consequence. The special damage must be the natural as well as the proximate consequence of the defamatory publication. As was well said by Mullett, J.:[4] "It is a rule equally consistent with good sense, good logic and good law that a person who would recover damages for an injury occasioned by the conduct of another must show, as an essential part of his case, the relation of cause and effect between the conduct complained of and the injury sustained." This subject has been treated at large in another place.[5] The injury must be such as according to the usual course of things, or the general experience of mankind,

[1] Roberts v. Roberts, 5 B. & S. 384.

[2] Falsely and maliciously to impute in the coarsest terms, and on the most public occasion, want of chastity to a woman of high station and unspotted character, or want of veracity or courage to a gentleman of undoubted honesty and honor, cannot be made the foundation of any proceeding civil or criminal; whereas an action may be maintained for saying that a cobbler is unskilful in mending shoes, or that one has held up his hand in a threatening posture to another. Report of committee of house of lords on defamation and libel, July, 1843: Townshend on S. & L., § 57.

[3] Folkard's Stark., § 385; Barnes v. Strudd, 1 Lev. 261; Townshend on S. & L., § 200.

[4] Olmsted v. Brown, 12 Barb. 652.

[5] Vol. 1, § 29.

was likely to ensue from the publication complained of. It is not deemed natural for a parent to withhold favors in the way of instruction and dress to his minor child in consequence of a charge of self-pollution which he disbelieves.[1] Grover, J., said: "I do not think special damages can be predicated upon the act of any one who wholly disbelieves the truth of the story. It is inducing acts injurious to the plaintiff, caused by a belief of the truth of the charge made by the defendant, that constitutes the damage which the law redresses." When, however, the charge made, independently of belief of its truth, has caused the person to whom it was published or addressed to act upon it, and to turn out of employment a servant to [**671**] whom the charge referred, the disbelief, or testimony of it, has been held immaterial.[2] "It may often happen," say the court, "that a person may not believe what is told, and yet not have courage to keep the individual who labors under the imputation." Park, J., observed: "It is said that the witness would have turned the plaintiff away on the defendant's wish to that effect being intimated although no slanderous words had been used. But it is clear that if the words in question had not been used the plaintiff would not have been dismissed; and it is sufficient for this action to show that she was turned out in consequence of such words of the defendant. The effect of the evidence may be that the witness would have turned the plaintiff away if different words had been used; but different words were not used, and she was sent away in consequence of these." In many cases the special injury results from the action of one to whom the slanderous charge

[1] Anonymous, 60 N. Y. 262.

In Lynch v. Knight, 9 H. of L. Cas. 577, the wife brought the action, joining the husband for conformity, against A. for slander uttered by him to her husband, imputing to her that she had been "all but seduced by B. before her marriage, and that her husband ought not to suffer B. to visit his house." The special damage alleged was that in consequence of the slander the husband had compelled her to leave his house and return to her father, whereby she lost the *consortium* of her husband. It was held that the cause of complaint thus set forth would not sustain the action, inasmuch as the special damage relied upon did not arise from the natural and probable effect of the words spoken by the defendant, but from the precipitation or idiosyncrasy of the husband in dismissing his wife from his house when he was only cautioned not to let her mix in society. Folkard's Stark., § 383.

[2] Knight v. Gibbs, 1 A. & E. 43.

has been repeated by the person to whom the defendant published it. And it has been held that the defendant is not liable for the damage resulting from such repetition unless he authorized it, or it was a privileged communication. Thus it is said by Strong, J., in Terwilliger v. Wands,[1] that "where words are spoken to one person, and he repeats them to another, in consequence of which the party of whom they are spoken suffers damage, the repetition is, as a general rule, a wrongful act, rendering the person repeating them liable in like manner as if he alone had uttered them. The special damages in such a case are not a natural, legal consequence of the first speaking of the words, but of the wrongful act of repeating them, and would not have occurred but for the repetition, and the party who repeats them is alone liable for the damages."[2]

[1] 17 N. Y. 57.

[2] Citing Ward v. Weeks, 7 Bing. 211; Hastings v. Palmer, 20 Wend. 225; Keenholts v. Becker, 3 Denio, 346; Stevens v. Hartwell, 11 Met. 542.

In Olmsted v. Brown, 12 Barb. 662, Mullett, J., said: "A man may be justly held responsible for the necessary or ordinary legitimate consequences of his own acts. And such consequences may be included in the chain of causes which connect the original act with the final effect. But he cannot be made accountable for the unauthorized illegal acts of other persons, although his own conduct may have indirectly induced or incited the commission of the acts." Vicars v. Wilcocks, 8 East, 1; Moody v. Baker, 5 Cow. 357; Beach v. Ranney, 2 Hill, 314; McPherson v. Daniels, 10 B. & C. 263; Dole v. Lyon, 10 Johns. 447. He adds: "These decisions, and the reasons upon which they are founded, most clearly and fully establish the doctrine that the repetition of slander is unlawful, unless made with justifiable intentions and upon a justifiable occasion. And the conclusion is inevitable, that, when so unlawful, it is not an ordinary or necessary legitimate consequence of the defendant's original unlawful act, and cannot be used to make out the relation of cause and effect between the defendant's original slander and the injury attributed to it, and which might not have happened but for the unjustifiable and illegal interference of another. This rule presupposes what the law plainly declares, that there may be intentions and occasions which will justify the repetition of slanderous words. And those who duly appreciate the rights of the social, domestic, religious and mere business relations of civilized life will find no difficulty in judging when these occasions occur. Where they do occur, the repetition of slanderous words, with the proper intentions, may be considered the ordinary or necessary and legitimate consequences of the uttering by the first slanderer, and render him accountable for all the injuries occasioned by such legitimate repetition."

The proposition in the text is sus-

[672] § 1222. **Criticism of the doctrine last stated.** It appears to the writer that this doctrine, though advanced by very able jurists and sanctioned by courts of distinguished learning and influence, is unsound. If the liability of the party first uttering the defamatory words for the damages resulting from a culpable repetition of them were denied on the ground that such repetition was not a natural or probable consequence of the first publication, the conclusion would harmonize with the principle which fixes the limit of responsibility generally for the consequences of torts.[1] An error in holding that the repetition of a scandal is not so likely to occur as that the utterer should be held to contemplate it is of minor consequence; if that holding were true the exemption from liability could be rested safely on that ground. The damages would then be rejected as too remote. But it is not true, probably, that when one utters a scandal he expects it to have no further circulation; that a subsequent repetition by his hearer is a consequence so contrary to the general experience that he cannot be reasonably held responsible for it. The relation of cause and effect is a matter which cannot always be actually ascertained; but if in the ordinary course of events a certain result usually follows from a given cause the immediate [673] relation of one to the other may be considered to be established.[2] The cases from the doctrine of which we dissent do not hold that the damages suffered from such repetition are remote within this rule, though in many cases particular losses may be so; they hold that such damages do not naturally and legitimately proceed from the first speaking; and that if the repetition occurs under such circumstances that the person who repeats the scandal incurs no liability the damages resulting therefrom may be charged to the first speaker, and are not remote. It is possible to suppose that the first utterer of the imputation might reasonably be held to antici-

tained in Prince v. Eastwood, 45 Iowa, 640; Clifford v. Cochrane, 10 Ill. App. 570; Burkett v. Griffith, 90 Cal. 532; Hastings v. Stetson, 126 Mass. 329; Gough v. Goldsmith, 44 Wis. 262; Burt v. Advertiser Newspaper Co., 154 Mass. 238, 247.

[1] There cannot be a recovery for the damages resulting from a particular republication, nor can damages be enhanced by the general probability of unlawful republications. Burt v. Advertiser Newspaper Co., 154 Mass. 238, 247.

[2] Ionides v. Universal Ins. Co., 14 C. B. (N. S.) 259.

pate an injurious privileged repetition, though not a wrongful one; but to hold him liable for the former on that ground, and not for the latter, would be to make his liability depend on a subtile and shadowy distinction. Whether a repetition was likely to ensue under the particular circumstances of a given case is often, and perhaps generally, a proper question for the jury, as whether alleged consequences were antecedently probable in other cases of tort. Whether a particular special injury sought to be made an element of damage is a natural and proximate consequence of a repetition of the slanderous charge is a question of law. But the doctrine that where the repetition is unlawful, and the person repeating the defamatory words is liable therefor, no recourse can be had to an earlier publisher of the scandal, and that redress must be sought exclusively against the person who is the more immediate cause of the injury, is unsound. Each is liable for the natural and proximate consequences of his acts; neither is relieved from this responsibility because the other is the more immediate agent to produce those consequences, and acted tortiously and illegally in doing so. Many illustrations of such double liability might be mentioned.[1] Where a marriage promise is broken in consequence of one of the parties being traduced, there is a right of action for such breach of the promise; but this has never been supposed to preclude an action against the slanderer who induced that breach. The loss of the marriage is a recognized element of damages in the latter action, though it is the very loss to be compen- [674] sated in the other.[2]

§ 1223. Slander of title. Defamatory language maliciously spoken of things is actionable only when it naturally and proximately causes damage to the owner.[3] The language must be false, spoken without legal excuse, and occasion pecuniary damage.[4] The malice which gives a right of action is legal as

[1] See vol. 1, §§ 29, 39, 41, 42.

[2] Folkard's Stark., § 386, and note (a); Townshend on S. & L., § 201; Lumley v. Gye, 2 E. & B. 216; Green v. Button, 2 C., M. & R. 707; Toms v. Whitney, 35 Up. Can. Q. B. 195; Miller v. Butler, 6 Cush. 71; Chapman v. Thornburgh, 17 Cal. 87.

[3] Swan v. Tappan, 5 Cush. 104; Malachy v. Soper, 3 Bing. N. C. 371; Ingram v. Lawson, 6 id. 212; Evans v. Harlow, 5 Q. B. 624.

[4] Id.; Halsey v. Brotherhood, 19 Ch. Div. 386; Burkett v. Griffith, 90 Cal. 532.

contradistinguished from personal malice, and may consist in uttering false statements either with a direct intention to injure another or in a reckless disregard of his rights and of the consequences that may result to him.[1] Misrepresentations by which a business is intentionally injured constitute a tort for which the law affords redress. Such torts are akin to slander and libel; but they are remediable within the broad principles which govern the action on the case. It lies for all wrongful acts unaccompanied by force from which injury ensues.[2] Slander of title falls within its scope. The publication must be malicious; the language must be false, and must occasion, as a natural and proximate consequence, a pecuniary loss — a special damage.[3] The allegation of damages must be special.[4] If the defamation is committed in the execution of a deed all who joined therein are jointly liable for the consequences; and it may be shown that after its execution they, or any of them, asserted title to the premises. Such testimony tends to show the slander, and the wilfulness and maliciousness of the claim made in asserting title to the property. If the claim was made with knowledge that it was baseless the person injured may recover, in addition to the taxable costs, any other reasonable outlay made by him in removing the cloud cast upon his title by the recitals in the deed.[5] A recent and well-considered English case lays down the rule that in an action for words not actionable *per se*, but constituting an untrue statement concerning the plaintiff's business, and which were maliciously published, which statement is intended or reasonably likely to produce, and in the ordinary course of things

[1] Gott v. Pulsifer, 122 Mass. 235.

[2] Snow v. Judson, 38 Barb. 212; Wren v. Weild, L. R. 4 Q. B. 213; White v. Merritt, 7 N. Y. 352; Gallager v. Brunel, 6 Cow. 346; Wier v. Allen, 51 N. H. 177; Pitt v. Donovan, 1 M. & S. 639; Cousins v. Merrill, 16 Up. Can. C. P. 114; West Counties Manure Co. v. Lower Chemical Manure Co., L. R. 9 Exch. 218.

[3] Townshend on S. & L., §§ 206-206c; Kendall v. Stone, 5 N. Y. 14; Like v. McKinstry, 41 Barb. 186; 4 Keyes, 397; Smith v. Spooner, 3 Taunt. 246; Hill v. Ward, 13 Ala. 310; Bailey v. Dean, 5 Barb. 297; Linden v. Graham, 1 Duer, 670; Paull v. Halferty, 63 Pa. St. 46; Re Madison Ave. Bap. Church, 26 How. Pr. 72; Burkett v. Griffith, 90 Cal. 533.

[4] Ashford v. Choate, 20 Up. Can. C. P. 471; Malachy v. Soper, 3 Bing. N. C. 371; Delegall v. Highley, 8 C. & P. 444; Kendall v. Stone, 5 N. Y. 14; Like v. McKinstry, 41 Barb. 186; Wilson v. Dubois, 35 Minn. 471.

[5] Chesebro v. Powers, 78 Mich. 472.

does produce, a general loss of business as distinct from the loss of particular known customers, evidence may be given of such general loss of business, and it is sufficient to support the action.[1]

Section 2.

THE DEFENSE.

§ 1224. Failure of plea of justification. A plea of [675] justification puts upon record a repetition of the defamatory charge, and includes a deliberate averment of its truth. Where such a plea is made, with no intention to support it by proof, or without reasonable ground for believing that the charge is true and can be proved, it is generally regarded as evidence of malice in the original speaking; as an aggravation of the wrong complained of, which may be considered by the jury for the enhancement of damages.[2] In Fero v. Roscoe[3] Bronson, C. J., said: "When one who is sued for defamation deliberately reaffirms the slander, and puts it on the records of the court by way of justification, if he fails to establish the truth of his plea he has done the plaintiff a new injury, which may properly be regarded as an aggravation of the original wrong. It is said that the attempt to justify may be made in good faith, or in the honest belief that the plaintiff is guilty of the matter laid to his charge. That may be so; but the injury to the plaintiff is not diminished by the mistaken belief of the defendant. And when a man is called into court for charging another with a crime he ought to pause and examine before he repeats the charge and places it on record; and if he makes a mistake in such a matter it should be at his peril, and not at the peril of the injured party." In [676]

[1] Ratcliffe v. Evans [1892], 2 Q. B. 524.

[2] Henderson v. Fox, 83 Ga. 233; Lowe v. Herald Co., 6 Utah, 175; Walker v. Wickens, 30 Pac. Rep. 181 (Kan.); Jackson v. Stetson, 15 Mass. 48; Alderman v. French, 1 Pick. 1; Lea v. Robertson, 1 Stew. 138; Updegrove v. Zimmerman, 13 Pa. St. 619; Gorman v. Sutton, 32 id. 247; Gilman v. Lowell, 8 Wend. 573; Shartle v. Hutchinson, 3 Ore. 337; Robinson v. Drummond, 24 Ala. 174; Pool v. Devers, 30 Ala. 672; Beasley v. Meigs, 16 Ill. 139; Spencer v. McMasters, id. 405; Doss v. Jones, 5 How. (Miss.) 158; Wilson v. Nations, 5 Yerg. 211; Faucitt v. Booth, 31 Up. Can. Q. B. 263; Wilson v. Robinson, 14 L. J. (Q. B.) 196. See Caulfield v. Whitworth, 18 L. T. (N. S.) 527.

[3] 4 N. Y. 165.

New York and some other states pleading and failing to establish a justification has been held conclusive evidence of malice, and to preclude any mitigating effect from the evidence given in support of the plea, as well as to deprive the [677] defendant of other mitigations.[1] In other states such a plea is not necessarily evidence of express malice. If the defendant, having reasonable cause and good grounds to believe the plaintiff guilty on evidence creating a strong presumption of guilt, pleads a justification for the purpose of getting these circumstances in evidence, and not for the purpose of repeating the slander, such plea is not evidence of express malice.[2] If he fails to make good such a plea it is in itself a circumstance which the jury may consider in fixing the damages as an aggravation of the tort;[3] but the jury is not bound in all cases so to consider it. On the contrary, if the defendant shows strong grounds in support of the charge he has made, though he does not wholly support his plea, the jury may, if they see fit, consider these grounds as mitigating circum- [678] stances, and reduce the damages accordingly.[4] So it has been held that where the plea of justification was so defectively drawn that judgment could not be rendered upon it,[5] or was withdrawn before trial,[6] or before a second trial, although an effort had been made to prove its truth on the first trial,[7]

[1] Id.; Van Benschoten v. Yaple, 13 How. Pr. 97; Shelton v. Simmons, 12 Ala. 466; Root v. King, 7 Cow. 613; Mapes v. Weeks, 4 Wend. 659; Bisbey v. Shaw, 12 N. Y. 72.

It was said in Larned v. Buffinton, 3 Mass. 546, that "when through the fault of the plaintiff the defendant, as well at the time of the speaking the words as when he pleaded his justification, had good cause to believe they were true, it appears reasonable that the jury should take into consideration this misconduct of the plaintiff to mitigate the damages."

[2] Parke v. Blackiston, 3 Harr. 373; Thomas v. Fischer, 71 Ill. 576; Ransone v. Christian, 49 Ga. 491; Sloan v. Petrie, 15 Ill. 425; Thomas v. Dunaway, 30 id. 373; Pallet v. Sargent, 36 N. H. 496; Rayner v. Kinney, 14 Ohio St. 283; Huson v. Dale, 19 Mich. 17.

[3] Robinson v. Drummond, 24 Ala. 174; Dewit v. Greenfield, 5 Ohio, 225; Cavanaugh v. Austin, 42 Vt. 576; Wilson v. Nations, 5 Yerg. 211; Burckhalter v. Coward, 16 S. C. 435.

[4] Ransone v. Christian, 49 Ga. 491; Henderson v. Fox, 83 id. 233; Byrket v. Monohon, 7 Blackf. 83; Landis v. Shanklin, 1 Ind. 92; Shank v. Case, id. 170; West v. Walker, 2 Swan, 32; Kennedy v. Holborn, 16 Wis. 457.

[5] Braden v. Walker, 8 Humph. 34.

[6] Gilmore v. Borders, 2 How. (Miss.) 824.

[7] Morris v. Lachman, 68 Cal. 109.

it is not to be considered in aggravation of damages. In Illinois it has been held that the withdrawal of the plea on the trial may be considered by the jury on the question of damages.[1] It has been ruled otherwise in Michigan.[2]

§ 1225. Same subject; effect of statutes. Now in New York and in other states, by statute, the plea of justification, put in in good faith, though unsustained by proof, is no longer evidence of malice to be considered by the jury for the enhancement of damages.[3] In Distin v. Rose[4] Church, C. J., said: "The code has made this change in the law as it previously stood, that although the justification is not sustained, yet the facts adduced for that purpose may be used in mitigation of damages if they tend to show good faith, or a belief in the truth of the words uttered. But when there is a total failure of proof tending in this direction, and the circumstances evince malice in reiterating the slander in the pleadings, it is allowable for the jury to take that circumstance into consideration.[5] I see no difference in principle whether the action be for breach of promise or slander. If a defendant in the former case takes advantage of his position as a party to maliciously invent a slander and spread it upon the record, or in the latter to repeat one already invented, it makes no difference. The law will not justify either. This rule should be applied with care and moderation, and I think should be confined to cases of bad faith in incorporating the justification in the pleading, and this can scarcely be said to be true under the code when the facts proved ought legitimately to go in mitigation of damages, because it seems incongruous to say that a failure to establish a justification may enhance the damages, and yet the facts proved under it may mitigate them."[6] In Massachusetts it is provided by statute that if the defendant fails to establish a plea of justification it shall not of itself be proof of malice; but the jury shall de- [679]

[1] Beasley v. Meigs, 16 Ill. 139; Spencer v. McMasters, id. 405.

[2] Evening News Ass'n v. Tryon, 42 Mich. 549. See Simpson v. Robinson, 12 Q. B. 513; Warwick v. Foulkes, 12 M. & W. 507; Shirley v. Keathy, 4 Cold. 29.

[3] Klinck v. Colby, 46 N. Y. 427; vol. 1, § 153.

[4] 69 N. Y. 122.

[5] Thorn v. Knapp, 42 N. Y. 474; Cruikshank v. Gordon, 118 id. 178; Distin v. Rose, 69 id. 122.

[6] Doe v. Roe, 32 Hun, 628; Aird v. Fireman's Journal Co., 10 Daly, 254.

cide the whole case, whether such plea was or was not made with malicious intent.[1]

§ **1226. Evidence in mitigation; plaintiff's bad character.** The defendant is entitled to offer, under the general issue, evidence of the plaintiff's general bad character at the time when the libel or slander was published, although he has also filed a plea of justification.[2] The plaintiff's character is in issue in such actions. It is presumed by law to be good, though it is generally so averred in the complaint or declaration.[3] Such an averment is unnecessary, and requires no denial in an answer under the code to let in disparaging proof; nor was it traversable at common law.[4] If denied, the denial will not have the effect of an unsupported plea of justification if no attempt is made to support the denial by proof, so as to aggravate the injury and authorize the jury to add to the amount of damages.[5] Evidence of the plaintiff's bad character is admitted for the reason that a person of disparaged fame or bad character does not suffer the same injury and is not entitled to the same measure of reparation as one whose character is unblemished.[6] The inquiry for this purpose must be confined to general character or reputation.[7] Particular acts

[1] St. 1826, ch. 107, § 2; Pub. Stats. 1882, ch. 167, § 79.

[2] Mahoney v. Belford, 132 Mass. 393; Stone v. Varney, 7 Met. 86; Henry v. Norwood, 4 Watts, 347; Powers v. Presgroves, 38 Miss. 227; Root v. King, 7 Cow. 613; Pope v. Welsh, 18 Ala. 631; Anonymous, 8 How. Pr. 434; Young v. Bennett, 5 Ill. 43; Burton v. March, 6 Jones' L. 409; Moyer v. Moyer, 49 Pa. St. 210. But see Myers v. Curry, 22 Up. Can. Q. B. 470; Smith v. Shumway, 2 Tyler, 74; Jones v. Stevens, 11 Price, 235.

[3] Shilling v. Carson, 27 Md. 175.

[4] Ayres v. Covill, 18 Barb. 260; Bennett v. Matthews, 64 Barb. 410; Pink v. Catanich, 51 Cal. 420; Sayre v. Sayre, 25 N. J. L. 235; Parkhurst v. Ketchum, 6 Allen, 406.

[5] Pink v. Catanich, 51 Cal. 420.

[6] Watson v. Christie, 2 B. & P. 224; Sayre v. Sayre, 25 N. J. L. 235; Ayres v. Covill, 18 Barb. 260; Root v. King, 7 Cow. 634; Hamer v. McFarlin, 4 Denio, 509; Campbell v. Campbell, 54 Wis. 97; Stone v. Varney, 7 Met. 86; Case v. Marks, 20 Conn. 251; Hallowell v. Guntle, 82 Ind. 554; Scott v. Sampson, 8 Q. B. Div. 491.

[7] Vick v. Whitfield, Mart. & Hayw. 396; Powers v. Presgroves, 38 Miss. 227; Bell v. Farnsworth, 11 Humph. 608; Pease v. Shippen, 80 Pa. St. 513; Dewit v. Greenfield, 5 Ohio, 225; Fisher v. Patterson, 14 Ohio, 418; Parkhurst v. Ketchum, 6 Allen, 406; McLaughlin v. Cowley, 131 Mass. 70; Shilling v. Carson, 27 Md. 185; Fuller v. Dean, 31 Ala. 654; Sayre v. Sayre, 25 N. J. L. 235; Clark v. Brown, 116 Mass. 504; Lamos v. Snell, 6 N. H. 413; Leonard v. Allen, 11 Cush. 241;

or instances of misconduct cannot be proved;[1] nor [680] rumors and reports, unless they are so common and prevalent that they have affected the general character.[2] The admissibility of this evidence is not, as has just been stated, affected by the fact that there is a plea of justification. It should, however, not be allowed to have any effect upon the issue formed upon that plea, but be confined to the question of damages.[3] In some states the inquiry may be as to the plaintiff's general character in respect to the trait involved in the imputation.[4] In others it is as to general reputation without such restriction.[5] It is not to be denied that there are some cases

Buckley v. Knapp, 48 Mo. 152; Hawkins v. Globe Printing Co., 10 Mo. App. 174.

[1] McLaughlin v. Cowley, 131 Mass. 70; Mahoney v. Belford, 132 id. 393; Hallowell v. Guntle, 82 Ind. 554; Scott v. Sampson, 8 Q. B. Div. 491; Buckley v. Knapp, 48 Mo. 152.

[2] Bowen v. Hall, 20 Vt. 232; Inman v. Foster, 8 Wend. 602.

[3] Bowen v. Hall, 20 Vt. 232.

[4] Id.; Warner v. Lockerby, 31 Minn. 421; Treat v. Browning, 4 Conn. 408; Bell v. Farnsworth, 11 Humph. 608; Dewit v. Greenfield, 5 Ohio, 225; Wright v. Schroeder, 2 Curtis, 548; Bridgman v. Hopkins, 34 Vt. 532; Conroe v. Conroe, 47 Pa. St. 198; McNutt v. Young, 8 Leigh, 542; Shilling v. Carson, 27 Md. 175; Lambert v. Pharis, 3 Head, 622; Drown v. Allen, 91 Pa. St. 393.

In Clark v. Brown, 116 Mass. 504, it was held that the defendant might introduce evidence in mitigation that the plaintiff's general reputation was bad or show that his general reputation is bad in respect to the charge made by the alleged slanderous words.

[5] Goodbread v. Ledbetter, 1 Dev. & Bat. L. 12; Paddock v. Salisbury, 2 Cow. 811; Andrews v. Vanduzer, 11 Johns. 38; —— v. Moor, 1 M. & S. 284; Leicester v. Walter, 2 Camp. 251; Rodriques v. Tadmire, 2 Esp. 720; Sheahan v. Collins, 20 Ill. 325; Bailey v. Hyde, 3 Conn. 463; Van Benschoten v. Yaple, 13 How. Pr. 97; Stiles v. Comstock, 9 id. 48; Richardson v. Northrup, 56 Barb. 105; 29 Am. Dec. 266; Sayre v. Sayre, 25 N. J. L. 239.

In Jones v. Stevens, 11 Price, 235, the court of exchequer held that in actions for libel general evidence of the plaintiff's bad character was irrelevant and inadmissible either to contradict the averments of good character contained in the declaration or in mitigation of damages. Graham, B., said: "On the present occasion there is a full concurrence of opinion amongst the whole court that such general evidence of bad character, whether offered on the general issue or in proof of matter pleaded by way of justification, is not admissible, and principally on the ground that a party cannot be expected to be prepared to rebut it; and that if it were received, any man might fall a victim to a combination made to ruin his reputation and good name even by means of the very action which he should bring to free himself from the effects of the malicious slander." It is observed of this case in Scott v. Sampson, 8 Q. B. Div. 491, 500, that it was an action for a

which favor the admission of evidence, to affect the plaintiff's character, of common rumor and suspicions that he has been guilty of the acts imputed to him in the alleged slanderous words.[1]

[681] § **1227. Same subject; evidence of common reports as to plaintiff's guilt.** If only not guilty is pleaded the defendant has been allowed in some jurisdictions to show, solely in mitigation of damages by rebutting in some degree the presumption of malice, that before the alleged speaking of the words it was a common rumor in the neighborhood that the plaintiff had been guilty of the specific offense charged.[2] In Shilling v. Carson [3] the court said that whether the defendant will be permitted under the general issue to give such evidence is not universally agreed. But where the evidence goes to prove that the defendant did not act wantonly and under the influence of actual malice, or it is offered solely to show the real character and degree of malice which the law implied from the falsity of the charge, all intention of proving the truth being disclaimed, it may be admitted and considered by the jury.[4] The admissibility of such evidence is forcibly contended for by Pennington, J., in Cook v. Barkley.[5]

libel on the plaintiff in the way of his profession as an attorney. Looking at the reasons given by the learned judges, it would almost appear that they regarded the evidence tendered in that case as evidence of particular facts tending to show the plaintiff's disposition. Although this case was decided by a court in banc in 1822, it does not appear to have been cited in cases ruled soon after. It has, however, been followed in the case referred to. See § 1227.

[1] Case v. Marks, 20 Conn. 248; Leicester v. Walter, 2 Camp. 251; —— v. Moor, 1 M. & S. 284.

[2] Edgar v. Newall, 24 Up. Can. Q. B. 215; Skinner v. Powers, 1 Wend. 451; Wetherbee v. Marsh, 20 N. H. 561; Cook v. Barkley, 2 N. J. L. 169; Fuller v. Dean, 31 Ala. 654; Calloway v. Middleton, 2 A. K. Marsh. 372; Van Derveer v. Sutphin, 5 Ohio St. 293; Galloway v. Courtney, 10 Rich. 414; Bridgman v. Hopkins, 34 Vt. 532; Kennedy v. Gregory, 1 Bin. 85; Henson v. Veatch, 1 Blackf. 369; Morris v. Barker, 4 Harr. 520; Fletcher v. Burrows, 10 Iowa, 557; Foot v. Tracy, 1 Johns. 45; Nelson v. Evans, 1 Dev. 9; Hinkle v. Davenport, 38 Iowa, 355; Jones v. Townsend's Adm'x, 21 Fla. 431; Montgomery v. Knox, 23 id. 595; Hewitt v. Pioneer Press Co., 23 Minn. 178; Saunders v. Mills, 6 Bing. 213; Patten v. Belo, 79 Texas, 41; McIntyre v. Bransford, — Ky. —; 17 S. W. Rep. 359 (under a statute permitting the defendant to show mitigating circumstances to reduce the damages); Hay v. Reid, 85 Mich. 296.

[3] 27 Md. 175.

[4] See Lambert v. Pharis, 3 Head, 622.

[5] 2 N. J. L. 169. "The defendant

The weight of authority it is believed is opposed to its admission either on a plea of justification or in mitigation.[1] In Wilson v. Fitch[2] Crockett, J., said: "It has often been decided that it is not admissible to prove in mitigation that

. . . offered to prove by a witness that it was so said and reported by other persons before the words were spoken by him; and that witnesses had been examined before the presbytery who had sworn to the facts; and that the plaintiff himself had acknowledged there was a report in circulation, and that it originated in his own family. So far at least as the testimony went to show there was such a report in circulation, and that it originated in the family of the plaintiff, I think the court erred in not receiving the testimony. The *quo animo* with which the words were spoken was the point in issue, as malice constitutes the gist of the action. It appears to me that the testimony was proper to show with what temper of mind the defendant [682] spoke the words; whether from a malicious design to injure the plaintiff, or from a laudable motive to preserve the purity of character so essentially requisite in a person exercising the functions of the plaintiff [who was a clergyman, and the defendant one of his congregation]; or from mere inadvertency; or even if it should appear to the jury that the defendant had pursued the inquiry with so much zeal as to indicate an evil intent; yet if it should appear that he did not give rise to the slander, but only repeated what he had heard from others, giving credit to it as coming from the plaintiff's own family, and the more especially if it should be found that this was done in the course of prosecuting the plaintiff before the session or presbytery, it certainly might and ought to go in mitigation of damages. . . . Supposing one of my neighbors, for instance, the parson of the parish, shall call at my house and very gravely inform me that one of our neighbors had been found out and fully detected in the commission of some scandalous offense, and detail the circumstances, both of the commission of the offense and of the detection; that other persons of good credit were to drop in and relate the same story, so that I should fully believe that the facts were not only true, but that they were public; and that in conversation afterwards with some other person I was to mention

[1] Storey v. Early, 86 Ill. 461; Peterson v. Morgan, 116 Mass. 350; Clark v. Munsell, 6 Met. 373; Alderman v. French, 1 Pick. 1; Wolcott v. Hall, 6 Mass. 514; Inman v. Foster, 8 Wend. 602; Wilson v. Fitch, 41 Cal. 363; Chamberlin v. Vance, 51 id. 75; Beardsley v. Bridgman, 17 Iowa, 290; Fisher v. Patterson, 14 Ohio, 418; Kenney v. McLaughlin, 5 Gray, 3; Bodwell v. Swan, 3 Pick. 376; Watson v. Moore, 2 Cush. 133, 141; Anthony v. Stephens, 1 Mo. 254; 13 Am. Dec. 497; Dame v. Kenney, 25 N. H. 323; Moberly v. Preston, 8 Mo. 466; Scott v. McKinnish, 15 Ala. 664; Pallet v. Sargent, 36 N. H. 496; Bowen v. Hall, 20 Vt. 232; Sheahan v. Collins, 20 Ill. 325; Mills v. Spencer, 1 Holt, 535; 3 E. C. L. 177; Collins v. Stephenson, 8 Gray, 438; Mapes v. Weeks, 4 Wend. 659; Matson v. Buck, 5 Cow. 499; Preston v. Frey, 91 Cal. 107.

[2] 41 Cal. 363.

prior and up to the time of the publication the plaintiff had been generally reported and suspected to have been guilty of the acts imputed to him in the libel. Some of the earlier cases hold such proof to be admissible. But the current of modern authorities is to the contrary. These decisions proceed on the theory that public policy, the good order and repose of society, and a due regard for the protection of private character, demand that no one should be permitted to excuse or palliate the offense of defaming the reputation of another on so slight a ground as public rumor or general suspicion, which are often unfounded and the result of malice or misapprehension. If [684] the defendant had offered to prove in mitigation that the plaintiff was commonly reported and generally believed to have been guilty of the acts imputed to him in the alleged libel, I think the proof would not have been admissible in mitigation of damages under the rule established by the almost unbroken current of modern decisions."[1] Savage, C. J., in

that there was such a report in circulation, without thinking it necessary to name the persons from whom I had it, and it should turn out afterwards to be a mistake, that it was another person resembling the one spoken of in name, or in other circumstances, which had led to the error; if the party should think proper to bring an action against me, I could not plead that I had it from other persons and that it was a general report in the neighborhood, but I must plead the general issue that I was not guilty of a malicious slander; reason and justice, however, would say that I might give in evidence the whole transaction, the manner and occasion of speaking the words; that if it would not wholly excuse me it might at least go in extenuation of the injury. . . . All the circumstances connected with the words should go fully and fairly to the jury, who must judge from them of the guilt or innocence of the defendant; and in case they find him blamable, to assess such damages as the more or less aggravated circumstances of the case will [683] justify. Justice and reason call for this rule; and the law, I apprehend, does not deny it; nor can I perceive what inconvenience can result from it. An intelligent court will always instruct the jury in what light to apply the testimony; distinguishing between that which goes to the point in issue and that which goes in mitigation or aggravation. Is it not as reasonable to mitigate as to aggravate? Our law does not delight in exposing the dark side of the human character, it seeks truth; it is not vindictive, it is merely just. It is too dignified and enlightened to put on the same footing the vile inventor, fabricator and publisher of a malignant slander, and him who inadvertently repeats what is already in circulation."

[1] In 13 Am. Dec. 500, the annotator says: "The correct doctrine, it is conceived, is that laid down in Bowen

Gilman v. Lowell,[1] thus forcibly states the objections to such evidence: "That reports of a similar character were prevalent in the neighborhood might show a less degree of malice in the defendant; but they have a tendency to prove the truth and are therefore inadmissible; not that reports are testimony to convict of a crime, but they destroy reputation and have in fact the same effect as proof. It often happens that reports prejudicial to the plaintiff have prevailed extensively before he commences a suit, and the fact that his character is suffering from these reports unmerited opprobrium drives him to a prosecution. If then he is to be met by these reports and only allowed a nominal verdict, which is about equal to a verdict against him, 'he had better,' in the language of Chief Justice Parsons,[2] which I have before quoted in Matson v. Buck,[3] 'sink privately under the weight of unmerited calumny, lest by attempting his vindication he give notoriety to slanders which before had been circulated only in whispers.'" In a recent case Cave, J., after reviewing the previous cases ruled in the various English courts, says that evidence of rumors and suspicions to the same effect as the defamatory matter complained of is inadmissible on principle, as only indirectly tending to affect the plaintiff's reputation. "If these rumors and suspicions have, in fact, affected the plaintiff's reputation, that may be proved by general evidence of reputation. If they have not affected it they are not relevant to the issue. To admit evidence of rumors and suspicions is to

v. Hall, 20 Vt. 232, that reports or suspicions of the plaintiff's guilt are inadmissible unless they have become so general as to affect the reputation or character. Of course the defendant ought not to be held responsible for damage done to the plaintiff's character by the slander before he (the defendant) took any part in circulating it. But, on the other hand, it is certainly the sounder as well as the safer rule to require every person who assists in giving currency to a defamatory report concerning another to take upon himself the risk of its being false, unless he repeats the report not merely from an honest belief in its truth, but also for justifiable ends. The mere tattler and scandal-monger should be held to a strict accountability, whether he is the originator of the slander or only aids in its circulation. Every individual who wantonly or negligently contributes to the perpetration of the injury should be responsible for its consequences."

[1] 8 Wend. 579.

[2] 6 Mass. 518.

[3] 5 Cow. 500.

give any one who knows nothing whatever of the plaintiff, or who may even have a grudge against him, an opportunity of spreading through the means of the publicity attending judicial proceedings what he may have picked upon from the most disreputable sources, and what no man of sense, who knows the plaintiff's character, would for a moment believe in. Unlike evidence of general reputation, it is particularly difficult for the plaintiff to meet and rebut such evidence, for all that those who know him best can say is that they have not heard anything of these rumors. Moreover, it may be the defendant himself who has started them."[1] In an action for words imputing unchastity to a woman it was held no defense [685] to show that the defendant spoke them to her, and was led to do so by her general conduct, and especially by her deportment with a particular man, believing the imputation to be true. Evidence of particular instances was held not admissible.[2] Rumors and reports short of general reputation are inadmissible because they are generally held not to afford any extenuation of the wrong of aiding to continue the scandal,[3] and facts which might lead to a suspicion and reasonable be-

[1] Scott v. Sampson, 8 Q. B. Div. 491, 503. Continuing, the judge said: "Turning to the authorities, it will be seen that while such evidence appears to have been admitted by Lord Ellenborough, C. J., in Eamer v. Merle (not reported), and by Cresswell, J., with the approbation of Wightman, J., in Richards v. Richards (2 Mood. & Rob. 557), and while its admissibility was supported by Pigot, C. B., in Bell v. Parke (11 Ir. C. L. Rep. 413), it was doubted by Abbott, C. J., in Waithman v. Weaver (11 Price, 257, n.), and by Coleridge, J., in Nye v. Thompson (16 Q. B. 175), and it was held inadmissible by Fitzgerald and Hughes, BB., in Bell v. Parke (11 Ir. C. L. Rep. 413), and by the whole court of exchequer in Jones v. Stevens (11 Price, 235). In Leister v. Walter (2 Camp. 251), evidence of rumors and suspicions was admitted by Sir James Mansfield against his own judgment; but in that case it was proposed to prove that the plaintiff's relations and former acquaintances had ceased to visit him on account of these rumors and suspicions, so that the evidence would seem really to have amounted to evidence of general reputation. Upon the whole, both the weight of authority and principle seem against the admission of such evidence."

[2] Parkhurst v. Ketchum, 6 Allen. 406; McLaughlin v. Cowley, 131 Mass. 70; Fitzgerald v. Stewart, 53 Pa. St. 343; Dewit v. Greenfield, 5 Ohio, 225; Vick v. Whitfield, 2 Hayw. 222; R——— v. M———, 21 Wis. 50; Watson v. Moore, 2 Cush. 133. See Lawler v. Earle, 5 Allen, 22; Shoulty v. Miller, 1 Ind. 544.

[3] Proctor v. Houghtaling, 37 Mich. 41; Bush v. Prosser, 11 N. Y. 347; Willover v. Hill, 72 id. 36.

lief of the truth of the imputation are excluded under the rule that requires a plea of justification to let in proof tending to show the truth of the words.[1] But under the statutes, now general in this country, allowing facts and circumstances alleged either in justification or in mitigation to be considered in mitigation, where the justification, pleaded in good faith, is not established, all such as were known to the defendant at the time of speaking the words, and calculated to induce a belief in their truth, may be proved and considered.[2]

§ 1228. Same subject; proof of truth of words. To prevent surprise to the plaintiff on the trial it has been universally held since Underwood v. Parks[3] that the defendant shall not introduce evidence of the truth of the imputation unless he has specially pleaded that the words were true by way of justification.[4] In the absence of such a plea evidence tending to establish the truth of the charge is generally held inadmissible for the purpose of mitigation.[5] But the defendant may prove under the general issue the circumstances which induced him erroneously to make the charge.[6] Particular [686] facts which might form links in the chain of circumstantial evidence against the plaintiff cannot be proved. Accordingly it was held that proof that he was in possession of the property alleged to have been stolen, and returned it to the owner

[1] Brickett v. Davis, 21 Pick. 407, 408.

[2] Bush v. Prosser, 11 N. Y. 347; Hatfield v. Lasher, 81 id. 246; Distin v. Rose, 69 id. 127.

[3] 2 Str. 1200.

[4] Vol. 1, § 152; Townshend on S. & L. 682; Bodwell v. Swan, 3 Pick. 376; Watson v. Moore, 2 Cush. 133; Root v. King, 7 Cow. 613; Pallet v. Sargent, 36 N. H. 496; Young v. Bennett, 5 Ill. 43; Beardsley v. Bridgman, 17 Iowa, 290; Ridley v. Perry, 16 Me. 21; Minesinger v. Kerr, 9 Pa. St. 312; Porter v. Botkins, 59 Pa. St. 484; 11 Am. Dec. 130, note.

[5] Id.

[6] Id.; Treat v. Browning, 4 Conn. 408; Eagan v. Gault, 1 McMull. 468; Dewit v. Greenfield, 5 Ohio, 225; Bailey v. Hyde, 3 Conn. 463; Fero v. Ruscoe, 4 N. Y. 162; Warmouth v. Cramer, 3 Wend. 395; Van Ankin v. Westfall, 14 Johns. 232; Shepard v. Merrill, 13 id. 475; Matson v. Buck, 5 Cow. 499; Laine v. Wells, 7 Wend. 175; Samuel v. Bond, Litt. Sel. Cas. 158; Shirley v. Keothy, 4 Cold. 29; McCampbell v. Thornburgh, 3 Head, 109; Bourland v. Eidson, 8 Gratt. 27; Thompson v. Bowen, 1 Doug. 321, overruled in Farr v. Rasco, 9 Mich. 353; Parke v. Blackiston, 3 Harr. 373; Bisbey v. Shaw, 12 N. Y. 67; Hutchinson v. Wheeler, 35 Vt. 330; Haywood v. Foster, 16 Ohio, 88; Wilson v. Apple, 3 id. 270; Hawkins v. Globe Printing Co., 10 Mo. App. 174; Warner v. Lockerby, 31 Minn. 421.

about the time of the prosecution of another person for the stealing of other property alleged to have been taken at the same time, was held inadmissible on that ground.[1] The defendant may prove any facts in the conduct of the plaintiff in relation to the transaction which was the occasion of the slanderous language complained of, tending to excuse the uttering of the words, provided the facts do not tend to prove the truth of the charge, but in fact relieve the plaintiff from the imputation.[2] Thus, when a party charged one against whom a justice's judgment had been obtained with false swearing in making oath that he was a freeholder, he was allowed to show that on search for the deed in the proper office where by law it was required to be recorded, it was not found owing to a mistake of the recording officer in indexing the records.[3] A plea of justification is sustained by justifying so much of the defamatory matter as constitutes the sting of the charge; it is unnecessary to repeat and justify every word of the alleged defamatory matter if the substance of the charge be justified. If the substantial imputations be proved true a slight inaccuracy in the details will not prevent a judgment for the defendant, if the inaccuracy does not change the complexion of the affair so as to affect the reader of the article differently than the actual truth would.[4] If, however, the alleged libelous article is indivisible, and the facts asserted are dependent on each other to impute the defamatory charge, then each material allegation must be justified or the plaintiff

[1] Warmouth v. Cramer, 3 Wend. 395.

[2] Bourland v. Eidson, 8 Gratt. 27; Purple v. Horton, 13 Wend. 9; Mosier v. Stoll, 119 Ind. 244.

[3] Gilman v. Lowell, 8 Wend. 573; Chestwood v. Mayo, 5 Munf. 16.

In Hutchinson v. Wheeler, 35 Vt. 330, under the general issue, it was held competent for the defendant to show in mitigation, as tending to evince his belief in the words charged,— which were that the plaintiff had poisoned his cow,— that his cow had been poisoned; that for some time previous to the loss there had been a bitter, hostile feeling on the part of the plaintiff towards the defendant; that the defendant having poisoned the plaintiff's dog, the plaintiff had several times threatened to pay the defendant in his own coin; that the defendant had attempted to instigate a prosecution against the plaintiff, and that shortly before the defendant's cow was poisoned a new quarrel had broken out between the parties.

[4] Odgers on Libel, etc., 170, citing Alexander v. Railway Co., 34 L. J. (Q. B.) 152; Stockdale v. Tarte, 4 Ad. & E. 1016; Blake v. Stevens, 4 F. & F. 239. To the same effect is Sullings v. Shakespeare, 46 Mich. 413.

will be entitled to recover to the extent that he has been damaged by the unjustified portion.[1]

§ **1229. Same subject.** In estimating the damages the degree of the defendant's malice is always to be considered; [687] therefore any circumstances, consistent with an admission of the falsity of the words spoken, tending to show that he uttered them under a mistaken belief that they were true, may be proved under the general issue in mitigation.[2] In the nature of things the scope of this evidence is very limited, and the manifest hardship of compelling a defendant to plead justification, with the hazard of aggravating the damages if it be not established, or of depriving him of the privilege of proving a state of facts which, though tending to prove the words true, and therefore of an extenuating nature, were insufficient for that purpose, have led to some diversities of decision. Some courts have applied the rule with more liberality than others. In Bush v. Prosser[3] Selden, J., said: "The courts in England, under a sense of the admitted right [of the defendant to mitigate damages by showing the absence of malice], have in a number of cases decided that facts and circumstances falling short of proving, although tending to prove, the truth of the charge might be received in mitigation.[4] But the courts in this state and in Massachusetts, with less justice but better logic, have uniformly held that a rule which excluded proof of the truth of the charge must necessarily exclude evidence tending to prove it. But it is a little surprising to observe how often judges have asserted in the same paragraph both the right to mitigate by disproving malice and the rule which effectually precluded the exercise of the right without any apparent consciousness of the conflict between the two. I will refer to a few only out of the many instances. In the case of King v. Root[5] Judge Savage says that the defendant 'may show in evidence under the general issue, by way of excuse, anything short of a justification which does not necessarily imply the truth of the charge or tend to

[1] Weaver v. Lloyd, 1 C. & P. 295; Ingram v. Lawson, 5 Bing. N. C. 218.

[2] Mosier v. Stoll, 119 Ind. 244; Wilson v. Apple, 3 Ohio, 270.

[3] 11 N. Y. 347.

[4] Knobell v. Fuller, Norris' Peake, Append. 130; Chalmers v. Shackell, 6 C. & P. 475; Leicester v. Walter, 2 Camp. 251.

[5] 7 Cow. 613.

prove it true, but which repels the presumption of malice arising from the fact of publication.' The same judge, in Purple v. Horton,[1] says: 'Facts and circumstances may be shown in mitigation when they disprove malice, and do not [688] tend to prove the charge, or form a link in the chain of evidence to prove a justification.' Again, Judge Bronson in Cooper v. Barber[2] says: 'Facts and circumstances which tend to disprove malice by showing that the defendant, though mistaken, believed the charge true when it was made may be given in evidence in mitigation of damages.' It does not appear to have occurred to either of these eminent judges that there was any incongruity between the two branches of the proposition thus asserted by them. But it is certainly difficult to comprehend how a defendant is to disprove malice by showing 'that he believed the charge true when it was made' without giving evidence tending to establish its truth; since a belief based on information derived from others cannot be shown." In Michigan the doctrine of this narrow privilege of mitigation has been rejected; there facts tending to establish the truth of the words may be shown; the plea of the general issue, without notice of justification, is treated as a conclusive admission of their falsity, and that such facts merely disprove malice by showing that the defendant at the time he uttered the words mistakenly believed them to be true.[3] A rule nearly as liberal is recognized in Ohio.[4]

§ **1230. Same subject; effect of statutes.** It is very generally provided by statute, and especially in states which have adopted the code, that the defendant may in his plea or answer allege both the truth of the matter charged as defamatory, and any mitigating circumstances to reduce the amount of damages; and whether he prove the justification or not he may give in evidence the mitigating circumstances. Under such statutes matters in mitigation may and probably should be specially stated in the answer. This is implied by their permissive language.[5] For this purpose facts and circumstances

[1] 13 Wend. 9.

[2] 24 Wend. 105.

[3] Huson v. Dale, 19 Mich. 17.

[4] Haywood v. Foster, 16 Ohio, 88; Dewit v. Greenfield, 5 id. 225; Wilson v. Apple, 3 id. 270; Reynolds v. Tucker, 6 Ohio St. 516.

[5] McKyring v. Bull, 16 N. Y. 297; vol. 1, § 166; Willover v. Hill, 72 N. Y. 36, 38; Spooner v. Keeler, 51

may be set up which tend to prove the truth of the charge to show an absence of malice, by proper averments that [689] the defendant was, by such facts, induced to believe the defamatory matter to be true at the time of the publication.[1] The defendant may in his answer allege the truth of the matters charged and mitigating circumstances, or either. It is not necessary to plead the former in order to aver and have the benefit of the latter. All matters receivable in evidence in mitigation may be pleaded for that purpose either with or without justification.[2] Although the evidence fails to prove the justification when the truth of the words is pleaded both for that purpose and in mitigation, he is still entitled to have such evidence as has been adduced tending to establish the truth considered by the jury for the purpose of mitigation.[3]

§ **1231. Evidence in mitigation generally.** The defendant is always entitled to show, under proper pleading, the particular circumstances under which the alleged defamatory matter was published, for the purpose of showing the nature and character of the publication,[4] as well as the occasion and motive of it.[5] Evidence for this purpose to disprove malice, by showing facts and circumstances which caused the defendant to believe the charge true when he made it, must be such as would reasonably induce in the mind of a person of ordinary intelligence a belief in the truth of the charge, and it must also appear that he was thereby brought to believe in

id. 527; Bower v. Derideker, 37 Iowa, 418. It is optional in Indiana. O'Connor v. O'Connor, 27 Ind. 69.

[1] Bennett v. Matthews, 64 Barb. 410; Bush v. Prosser, 11 N. Y. 347; McKyring v. Bull, 16 id. 297; Stiles v. Comstock, 9 How. Pr. 48; Heaton v. Wright, 10 id. 79; Bisbey v. Shaw, 12 N. Y. 67; Dolevin v. Wilder, 7 Robt. 319; Van Benschoten v. Yaple, 13 How. Pr. 97; Wachter v. Quenzer, 29 N. Y. 547; Willover v. Hill, 72 id. 36.

[2] Id.; Graham v. Stone, 6 How. Pr. 15; Brown v. Orvis, id. 376; Follett v. Jewett, 1 Am. L. Reg. 600; 11 N. Y. Leg. Obs. 193.

[3] Bisbey v. Shaw, 12 N. Y. 67; Spooner v. Keeler, 51 id. 529; Kinyon v. Palmer, 18 Iowa, 377; Kennedy v. Holborn, 16 Wis. 457; Distin v. Rose, 69 N. Y. 127.

[4] Jeffras v. McKillop, 2 Hun, 351. See Storey v. Early, 86 Ill. 461.

[5] Morris v. Lachman, 68 Cal. 109; Welker v. Butler, 15 Ill. App. 209; Bruce v. Reed, 104 Pa. St. 408; Larned v. Buffinton, 3 Mass. 546; Abrams v. Smith, 8 Blackf. 95; Root v. King, 7 Cow. 613; Lewis v. Walter, 4 B. & Ald. 605; Haynes v. Leland, 29 Me. 233; Haines v. Welling, 7 Ohio, 253.

its truth.[1] Therefore, it should appear that at the time the defendant made the charge he knew the facts upon which he relies for mitigation, and he should aver that such facts in-
[690] duced a belief in its truth at the time he made it; or they should be of such a character as to raise a reasonable presumption of such belief.[2] Merely believing the charge to be true, however sincere the belief may be, will not excuse either slander or libel;[3] but a belief reasonably induced by facts which the law permits to be proved as likely to produce it will mitigate the damages. There is considerable contrariety of decision as to the facts which may be shown in mitigation for having a tendency to create an honest belief of the truth of the imputation. The matter relied upon must be such as by the well-established principles of law may be proved for mitigation.[4] The defendant may show that he was drunk when he uttered the words, as such proof may tend to rebut malice.[5] But where it appeared that he repeated the charge both when drunk and when sober, on public and private occasions, his being drunk at the particular time alleged is no reason for abating the damages.[6] He may show he was insane;[7] that the publication was confidential.[8] Evidence that the defendant was in the habit of talking much about persons and things, and that what he said was not regarded by the community as worthy of notice and seldom occasioned remark, is not admissible in mitigation.[9] Where by statute the imputation of a want of chastity against a female is made actionable *per se* the repetition of it is not wholly

[1] Dolevin v. Wilder, 7 Robt. 319; 34 How. Pr. 488.

[2] Id.; Hatfield v. Lasher, 81 N. Y. 246; Reynolds v. Tucker, 6 Ohio St. 516; Whitney v. Janesville Gazette, 5 Biss. 330; Swift v. Dickerman, 31 Conn. 285; Bush v. Prosser, 11 N. Y. 347; Willover v. Hill, 72 id. 36; Morey v. Morning Journal Ass'n, 123 id. 207; Larrabee v. Minnesota Tribune Co., 36 Minn. 141; Pratt v. Pioneer Press Co., 35 id. 251; Negley v. Farrow, 60 Md. 158; Bronson v. Bruce, 59 Mich. 467; Kinney v. Roberts, 26 Hun, 166.

The belief of the person who gave the defendant his information in its truth is not available in mitigation. Hawkins v. Globe Printing Co., 10 Mo. App. 174.

[3] Sans v. Joerris, 14 Wis. 663; Burt v. Advertiser Newspaper Co., 154 Mass. 238.

[4] Graham v. Stone, 6 How. Pr. 15.

[5] Howell v. Howell, 10 Ired. 84.

[6] Id.

[7] Yeates v. Reed, 4 Blackf. 463.

[8] Jeffras v. McKillop, 2 Hun, 351.

[9] Howe v Perry, 15 Pick. 506.

excused by a protest at the time of disbelief, or by showing that those who heard the slander did not believe it to be true. Such conduct is actionable, and the question of the extent of responsibility is one for the jury, and is not to be solved by a presumption of harmlessness.[1] An imputation of perjury in a certain bill in chancery cannot be extenuated by proof that at the time of the publication the defendant supposed and believed that the plaintiff had sworn to it, when in fact it had been sworn to by another person.[2] A retraction of the [691] slander made so promptly as to become a part of the *res gestæ*, and freed from all suspicion that it was made by the defendant more for his own protection than for reparation to the victim of his calumny, is provable in mitigation.[3] A retraction to be available for this purpose should contain a full and unqualified withdrawal of the charge, unaccompanied with other offensive or libelous matter, and thus evince the intention of making some atonement for the injury done. Allowing such evidence properly gives the defendant a *locus penitentiæ*, and he should have the benefit of it when he evinces an honest endeavor to make atonement to as great an extent as is within his power. But hesitation, lurking insinuation, an attempted perversion of the plain import of the language used in the libelous article, or the substitution of one calumny for another, only aggravates the original offense, and shows a consciousness of the wrong done without the manliness or magnanimity to repair it.[4] A retraction of a libelous article published after a suit has been brought for the libel, it is held in Michigan, cannot be considered in mitigation.[5]

§ 1232. Same subject. The defendant may show for the purpose of rebutting malice and reducing damages that the words were spoken in anger, if the anger was induced by plaintiff immediately before the publication[6] or under mental

[1] Burt v. McBain, 29 Mich. 260; Markham v. Russell, 12 Allen, 573.

[2] Owen v. McKean, 14 Ill. 459.

[3] Id.

[4] Hotchkiss v. Oliphant, 2 Hill, 510.

[5] Evening News Ass'n v. Tryon, 42 Mich. 549. See Shirley v. Keathy, 4 Cold. 29.

[6] Newman v. Stein, 75 Mich. 402; Ritchie v. Stenius, 73 id. 563; Robinson v. Keyser, 22 N. H. 323; Pierson v. Steortz, Morris (Ia.), 136; Warner v. Lockerby, 31 Minn. 421; Jauch v. Jauch, 50 Ind. 135.

distress growing out of the plaintiff's conduct at the time the alleged wrong was done.[1] Evidence of a previous publication by the plaintiff will not be received in mitigation on the ground of provocation, unless not only the connection between the publications be manifest, but also that the provocation is so recent as to induce a fair presumption that the injury complained of was inflicted during the continuance of the feelings and passion excited by the provocation.[2] A distinct and inde- [692] pendent libel published by the defendant is not a mitigation; but, as just stated, if the publication by the plaintiff was so recent as to afford a reasonable presumption that the libel by the defendant was published under the influence of the passions excited by it, or where it is explanatory of the meaning of or of the occasion of writing the libel complained of, it may be given in evidence for that purpose. To render such evidence admissible, however, it is necessary that the article complained of should on its face refer, and profess to be a reply, to the libel published by the plaintiff; that such appear to be its nature and purpose on a comparison of the publications.[3] The libels themselves ought to be strictly proven

[1] McDougald v. Coward, 95 N. C. 368.

[2] Maynard v. Beardsley, 7 Wend. 560; May v. Brown, 3 B. & C. 113; Goodbread v. Ledbetter, 1 Dev. & Bat. L. 12; Child v. Homer, 13 Pick. 503. There can be no set-off of one libel against another; but in estimating the damages the jury may fairly consider the conduct of the plaintiff and the degree of respect which he himself has shown for the feelings of others. Folkard's Starkie, § 722; per Blackburn, J., in Kelly v. Sherlock, L. R. 1 Q. B. 698; Seely v. Cole, Wright (Ohio), 681. There can be no counter-claim in an action for defamation. Fellerman v. Dolan, 7 Abb. Pr. 395, note; Richardson v. Northrup, 56 Barb. 105. See MacDougall v. Maguire, 35 Cal. 274.

[3] Knott v. Burwell, 96 N. C. 272; Child v. Homer, 13 Pick. 503; Gould v. Weed, 12 Wend. 12; May v. Brown, 3 B. & C. 113. See Underhill v. Taylor, 2 Barb. 348; Hotchkiss v. Lathrop, 1 Johns. 286; Bourland v. Eidson, 8 Gratt. 27.

In Richardson v. Northrup, 56 Barb. 105, it was held that the defendant should be allowed to prove any circumstances which, at the time the words charged were spoken, were calculated to irritate and excite the defendant, and provoke him to the utterance of the words complained of; but that it was no answer to the plaintiff's claim of damages for slander that he has said or done anything, whether actionable or not, for the purpose of reducing the damages, unless such act or declaration actually excited the defendant to use the words charged. The defendant, it was also held, might prove a series of provocations on the part of the plaintiff, commencing long anterior to the speaking of the

and identified as the cause,[1] and that the plaintiff's publication came to the defendant's knowledge before he published the libel complained of.[2] The jury is to determine whether the language employed by the defendant was used because of the plaintiff's abuse, and they may consider for this [693] purpose the declarations of the defendant.[3] Where the defamatory publication is shown to have resulted immediately from a provocation given by the plaintiff in a defamatory charge against the defendant, only nominal damages in general should be given.[4] If the words complained of were spoken in the presence of the plaintiff his reply may be proved by the defendant.[5] But a subsequent publication cannot be given in evidence to determine whether a publication is libelous or not.[6] If the evidence shows that the defamatory words were spoken immediately after the trial of a law suit between the parties, and that they were occasioned by it, it will be competent for the defendant to show the facts and circumstances occurring on, and the conduct of the parties during, the trial. And if the words were spoken in the heat of passion thus excited that will go in mitigation.[7] The defendant may mitigate damages by showing the plaintiff to be a common libeler; but it must be shown in the same way as general reputation is proved; publications of the plaintiff cannot be resorted to for that purpose.[8]

§ 1233. Same subject. It is competent for the defendant under the general issue to show that the charge was occa-

words charged, provided they were continued from time to time down to and at the time the actionable words were spoken. In such a case each successive repetition of the provocation must necessarily become more annoying and exciting; and though there be no motive or spirit of revenge on the part of the defendant, the excitement of such repetition of the provocation becomes more intense and unbearable, and presents a much stronger case of mitigation than when the actionable words are spoken upon the first provocation. Sheffill v. Van Deusen, 15 Gray, 485; Porter v. Henderson, 11 Mich. 20; Lister v. Wright, 2 Hill, 320.

[1] Tarpley v. Blabey, 2 Bing. N. C. 437.

[2] Watts v. Fraser, 7 A. & E. 223.

[3] Botelar v. Bell, 1 Mo. 173.

[4] Pugh v. McCarty, 40 Ga. 444; Davis v. Griffith, 4 Gill & J. 342. See Hackett v. Brown, 2 Heisk. 264; Ransone v. Christian, 56 Ga. 351.

[5] Bradley v. Gardner, 10 Cal. 371.

[6] Usher v. Severance, 20 Me. 9.

[7] Powers v. Presgroves, 38 Miss. 227.

[8] Maynard v. Beardsley, 7 Wend. 560.

sioned by the misconduct of the plaintiff, either in attempting to commit the alleged crime, or in leading the defendant to believe him guilty.[1] But acts and declarations of third persons are inadmissible to show provocation.[2] Facts in the conduct of the plaintiff calculated to create a belief that the charge is true are doubtless provable in mitigation where under the pleadings the defendant is allowed to give evidence tending to show for this purpose that it is true.[3] Evidence of the moral or intellectual character of a person in whose hear- [694] ing or to whose understanding the slanderous words were spoken is immaterial on the question of damages.[4] In an action against husband and wife for words spoken by her, proof is not admissible in mitigation that the husband endeavored to prevent the circulation of the slander.[5] It has been held that the wrong of a publication of rumors in a newspaper may be mitigated by proof that such rumors existed;[6] and that a defendant may show that he copied the statement complained of as libelous from another newspaper.[7] But in another case it was held that the defendant should not be permitted to show that the charge was copied from another newspaper from the proprietor of which damages had been recovered; though the defendant might prove that he had stricken out many parts of the article which reflected on the plaintiff.[8] The fact that the article complained of was copied from and credited to another newspaper than that published by the defendant does not necessarily mitigate the damages. The effect to be given to a publication so made depends upon the particular circumstances of the case.[9] It may be shown that the publication complained of professes on its face to be based on other publications which are referred to, as on reports of investigations made concerning the character of a public officer.[10] In actions for libel the defendant is entitled

[1] West v. Walker, 2 Swan, 32. See Edgar v. Newell, 24 Up. Can. Q. B. 215; McCampbell v. Thornburg, 3 Head, 109.

[2] Underhill v. Taylor, 2 Barb. 348.

[3] Reynolds v. Tucker, 6 Ohio St. 516; Hatfield v. Lasher, 81 N. Y. 246.

[4] Sheffill v. Van Deusen, 15 Gray, 485.

[5] Yeates v. Reed, 4 Blackf. 463.

[6] Skinner v. Powers, 1 Wend. 451.

[7] Saunders v. Mills, 6 Bing. 213.

[8] Creevy v. Carr, 7 C. & P. 64.

[9] Bronson v. Bruce, 59 Mich. 467, 476; Burt v. Advertiser Newspaper Co., 154 Mass. 238.

[10] Burt v. Advertiser Newspaper Co., 154 Mass. 238.

to read the entire article in which is contained the alleged libel.[1] But distinct or separate libels not declared on cannot be introduced in evidence and relied on either by the plaintiff or defendant to show malice and aggravate or to mitigate damages.[2] Where exemplary damages are sought for libel the defendant may prove in Michigan any circumstances tending to show that he acted in good faith and with all proper precautions, and had good cause to believe that the statement complained of was true.[3] Where it appears that the libel was published with no intent to injure the person libeled, and that all proper precautions were observed in publishing it, the recovery of damages will be limited to the actual injury.[4] If the alleged libelous article is one of a series relating to [695] a matter of public concern, the defendant may introduce them all to show good faith on his part.[5] All papers referred [696] to in a libel may be admitted for the purpose of explanation and interpretation.[6] A defendant in an action for libel or slander cannot mitigate damages by proving his own bad character,[7] or poverty.[8] Nor is it any mitigation that he spoke the words in apparent good humor.[9]

In some early cases of slander, both in England and in this country, it has been held that giving the name of the author at the time of speaking the defamatory words was a full excuse, or at least a mitigation of the wrong.[10] Later authori-

[1] Graves v. Waller, 19 Conn. 90, 94.

[2] Fisher v. Patterson, 14 Ohio, 418.

[3] Scripps v. Foster, 41 Mich. 472.

[4] Evening News Ass'n v. Tryon, 42 Mich. 549; Scripps v. Reilly, 38 id. 23; Detroit Daily Post Co. v. McArthur, 16 id. 451.

[5] Scripps v. Foster, 41 Mich. 742.

In Bailey v. Kalamazoo Pub. Co., 40 Mich. 257, Campbell, C. J., said: "The public are interested in knowing the character of candidates for congress; and while no one can lawfully destroy the reputation of a candidate by falsehood, yet if an honest mistake is made (as in misnaming an offense of which the plaintiff has been guilty) in an honest attempt to enlighten the public, it must reduce the damages to a minimum, if the fault is not serious, and there should be no unreasonable responsibility where there is no actual malice." Bronson v. Bruce, 59 Mich. 467. See Smith v. Scott, 2 C. & K. 580.

[6] Nash v. Benedict, 25 Wend. 645; Gould v. Weed, 12 id. 12.

[7] Hastings v. Stetson, 130 Mass. 76.

[8] Meyers v. Malcolm, 6 Hill, 295; Palmer v. Haskins, 28 Barb. 90.

[9] Weaver v. Hendrick, 30 Mo. 502.

[10] Earl of Northampton's Case, 12 Coke, 132; Davis v. Lewis, 7 T. R. 17; Hawkes v. Carter, 1 Law Reporter (London), 192; Bennett v. Bennett, 6 C. & P. 588; Binns v. McCorkle, 2 Brown (Pa.), 79; Hersh v. Ringwalt, 3 Yeates, 508; Kennedy v.

[697] ties qualified the doctrine,[1] requiring either that there be a just reason for the repetition, or that the defendant repeat the charge as he heard it, and refer to the person from whom he heard it as the author, and that the repetition be without any intention to injure or defame the person to whom the charge refers.[2] A man who wantonly or inconsiderately repeats a defamatory tale fabricated by another is certainly liable to answer in damages for assisting in the propagation of the slander; but he is not answerable in the same degree as the author of the slander unless it should appear he was actuated by malice and an intention to defame.[3] In some cases it was required that the person named as author be responsible and within the state, so that he could be sued for the slander.[4] The later cases in England and in several of the states hold that proof that when the words were spoken the author was named is of itself no defense.[5] In Sans v. Joerris[6] Dixon, C. J., said: "The doctrine extrajudicially announced in the fourth resolution of the Earl of Northampton's Case,[7] that the repetition of slander, if the name of the inventor be given at the time, is not actionable, has never been ex-
[698] tended to libel; and even in regard to oral slander has met with disapprobation, and may be considered as virtually overruled.[8] Whether this doctrine is placed on the ground that

Gregory, 1 Bin. 85; Morris v. Duane, id. 90; Cook v. Barkley, 2 N. J. L. 169; Smith v. Stewart, 5 Pa. St. 372; Kelley v. Dillon, 5 Ind. 426; Trabue v. Mays, 3 Dana, 138; Robinson v. Harvey, 5 T. B. Mon. 519; Parker v. McQueen, 8 B. Mon. 16; Miller v. Kerr, 2 McCord, 285; Church v. Bridgman, 6 Mo. 190. See Folkard's Starkie on S. & L., § 317.

[1] McPherson v. Daniels, 10 B. & C. 263; Lewis v. Walter, 4 B. & Ald. 605.

[2] Cummerford v. McAvoy, 15 Ill. 311; Church v. Bridgman, 6 Mo. 190; Haynes v. Leland, 20 Me. 233; Abrams v. Smith, 8 Blackf. 95; Jones v. Chapman, 5 id. 88; Johnston v. Lance, 7 Ired. 448; Skinner v. Grant, 12 Vt. 456; Inman v. Foster, 8 Wend. 602.

[3] Easterwood v. Quin, 2 Brev. 64: 3 Am. Dec. 700.

[4] Scott v. Peebles, 10 Miss. 546; Trabue v. Mays, 3 Dana, 138; Johnston v. Lance, 7 Ired. 448; Larkins v. Tarter, 3 Sneed, 681.

[5] McGregor v. Thwaites, 3 B. & C. 24; Bennett v. Bennett, 6 C. & P. 588; Tidman v. Ainslie, 10 Exch. 63; Chevalier v. Brush, Anthon's Law Stud. 186; Mapes v. Weeks, 4 Wend. 659; Inman v. Foster, 8 id. 602; Hotchkiss v. Oliphant, 2 Hill, 510; Austin v. Hanchet, 2 Root, 148; Treat v. Browning, 4 Conn. 408; Sans v. Joerris, 14 Wis. 663; Haines v. Welling, 7 Ohio, 253.

[6] 14 Wis. 667.

[7] 12 Coke, 134.

[8] Citing Bennett v. Bennett, 6 C. &

the person who needlessly publishes or repeats a previously invented slander gives it the credit which is due to himself, or, as was said by Chief Justice Best in De Crespigny v. Wellesley,[1] that it is every man's moral duty if he hear anything injurious to the character of his neighbor which he does not know to be true, and which does not concern the public or the administration of justice, to lock it up forever in his own breast; or, on the general rule in this world, said to be applicable to nations as well as individuals, that every person should attend to his own affairs, it is, in my judgment, equally sound law, which the security of reputation, the happiness of families, and the peace and good order of society demand shall be rigidly enforced in all cases."[2] If time is lost because of slander the defendant cannot escape liability for it by proving that the plaintiff received compensation for his time from a third person.[3]

P. 588; Lewis v. Walter, 4 B. & Ald. 605; Crane v. Douglass, 2 Blackf. 195; McPherson v. Daniels, 10 B. & C 263. See, also, Hotchkiss v. Oliphant, 2 Hill, 510.

[1] 5 Bing. 393.

[2] Tidman v. Ainslie, 10 Exch. 63, note.

[3] Elmer v. Fessenden, 154 Mass. 427.

CHAPTER XXXV.

MALICIOUS PROSECUTION.

§ 1234, 1235. Nature of the wrong.
1236. Unauthorized suit or appeal.
1237, 1238. Elements of damage.
1239, 1240. Evidence in mitigation.

[699] **§ 1234. Nature of the wrong.** The wrong denoted by this title is of the same nature as libel and slander. It involves among other elements of injury the defamation of the accused. This is so when a criminal charge is maliciously preferred without reasonable or probable cause; a right of action accrues when the prosecution has terminated in an acquittal or discharge.[1] Where the accusation is acted upon, the arrest of the accused, holding him to bail or imprisoning him, and the incidental loss of time, and the expense of a defense are among the natural and proximate consequences.[2] The rule that the prosecution must have terminated rests on the ground that the law will not tolerate inconsistent judgments upon the same question between substantially the same parties. But there is a class of actions in which it has been held that an admission that the alleged malicious suit could not be maintained obviated the necessity of proving that such suit had terminated.[3] Such admission may be by plea or parol. "The bare possibility of inconsistent verdicts should not exempt or relieve a party from responsibility for admitted

[1] Cooley on Torts, 180–190.

The dismissal of a criminal prosecution, if it has not been recommenced, is sufficient to give the accused a right of action. Marbourg v. Smith, 11 Kan. 554; Fay v. O'Neill, 36 N. Y. 11; Hays v. Blizzard, 30 Ind. 457. A discharge against the protest of one who is under recognizance to appear before a grand jury by the entry of a *nolle*, before action by that body, is a termination of the proceedings. Graves v. Dawson, 133 Mass. 419. The technical prerequisite is that the prosecution be disposed of in such manner that it cannot be revived and that the prosecutor must be put to a new one. Long v. Rogers, 17 Ala. 546; Clark v. Cleveland, 6 Hill, 344; Vinal v. Core, 18 W. Va. 1.

[2] Saville v. Roberts, 1 Lord Raym. 374; Sonneborn v. Stewart, 2 Woods, 599; Lavender v. Hudgens, 32 Ark. 763; Garvey v. Wayson, 42 Md. 178.

[3] Wills v. Noyes, 12 Pick. 326; Page v. Cushing, 38 Me. 527.

wrong."[1] If a demurrer admits that a suit was maliciously and hopelessly instituted any presumption to the contrary is overcome and the result of such suit is immaterial.[2] Where a peace warrant is sued out maliciously and without probable cause in an *ex parte* proceeding, and the person proceeded against is committed to jail until he gives security for his future conduct, his right of action is perfect on his release,[3] or if he does not give security, on the expiration of the period fixed for his detention.[4] The general rule does not apply to a civil action in which the trial and judgment do not necessarily involve the question of the existence of probable cause; as where an attachment is obtained as auxiliary to such an action.[5] In Texas the claim for damages in such a case may be tried, under a plea of reconvention, with the attachment suit.[6] If a malicious arrest is made of a servant, against whom there is no right of action, the object being solely to injure his master, the latter has a cause of action for the wrong done him.[7]

§ 1235. Same subject. In many cases the injury to reputation is the most serious consequence of the wrong. An accusation made under the forms of law, on the pretense of bringing a guilty man to justice, is made in the most imposing and impressive manner, and may inflict a deeper injury upon the reputation of the party accused than the same words would uttered under any other circumstances.[8] This wrong, however, does not consist entirely in the malicious prosecution of groundless criminal proceedings; though the element of defamation is mostly confined to them. The malicious prosecution, without probable cause, of civil proceedings involving arrest, attachment, sequestration, or other interference with person or property, or which is the cause of any special grievance or injury, will, according to the general current of authority, give a right of action.[9] The same has been held of proceedings to have a person declared insane or [700]

[1] Page v. Cushing, 38 Me. 527.

[2] St. Johnsbury, etc. R. Co. v. Hunt, 55 Vt. 570.

[3] Hyde v. Greuch, 62 Md. 577.

[4] Steward v. Gromett, 7 C. B. (N. S.) 191; 97 Eng. C. L. 191.

[5] Fortman v. Rottier, 8 Ohio St. 548. Compare Tisdall v. Kingman, 34 S. C. 326.

[6] Tynberg v. Cohen, 76 Texas, 409.

[7] St. Johnsbury, etc. R. Co. v. Hunt, 55 Vt. 570.

[8] Rockwell v. Brown, 36 N. Y. 209.

[9] Wengert v. Beashore, 2 N. J. L.

bankrupt without probable cause;[1] and in cases of malicious abuse of legal process.[2] Whether an action may be maintained for maliciously, and without reasonable or probable cause, prosecuting a civil action not involving an arrest of the

232; Henderson v. Jackson, 9 Abb. Pr. (N. S.) 393; Herman v. Brookerhoff, 8 Watts, 240; Tancred v. Leyland, 16 Q. B. 669; Donnell v. Jones, 13 Ala. 490; 17 id. 689; McKellar v. Couch, 34 id. 336; Stewart v. Cole, 46 id. 646; Collins v. Hayte, 50 Ill. 353; Lawrence v. Hagerman, 56 id. 68; Watkins v. Baird, 6 Mass. 506; Hayden v. Shed, 11 id. 500; Lindsay v. Larned, 17 id. 190; Weaver v. Page, 6 Cal. 681; Pierce v. Thompson, 6 Pick. 193; Barhans v. Sanford, 19 Wend. 417; Besson v. Southard, 10 N. Y. 236; Churchill v. Siggers, 3 El. & Bl. 937; Austin v. Debnam, 3 B. & C. 139; Sinclair v. Eldred, 4 Taunt. 7; Farley v. Danks, 4 El. & Bl. 493; Spaids v. Barrett, 57 Ill. 289; Nelson v. Danielson, 82 id. 545; Tomlinson v. Warner, 9 Ohio, 103; Fortman v. Rottier, 8 Ohio St. 548; Burkhart v. Jennings, 2 W. Va. 242; Savage v. Brewer, 16 Pick. 453; De Medina v. Grove, 10 Q. B. 168; Preston v. Cooper, 1 Dill. 589; Robinson v. Kellum, 6 Cal. 399; Cox v. Taylor, 10 B. Mon. 17; Walser v. Thies, 56 Mo. 89; Holliday v. Sterling, 62 id. 321; McCullough v. Grishobber, 4 W. & S. 201; Spengler v. Davy, 15 Gratt. 381; Wood v. Weir, 5 B. Mon. 544; Fullenwider v. McWilliams, 7 Bush, 389; Closson v. Staples, 42 Vt. 209; Hoyt v. Macon, 2 Colo. 113; Williams v. Hunter, 3 Hawks, 545; 14 Am. Dec. 599, note; Clark v. Pearce, 80 Texas, 146.

It is otherwise as to a levy upon real estate where there is no disturbance of the possession, use or enjoyment of the premises. Trawick v. Martin Brown Co., 79 Texas, 460; Heath v. Lent, 1 Cal. 410; Brandon v. Allen, 28 La. Ann. 60; Muldoon v. Rickey, 103 Pa. St. 110.

If the suit which is alleged to have been maliciously brought was against the makers of a joint note who were jointly engaged in business and jointly owned the property attached in that suit, they may unite in an action to recover for injury to their joint credit, business or property. Cochrane v. Quackenbush, 29 Minn. 376, citing Donnell v. Jones, 13 Ala. 490; Patten v. Gurney, 17 Mass. 182; Medbury v. Watson, 6 Met. 257. Damages cannot be recovered for the malicious seizure of property without probable cause as though it had been converted. Burton v. St. Paul, etc. Ry. Co., 33 Minn. 189.

[1] Sonneborn v. Stewart, 2 Woods, 599; 98 U. S. 187; Brown v. Chapman, 1 W. Bl. 427; Chapman v. Pickersgill, 2 Wils. 145; Lockenour v. Sides, 57 Ind. 360.

[2] Hogg v. Pinckney, 16 S. C. 387; Churchill v. Siggers, 3 El. & B. 929; Savage v. Brewer, 16 Pick. 453; Barnett v. Reed, 51 Pa. St. 190; Jennings v. Florence, 2 C. B. (N. S.) 467; Austin v. Debnam, 3 B. & C. 139; Krug v. Ward, 77 Ill. 603; Grainger v. Hill, 4 Bing. N. C. 212; Elsee v. Smith, 1 D. & R. 97.

Where one is maliciously arrested under bail process upon an allegation of fraud, he must allege that the order of arrest was vacated before he began his action, but he need not aver that the action in which the arrest was made had terminated. In such an action it is not necessary to prove express malice or malice in fact, nor to prove actual damage; depri-

person or seizure of property, is not settled.[1] On principle it is difficult to deny the right of action where the taxable costs are not a full compensation for the trouble and expense of defending the groundless suit. In the words of Lord Campbell:[2] "To put into force the process of the law, maliciously and without any reasonable or probable cause, is wrongful; [701] and if thereby another is prejudiced in property or person, there is that conjunction of injury and loss which is the foundation of an action on the case." The expenses and trouble of defending such an action are proper elements of damage, and why should they alone not be considered sufficient to maintain the action? Where the claim which is the subject of the action is not only false, but the action is prompted alone by malice and without any probable cause, the defendant's right of recovery for the expenses incurred and damages sustained should be as fully recognized as if his property had been attached or his body taken charge of by the plaintiff.[3] The damages include compensation for the defendant's time, trouble and expense in defending the action.[4]

§ 1236. Unauthorized suit or appeal. Though there is no element of malice in one who unauthorizedly brings a suit or prosecutes an appeal in the name of another, he is liable to the other party thereto for such damages as may result to him.[5]

vation of liberty and injury to reputation, feelings and person will support a verdict. Hogg v. Pinckney, 16 S. C. 387, distinguishing Frierson v. Hewitt, 2 Hill (S. C.), 499.

[1] Compare Mayer v. Walter, 64 Pa. St. 283; McNamee v. Minke, 49 Md. 122; Byne v. Moore, 5 Taunt. 187; Gregory v. Derby, 8 C. & P. 749; Clarke v. Postan, 6 id. 423; Closson v. Staples, 42 Vt. 244; Woods v. Finnell, 13 Bush, 628; Whipple v. Fuller, 11 Conn. 581; Lawyer v. Loomis, 3 Thomp. & C. 393; Newfield v. Copperman, 15 Abb. (N. S.) 360; Berry v. Adamson, 6 B. & C. 528; Wanzer v. Wyckoff, 9 Hun, 178; Cardival v. Smith, 109 Mass. 158; Allgor v. Stillwell, 6 N. J. L. 166; Woodmansee v. Logan, 2 id. 93; 1 Am. Lead. Cas. 200–224; Cooley on Torts, 188, 189; Hoyt v. Macon, 2 Colo. 113; Lockenour v. Sides, 57 Ind. 360; Wetmore v. Mellinger, 64 Iowa, 741; Smith v. Hinstrager, 67 id. 109; Johnson v. King, 64 Texas, 226; Smith v. Adams, 27 id. 30; Eberley v. Rupp, 90 Pa. St. 259.

[2] Churchill v. Siggers, 3 El. & Bl. 929.

[3] McCardle v. McGinley, 86 Ind. 538; Marboury v. Smith, 11 Kan. 554; Magmer v. Renk, 65 Wis. 364; Woods v. Finnell, 13 Bush, 628; Eastin v. Bank of Stockton, 66 Cal. 123; Closson v. Staples, 42 Vt. 209, fully reviewing the English and early American cases.

[4] McCardle v. McGinley, 86 Ind. 538.

[5] Foster v. Dow, 29 Me. 442; Smith

Evidence of express malice is competent.[1] If the plaintiff in an action to recover for such a wrong disclaims special damages for injury to his character the defendant cannot attack it either for the purpose of rebutting the evidence of malice or in mitigation of damages.[2] The recovery in such an action where an appeal is taken is not affected by the fact that the person who was unauthorizedly named as plaintiff in the original suit had a right of action against the defendant.[3] Where an appeal is taken without authority the damages to the person in whose favor the judgment was rendered (it remaining in full force) cannot exceed the balance due on it, with the costs of the proceeding in which it was rendered, and of the action brought to enforce its collection.[4]

[703] § **1237. Elements of damage.** These are thus classified by Holt, C. J., in Saville v. Roberts:[5] 1. Damages to [704] a man's fame, as if the matter whereof he is accused be scandalous. 2. Where a man is put in danger to lose his life or limb or property. 3. Damage to a man's property, as where he is forced to spend money in necessary charges to acquit himself of the crime. 4. Any special damage. In general terms, said Graves, J., the elements of damage are the expense the plaintiff incurred about the prosecution complained of, his loss of time, his deprivation of liberty and the loss of the society of his family, the injury to his fame, personal mortification and the smart and injury of the malicious arts and acts and oppression of the defendant.[6] The injury to reputation must be estimated and reparation made for it on the same considerations which govern in actions for slander or libel.[7] Bodily and mental suffering may be taken into account, and the latter where there is no physical injury or pain.[8] So the jury may take into consideration the indignity.[9]

v. Hyndman, 10 Cush. 554; Bond v. Chapin, 8 Met. 31; Streeper v. Ferris, 64 Texas, 12.

[1] Smith v. Hyndman, 10 Cush. 554.

[2] Id.

[3] Foster v. Dow, 29 Me. 442.

[4] Streeper v. Ferris, 64 Texas, 12.

[5] 1 Ld. Raym. 374.

[6] Hamilton v. Smith, 39 Mich. 222; Wilson v. Bowen, 64 id. 133, 141.

[7] Sheldon v. Carpenter, 4 N. Y. 578.

[8] Parkhurst v. Mastellar, 57 Iowa, 474; Rowlands v. Samuel, 11 Q. B. 39; Shatto v. Crocker, 87 Cal. 629 (injury to the feelings is provable under the general allegation of damages).

[9] McWilliams v. Hoban, 42 Md. 56.

If a man be falsely and maliciously indicted for a crime which is a scandal to him and hurts his fame an action lies although the indictment be insufficient or an *ignoramus* be found;[1] for though no expense may be incurred the mischief of the slander has been effected.[2] The condition or number of the plaintiff's family is not material to the question of damages.[3] Injury resulting from the sickness of the plaintiff's wife by reason of the malicious prosecution is too remote.[4] The damages may consist in the personal labor and trouble imposed on the plaintiff in procuring his acquittal or discharge, and the pain and anxiety of mind naturally occasioned by the pendency of a criminal accusation. The plaintiff may prove in aggravation of damages the length of his imprisonment, expenses, situation and circumstances.[5] Where a female was falsely and maliciously prosecuted for perjury and suffered in health in consequence and was rendered insane, an increased recovery on that account was sustained.[6] The plaintiff may recover not only for an unlawful arrest and imprisonment and the expenses of his defense, but also for the injury to his fame and reputation occasioned by the false accusation.[7] But publicity given to the fact of the prosecution by the entry of the plaintiff's name upon detective police annals cannot be proven unless they were kept pursuant to law or the fact that such entry would be made was known to the defendant.[8] The right to recover the expense incurred in defending the crim-

[1] Saville v. Roberts, 1 Ld. Raym. 374.

[2] Id.

[3] Reisan v. Mott, 42 Minn. 49.

[4] Hampton v. Jones, 58 Iowa, 317.

[5] Folkard's Starkie, § 651; Spear v. Hiles, 67 Wis. 350; Cointement v. Cropper, 41 La. Ann. 303. The ruling in Peterson v. Toner, 80 Mich. 350, indicates that the recovery of liberal compensation will be disapproved.

[6] Plath v. Braunsdorff, 40 Wis. 107. The condition of a child born of a mother who was pregnant when incarcerated in jail is not an element of damages. This was held in view of the testimony in the particular case, and the common knowledge that there are numerous causes for physical, mental or nervous deficiency in children; that healthy women do sometimes give birth to deficient children; that nervous or otherwise unhealthy women often bear healthy children. Spear v. Hiles, 67 Wis. 361.

[7] Sheldon v. Carpenter, 4 N. Y. 579; Faynan v. Knox, 40 N. Y. Super. Ct. 41; Lunsford v. Dietrich, 86 Ala. 250; Clarke v. American Dock & Imp. Co., 35 Fed. Rep. 478; Blunk v. Atchison, etc. R. Co., 38 id. 311.

[8] Garvey v. Wayson, 42 Md. 178. It may be shown that the defendant caused notice of plaintiff's arrest to

inal prosecution is not affected by the fact that payment thereof has not been made.[1] A recovery in the action for malicious prosecution bars a subsequent action of slander for the accusation uttered for the purpose of having the arrest made and on the occasion when it was made.[2] The jury are to determine the amount of damages when the essential facts for the maintenance of the action have been established, and [705] may take into consideration the expense to which the plaintiff has been subjected, his trouble and anxiety, and the ignominy of being arraigned at the bar of justice as an offender against the laws;[3] they are to take into consideration the circumstances of the case, and to award such damages as will not only compensate for the wrong and indignity suffered in consequence of the defendant's wrongful act, but they may also award exemplary or punitive damages as a punishment for such act.[4] The allowance of such damages is unauthorized where the property seized is used for the purpose of violating the criminal law, either on account of the seizure or the resulting injury to the reputation of the person who carried on the illegal business in which it was used. If he conducted other business in connection with that which was illegal exemplary damages can be recovered only for the wrong done him in connection with that which was not illegal.[5] A partner who does not advise, direct or know of the institution of a suit which is prosecuted in the firm name until after its termination is not liable for vindictive damages.[6]

be published. The fact affects the damages and tends to show malice. Cooney v. Chase, 81 Mich. 203.

[1] Walker v. Pittman, 108 Ind. 341.

[2] Sheldon v. Carpenter, 4 N. Y. 579.

[3] Tompson v. Massey, 3 Me. 305; Faynan v. Knox, 40 N. Y. Super. Ct. 41.

[4] Hurlbut v. Hardenbrook, 52 N. W. Rep. 510 (Iowa); McWilliams v. Hoban, 42 Md. 56; Weaver v. Page, 6 Cal. 681; Russell v. Dennison, 45 Cal. 337; Lytton v. Baird, 95 Ind. 349; Western News Co. v. Wilmarth, 33 Kan. 510. *Contra*, Wilson v. Bowen, 64 Mich. 133.

The defendant's wealth may be proved to affect the amount of punitive damages. Peck v. Small, 35 Minn. 465; Sexson v. Hoover, 1 Ind. App. 65.

In Russell v. Bradley, 50 Fed. Rep. 515, a verdict for $12,500 was sustained on the ground that the punitive damages to be allowed were within the discretion of the jury so long as there was no evidence of prejudice, perverseness or corruption.

[5] Kauffman v. Babcock, 67 Texas, 241.

[6] Rosenkrans v. Barker, 115 Ill. 331.

§ **1238. Same subject.** The plaintiff, when he has been prosecuted for a crime maliciously and without probable cause, may recover for the expense he has been put to, as well as for the annoyance he has undergone, and for the injury to his feelings.[1] The amount of recovery for the expense incurred will be limited to such sum as is reasonable.[2] Where the statutes require that the party summoned in garnishee proceedings shall appear and answer under oath, one who has been garnished and has not appeared cannot recover the expense incurred in sending an agent to appear for him, unless the garnishee is a corporation.[3] It has been held in some cases that it is discretionary with the jury to allow the plaintiff the amount or any portion of it paid in defending against the prosecution;[4] generally, however, he is entitled to recover not only the costs and expenses attending the defense of the groundless suit, without reference to taxable costs, including counsel fees,[5] but also consequential damages which naturally and proximately result therefrom. In an early California case a suit was brought on a paid bill of exchange, and property attached and held for four months, when it was released by giving a bond. The jury gave a verdict, in an action for a malicious prosecution of that suit and suing out that attachment, for $15,000, which was sustained. The court say: "In cases of this nature there is no settled rule as to the amount to be recovered. The jury are not confined to the actual pecuniary loss sustained by the plaintiff, but may take into consideration the character and position of the parties, and all the circumstances attending the transaction. In such cases we cannot disturb a verdict unless it clearly appears that injustice has been done."[6] In an English case[7] a judgment creditor who had recovered judgment for £115, of which £100 were afterwards paid, caused the debtor to be taken on execution for the full amount,

[1] Rowlands v. Samuel, 11 Q. B. 39.

[2] Eastin v. Bank of Stockton, 66 Cal. 123.

[3] Cornell v. Payne, 115 Ill. 63.

[4] Gregory v. Chambers, 78 Mo. 294; Bradlaugh v. Edwards, 11 C. B. (N. S.) 377.

[5] Closson v. Staples, 42 Vt. 209; Woods v. Finnell, 13 Bush, 628; Smith v. Smith, 20 Hun, 559, note; Magner v. Renk, 65 Wis. 364.

[6] Weaver v. Page, 6 Cal. 681; Peck v. Small, 35 Minn. 465. See Russell v. Dennison, 45 Cal. 337; Phelps v. Cogswell, 70 id. 201.

[7] Churchill v. Siggers, 3 El. & Bl. 929.

and this being found to have been done maliciously and without probable cause, and special damages being alleged because [706] the plaintiff was prevented from attending to his business, injured in his credit and character, and incurred expense in procuring his liberation by a judge's order, he was held, on demurrer, entitled to judgment.[1] If money has been paid to secure the release of property maliciously seized the damages are measured by the payment.[2]

In an Iowa case a party holding a lease of a mine for a specified time was ejected therefrom by a judgment, afterwards reversed, in an action of forcible entry and detainer maliciously instituted. In an action for this proceeding it was held that the measure of damages was the reasonable value of the use of the premises for the time the plaintiff had been kept out of possession, and for any permanent injury to his leasehold interest sustained by reason of the mine caving or otherwise getting out of repair through the failure of the defendant to use ordinary care during the time he held possession.[3] If the result of a malicious attachment levied without probable cause upon a growing crop was to so demoralize the tenants and laborers of the owner that they, because of distrust of his financial ability to perform his contracts with them, leave him, and the injury resulting to his credit prevents him from obtaining other laborers and supplies, in consequence of which his crops are injured, such injury is an element of damage to the extent of the resulting depreciation.[4] In an action for maliciously and without probable cause procuring a merchant to be adjudged a bankrupt, under which adjudication, before the proceeding was dismissed, he was deprived of his entire stock of goods, and his store shut up for about thirteen months, the jury were instructed that the plaintiff was entitled to recover the actual damage to his goods, for the breaking up of his business, and the destruction of his credit. "The value of his own time," say the court, "is also a fair charge, as he has been obliged to give his attention to the proceedings instituted against him, and has not been able

[1] Lawrence v. Hagerman, 56 Ill. 68; Tiblier v. Alford, 12 Fed. Rep. 262.

[2] Clark v. Pearce, 80 Tex. 146.

[3] Moffatt v. Fisher, 47 Iowa, 473; Newark Coal Co. v. Upson, 40 Ohio St. 17.

[4] Brewer v. Jacobs, 22 Fed. Rep. 217.

to pursue any business." It was also held that his expenses for lawyers' fees in following up and setting aside the proceedings in bankruptcy were a fair item of charge to be allowed.[1] In Krug v. Ward[2] it was held that evidence of the payment of an attorney's fee, and expenses of defending the groundless suit, was admissible, though the former was paid by another for the plaintiff. But in assessing the damages the expenses of prosecuting the action for malicious prosecution are not deemed the natural and proximate consequence of the wrong complained of, and cannot be taken into consideration.[3]

For this wrong the injured party is entitled to ade- [**707**] quate compensation covering all the elements of the particular injury. Therefore the jury, in determining the amount, will consider the nature of the prosecution, and its natural effect on reputation, credit and private feelings; the incidental consequences of arrest, holding to bail, or of interference with property; the consequential loss of time, and any other loss, as the expense of defending. Malice is of the gist of the action, and the damages for other than pecuniary items may be greatly increased or diminished by the evidence on that subject. Where there is actual and express malice exemplary damages may be recovered,[4] if actual damage has been sustained.[5] In fixing the amount of vindictive damages the jury should exercise a fair and reasonable discretion, keeping in

[1] Sonneborn v. Stewart, 2 Woods, 599, reversed as to allowance of attorney's fees and on other points, 98 U. S. 187; Fullenwider v. McWilliams, 7 Bush, 389.

[2] 77 Ill. 603.

[3] Stewart v. Sonneborn, 98 U. S. 197; Good v. Mylin, 8 Pa. St. 51; Alexander v. Herr, 11 id. 537; Stopp v. Smith, 71 id. 285; Hicks v. Foster, 13 Barb. 663.

[4] McWilliams v. Hoban, 42 Md. 56; Sonneborn v. Stewart, 2 Woods, 599; Wanzer v. Bright, 52 Ill. 35; Parkhurst v. Mastellar, 57 Iowa, 474; Lunsford v. Dietrich, 86 Ala. 250; Lytton v. Baird, 95 Ind. 349; Peden v. Mail, 118 id. 560; McGarry v. Missouri P. Ry. Co., 36 Mo. App. 340; Orr v. Seiler, 1 Penny. (Pa.) 445; Jacobs v. Crum, 62 Texas, 401 (malice of an agent, under the facts, warranted the imposition of exemplary damages against his principal); Farrar v. Talley, 68 id. 349; Vinal v. Core, 18 W. Va. 1, 48; Spear v. Hiles, 67 Wis. 350; Tiblier v. Alford, 12 Fed. Rep. 262; Jarman v. Stewart, id. 266 (construing the Tennessee statute, and holding that punitive damages may be recovered whether the action be upon an attachment bond or upon the case); Sexson v. Hoover, 1 Ind. App. 65.

[5] Schippel v. Norton, 38 Kan. 567.

view the nature of the wrong done, and the aggravating circumstances,[1] and the wealth of the defendant.[2] If successive suits were brought by the defendant upon the same groundless claim that fact is admissible to show malice.[3] Where the malicious prosecution was based upon some of the counts in an information the plaintiff was held not to be barred of the right to recover actual damages because he did not distinguish between those which were caused by the malicious counts and those which resulted from the others. In other words, the defendant cannot escape liability because he united groundless accusations with those for which there was probable cause.[4]

§ 1239. Evidence in mitigation. The plaintiff is required to show that the defendant was actuated by malice, and that the prosecution was without probable cause.[5] The absence of such cause does not raise a legal presumption of malice, but the jury may infer malice as matter of fact from the want of it.[6] The want of probable cause, however, cannot be inferred from malice.[7] The important inquiry, therefore, in such cases is whether there was probable cause, which is such a state of facts in the mind of the prosecutor as would lead a man of ordinary caution and prudence to believe, or to entertain an honest and strong suspicion, that the facts essential to the prosecution exist.[8] Probable cause does not depend on the

[1] Frankfurter v. Bryan, 12 Ill. App. 549, 556; Phelps v. Cogswell, 70 Cal. 201.

[2] Spear v. Hiles, 67 Wis. 350; Peck v. Small, 35 Minn. 465.

[3] Magmer v. Renk, 65 Wis. 364; Cooney v. Chase, 81 Mich. 203.

[4] Boogher v. Bryant, 86 Mo. 42.

[5] Paddock v. Watts, 116 Ind. 146; Girot v. Graham, 41 La. Ann. 511; Hicks v. Faulkner, 8 Q. B. Div. 167; Winfield v. Kean, 1 Ontario, 193.

[6] Harpham v. Whitney, 77 Ill. 32; Frankfurter v. Bryan, 12 Ill. App. 549; Paddock v. Watts, 116 Ind. 146; Decoux v. Lieux, 33 La. Ann. 392; Jacobs v. Crum, 62 Texas, 401; Vinal v. Core, 18 W. Va. 1; Tiblier v. Alford, 12 Fed. Rep. 262; Winfield v. Kean, 1 Ontario, 193; Roy v. Goings, 112 Ill. 656; Levy v. Brannan, 39 Cal. 485; Harkruder v Moore, 44 id. 144; Mowry v. Whipple, 8 R. I. 360; Straus v. Young, 36 Md. 246; Lawyer v. Loomis, 3 Thomp. & C. 393; Carson v. Edgworth, 43 Mich. 241; Heath v. Heape, 1 H. & N. 478; Wanzer v. Wyckoff, 9 Hun, 178; Wheeler v. Nesbitt, 24 How. (U. S.) 544; Humphries v. Parker, 52 Me. 505; Sutton v. Johnson, 1 T. R. 493; Pullen v. Glidden, 68 Me. 562.

[7] Id.; Brown v. Smith, 83 Ill. 291.

[8] Bacon v. Towne, 4 Cush. 238; Carl v. Ayers, 53 N. Y. 17; Foshay v. Ferguson, 2 Denio, 617; Harpham v. Whitney, 77 Ill. 42; Scanlan v. Cowley, 2 Hilt. 489; Heyne v. Blair, 62

actual state of the case in point of fact, but upon [708] the honest and reasonable belief of the party commencing the prosecution.[1] In some cases the test as to what constitutes probable cause is less favorable to the defendant than that given, the words "honest and strong suspicion" being omitted. Thus, in Minnesota the term is defined, as to civil actions, to be such reasons, supported by facts and circumstances, as will warrant a cautious man in the belief that his action and the means taken in prosecuting it are legally just and proper.[2] This definition has been applied in other cases, and without reference to whether the prosecution complained of was civil or criminal.[3] It is not substantially different from that given by the supreme court of the United States: "Probable cause is the existence of such facts and circumstances as would excite the belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor, that the person charged was guilty of the crime for which he was prosecuted."[4] As defined by Hawkins, J., reasonable and probable cause is an honest belief in the guilt of the accused, based upon a full conviction, founded upon reasonable grounds, of the existence of a state of circumstances which, assuming them to be true, would reasonably lead any ordinarily prudent and cautious man, placed in the position of the accuser, to the conclusion that the person charged was probably guilty of the crime imputed. There must be, first, an honest belief of the accuser in the guilt of the accused; second, such belief must be based on an honest conviction of the circumstances which led the accuser to that conclusion; third, such second-mentioned belief must be based upon reasonable grounds; by this is meant such

N. Y. 22; Lacey v. Mitchell, 23 Ind. 67; Rice v. Ponder, 7 Ired. 390; Fitzgibbon v. Brown, 43 Me. 169; Ash v. Marlow, 20 Ohio, 119; Barron v. Mason, 31 Vt. 197; Decoux v. Lieux, 33 La. Ann. 392; Hyde v. Greuch, 62 Md. 577; Wilson v. Bowen, 64 Mich. 133; Blunk v. Atchison, etc. R. Co., 38 Fed. Rep. 311.

[1] James v. Phelps, 11 A. & E. 483; Heslop v. Chapman, 23 L. J. (Q. B.) 49; Hall v. Suydam, 6 Barb. 83. Compare Bell v. Pearcy, 5 Ired. L. 83; Delegal v. Highley, 3 Bing. N. C. 950; Haddrick v. Heslop, 12 Q. B. 267. See Vinal v. Core, 18 W. Va. 1.

[2] Burton v. St. Paul, etc. Ry. Co., 33 Minn. 189.

[3] Van Sickle v. Brown, 68 Mo. 635; Sharpe v. Johnston, 76 id. 660; McGarry v. Missouri P. Ry. Co., 36 Mo. App. 340. See Vinal v. Core, 18 W. Va. 1, 27.

[4] Wheeler v. Nesbitt, 24 How. 544; Spear v. Hiles, 67 Wis. 350.

grounds as would lead any fairly cautious man in the defendant's situation so to believe; fourth, the circumstances so believed and relied on by the accuser must be such as to amount to reasonable ground for belief in the guilt of the accused.[1] If the prosecutor is so injured by the offense committed that he is not capable of drawing his conclusions with the same impartiality that a disinterested person would have done, the jury, in passing upon the question of probable cause, may consider that fact.[2] Only such facts as were known to the defendant when he instituted the suit are to be considered in determining the question of probable cause.[3] Where the proceeding instituted is of a criminal character the finding of an indictment or the commitment of the accused by an examining magistrate is *prima facie* evidence of such cause.[4] And the refusal to do either is very persuasive evidence that probable cause did not exist.[5] The want of such cause is in some degree a negative, and the plaintiff can only be called upon to give slight evidence of it.[6]

§ **1240. Same subject.** If it appears that there was probable cause, that is a complete defense. But if the evidence tending to show it fails in that object, to the extent that it affords ground for belief that the party prosecuted was guilty, it tends to rebut malice, and may mitigate exemplary damages, or those which might be awarded solely because of malice.[7] Facts within defendant's knowledge, and facts communicated to him by others, and even rumors or reports in the neighborhood, have been allowed to be proved.[8] While

[1] Hicks v. Faulkner, 8 Q. B. Div. 167, 171.

[2] Spear v. Hiles, 67 Wis. 361.

[3] Jacobs v. Crum, 62 Texas, 401.

[4] Sharpe v. Johnston, 76 Mo. 660, 670.

[5] Id.; Bostick v. Rutherford, 4 Hawks (N. C.), 83; Vinal v. Core, 18 W. Va. 1, 42. *Contra*, Israel v. Brooks, 23 Ill. 575.

[6] Taylor v. Williams, 2 B. & Ad. 845; Cotton v. James, 1 id. 128; Vinal v. Core, 18 W. Va. 1, 41.

[7] Bacon v. Towne, 4 Cush. 217; Bell v. Pearcy, 5 Ired. 83.

[8] Pullen v. Glidden, 68 Me. 562; Carl v. Ayers, 53 N. Y. 14; Bacon v. Towne, *supra;* Carpenter v. Sheldon, 5 Sandf. 77; Hitchcock v. North, 5 Rob. (La.) 328; Lamb v. Gulland, 44 Cal. 609; Thomas v. Russell, 9 Exch. 764; Lister v. Perryman, L. R. 5 Exch. 365; Heyne v. Blair, 62 N. Y. 19; Miller v. Milligan, 48 Barb. 30; Foshay v. Ferguson, 2 Denio, 617; Gallaway v. Burr, 32 Mich. 332; Wyatt v. White, 6 H. & N. 371; Vinal v. Core, 18 W. Va. 1; Hicks v. Faulkner, 8 Q. B. Div. 167.

proof that the defendant acted upon the advice of counsel learned in the law, given after a full and fair statement of all the known facts, will be a full defense, because when so advised that the cause is sufficient for his exoneration it will be deemed probable cause,[1] yet advice from any other person will not have the same effect;[2] but the fact that advice is given by a magistrate or by police officers may be admitted to show the circumstances under which the prosecution was instituted and to mitigate damages.[3] According to the better authorities the defendant may prove the general bad reputation of the plaintiff, both to rebut the proof of want of probable cause and in mitigation of damages. The same facts which would raise a strong suspicion in the mind of a cautious and reasonable man against a person of notoriously bad character for honesty and integrity would make a slighter impression if

[1] Ravenga v. Mackintosh, 2 B. & C. 693; Stanton v. Hart, 27 Mich. 539; Wicker v. Hotchkiss, 62 Ill. 107; Laird v. Taylor, 66 Barb. 143; Pullen v. Glidden, 68 Me. 566; Paddock v. Watts, 116 Ind. 146; Schippel v. Norton, 38 Kan. 567. See Vinal v. Core, 18 W. Va. 1.

If an attorney's compensation depends upon the number of prosecutions instituted, his advice is not a defense. McGarry v. Missouri P. Ry. Co., 36 Mo. App. 340. Neither is it so when client and attorney are in complicity in instituting a groundless prosecution. Watt v. Corey, 76 Me. 87; Hamilton v. Smith, 39 Mich. 222. Advice given upon a misrepresentation of the circumstances is not available as a defense (Decoux v. Lieux, 33 La. Ann. 392), or upon a partial statement of the facts known to the defendant. Roy v. Goings, 112 Ill. 656; Cointement v. Cropper, 41 La. Ann. 392; Watt v. Corey, 76 Me. 87; Peterson v. Toner, 80 Mich. 350. Not only must all known facts be fully disclosed, but also all such facts and information as in the exercise of reasonable care and prudence, with due regard to the rights of the party to be proceeded against, the defendant ought to have obtained. Watt v. Corey, 76 Me. 87; Hyde v. Greuch, 62 Md. 577. The advice of counsel is more important on the question of malice than on that of probable cause, and is not conclusive as to the former. Brewer v. Jacobs, 22 Fed. Rep. 217. If the jury find that the defendant acted maliciously and without probable cause, the fact that he was advised to institute a suit will not exempt him from liability. Jacobs v. Crum, 62 Tex. 401; Gulf, etc. Ry. Co. v. James, 73 id. 12; Glascock v. Bridges, 15 La. Ann. 672; Roy v. Goings, 112 Ill. 656. In determining the effect to be given to the advice of counsel the jury may consider whether the defendant paid for it or not. Cooney v. Chase, 81 Mich. 203.

[2] Stanton v. Hart, 27 Mich. 539; Burgett v. Burgett, 43 Ind. 78; Murphy v. Larson, 77 Ill. 172; Beal v. Robeson, 8 Ired. 276.

[3] Hirsch v. Feeney, 83 Ill. 550; White v. Tucker, 16 Ohio St. 468.

[709] they tended to throw a charge of guilt upon a man of good reputation.[1] The fact that the plaintiff might, in the criminal proceeding against him, have shortened his imprisonment by availing himself of his right to a preliminary exam-

[1] Rosenkrans v. Barker, 115 Ill. 333, quoting the first sentence of the text; Gregory v. Chambers, 78 Mo. 294; Martin v. Hardesty, 27 Ala. 458; Bacon v. Towne, 4 Cush. 217, 240; Rodriguez v. Tadmire, 2 Esp. 721; Fitzgibbon v. Brown, 43 Me. 169; Israel v. Brooks, 23 Ill. 575. See Blizzard v. Hays, 46 Ind. 166; Oliver v. Pate, 43 id. 132; Scott v. Fletcher, 1 Overt. 488; Bostick v. Rutherford, 4 Hawks, 83.

Testimony as to the bad reputation of the plaintiff in respect to the matter charged in the original proceeding is admissible if pleaded, otherwise not. Scheer v. Keown, 34 Wis. 349. And so as to evidence of a general rumor to the effect that plaintiff was guilty of the offense for which he was prosecuted. Spear v. Hiles, 67 Wis. 350. If the plaintiff is a minor and has been maliciously informed against for threatening a breach of the peace, the general bad reputation of his mother as a peaceable and orderly person is not provable to show good faith. Hyde v. Greuch, 62 Md. 577.

In Pullen v. Glidden, 68 Me. 563, Barrows, J., said: "The discrepancy in the decisions has arisen from a neglect to make the proper discrimination between the issue presented by the plea of not guilty in an action for malicious prosecution and that which arises on the same plea in actions of libel and slander. The similarity in the injuries complained of in these classes of suits has led to a confusion in the decisions touching the pleadings and the evidence applicable to them. With something of a general likeness there are important differences in the contentions liable to arise upon a plea of the general issue in suits for malicious prosecution and those for slander, verbal or written, and sufficient care has not been taken in reporting the cases to designate the purpose for which the evidence was offered and the state of the pleadings. For instance, in slander, the speaking of actionable words raises the implication of malice in law, which is all that is necessary for the maintenance of the suit, though malice in fact may be proved to enhance the damage. True v. Plumley, 36 Me. 466; Jellison v. Goodwin, 43 Me. 287. Hence common reputation and other evidence not amounting to a justification, though tending to negative malice in fact, was not admitted for that purpose in Taylor v. Robinson, 29 Me. 323, though why it should not be competent upon the question of damages is perhaps not altogether clear. See East v. Chapman, 2 Car. & P. 570. But, as we have already seen, in actions for malicious prosecution where the question for the jury is whether the defendant, upon all the information he had, whether it was true or false, acted as a cautious, reasonable man not influenced by malice would act, the general reputation of the plaintiff is a proper subject of inquiry upon the question of probable cause. And since malice in fact may be inferred from the want of probable cause, it follows that it is pertinent also upon the question of malice. Here, however, the precise question is whether evidence of common repute in the neighborhood that the plaintiff was

ination, need not be considered as a ground for reducing [710] damages unless there is affirmative proof that his motive in waiving such examination and exposing himself to continued imprisonment was to enhance damages.[1]

guilty of the particular offense for which he was prosecuted was rightly received. Judge Redfield, in Barron v. Mason, 31 Vt. 201, says, emphatically, that such evidence ought to be regarded as one proof, though no sufficient one in itself, of probable cause. We think he was right. Not only the facts which the defendant knew, but the information he had received, in fine, the circumstances under which he acted, even his own consultations with counsel learned in the law, if he took advice of such, are competent evidence upon these questions of probable cause and malice in fact. A man who claims an investigation, according to law, of the charge he makes against another stands upon a different footing from him who indulges his tongue in slanderous babble which can result in nothing but mischief. This last must make his charges good by establishing their truth. But the first, whose doings may, in some contingencies, be serviceable to the community, is not responsible for his mistakes if he acts with reasonable caution and an honest purpose. While the prevalence of reports that a man had committed an offense would be no sufficient cause in itself for proceeding against him, it cannot be said that their existence would not lend a force even in the mind of a cautious and candid person to any criminatory facts or information which they would not have as against one whom the neighboring public did not believe to be guilty. It is one of the great possible variety of facts and circumstances that may have a bearing upon the question whether the defendant was acting 'prudently, wisely and in good faith.'"

[1] King v. Colvin, 11 R. I. 582.

CHAPTER XXXVI.

PERSONAL INJURY.*

§ 1241. Elements of damage.
1242–1245. Physical and mental pain.
1246. Loss of time, injury to business, diminished capacity.
1247. Same subject; pleading.
1248. Same subject; evidence.
1249. Same subject; measure of recovery.
1250. Expenses for surgical and medical aid, etc.
1251. But one action maintainable; prospective damages.
1252. Husband's or parent's action.
1253. Exemplary damages.
1254. Pecuniary circumstances of parties.
1255. Evidence in mitigation.
1256. Province of the jury, and instructions thereto.
1257, 1258. False imprisonment.

[711] § **1241. Elements of damage.** The law aims to afford full redress for personal injuries as well as for all others. The sufferer is entitled to compensation from the person by whose fault the injury occurred for the pain resulting from the corporal hurt so long as it produces pain; for mental suffering naturally resulting from the injury or wrong, whether such suffering be apprehension and anxiety from the depressing effect of the wrong or induced by its alarming character; for wounded sensibility or affection, and for sense of wrong and insult by reason of the malice of the wrong-doer and the incidents of the infliction; for impaired health and working capacity, mutilation or disfigurement; for the expenses of nursing and care, and for all other detrimental effects which naturally and proximately ensue. "It is to be assumed that every physical endowment, function and capacity is of importance in the life of every man and woman, and that occasion will arise for the exercise of each and all of them. And to the extent to which any function is destroyed, or its discharge rendered painful or perilous by the wrongful infliction of personal injury, is the party complaining entitled to damages.

* This subject received some attention under the head of Carriers of Passengers, *ante*, §§ 938–953. See also vol. 1, §§ 150, 151.

We can, in other words, conceive of no physical injury, wrongfully inflicted, whether entailing pain only, or disfigurement, or incapacity, relative or absolute, to perform any of the functions of life which may not be made the predicate for compensation in damages."[1]

§ 1242. Physical and mental pain. An injury to the person necessarily causes pain; it is a direct effect; and whether the pain is only momentary or continues for a long period, it is an immediate consequence. In the absence of any supervening fault of the injured party having the effect to retard or prevent a cure, he is entitled to compensation from the person who wrongfully inflicted the injury for all the pain suffered from the moment of the injury to the time of its complete cure. Money is an inadequate recompense for pain; but as the law can afford no other redress it aids the sufferer to obtain this in such measure as a jury, dispassionately considering all the circumstances, will allow.[2] Whether the [712]

[1] Alabama, etc. R. Co. v. Hill, 93 Ala. 514, 519, per McClellan, J., in a case in which the injury to an unmarried woman rendered child-bearing perilous to life. See The Oriflamme, 3 Sawyer, 397, 404, in which Deady, J., allowed $500 as compensation for the permanent disfigurement of the female plaintiff's face.

[2] Barlow v. Lowder, 35 Ark. 492; Smith v. Bagwell, 19 Fla. 117; Chicago & E. R. Co. v. Holland, 122 Ill. 461; Wall v. Livezay, 6 Colo. 465; Winkler v. St. Louis, etc. R. Co., 21 Mo. App. 99; Indiana Car Co. v. Parker, 100 Ind. 181; Central Passenger Ry. Co. v. Kuhn, 86 Ky. 578; Phillips v. London, etc. Ry. Co., 42 L. T. Rep. 6; Wallace v. Western, etc. R. Co., 104 N. C. 442; Houston, etc. Ry. Co. v. Boehm, 57 Texas, 152; Verrill v. Minot, 31 Me. 299; Pennsylvania R. Co. v. Allen, 53 Pa. St. 276; Slater v. Sherman, 5 Bush, 206; Elliott v. Van Buren, 33 Mich. 49; Ransom v. New York, etc. R. Co., 15 N. Y. 415; Curtiss v. Rochester, etc. R. Co., 20 Barb. 282; Chicago v. Langlass, 66 Ill. 361; Scott v. Hamilton, 71 id. 85; McLaughlin v. Corry, 77 Pa. St. 109; Lucas v. Flinn, 35 Iowa, 9; Oliver v. North Pacific T. Co., 3 Ore. 84; Tefft v. Wilcox, 6 Kan. 46; Welch v. Ware, 32 Mich. 77; Beardsley v. Swann, 4 McLean, 333; Pierce v. Millay, 44 Ill. 189; Swarthout v. New Jersey S. B. Co., 46 Barb. 222; Johnson v. Wells, etc. Co., 6 Nev. 225; Montgomery & E. Ry. Co. v. Mallette, 92 Ala. 209.

It is not often that a case is found in which the pain and suffering of the plaintiff constitute the sole ground of damage. There are a few cases which approximate to this. In Merrill v. St. Louis, 12 Mo. App. 466, the injury consisted of a sprained ankle. A physician prescribed for it once, and the plaintiff treated it herself for six weeks, after which time she was treated gratuitously at a hospital. No expenditures were proven. The plaintiff was confined to her room for several weeks, and for four months was unable to attend to her boarding-house. There

injury is the result of negligence or direct personal violence, the resulting pain is an element of damage to be compensated. In other words, it is an element of compensatory damages.[1]

was no evidence that any pecuniary loss was sustained; "though," said Judge Thompson, "we suppose from all the circumstances a jury might fairly infer that she sustained some loss." The court looked upon an award of $2,000 with distrust, but affirmed the judgment, saying: "We have no scales with which to estimate the value of this suffering, and consequently we cannot say that the jury, in awarding the sum named, have awarded an excessive sum, much less that they have acted from passion or prejudice." See Dimmitt v. Hannibal, etc. R. Co., 40 Mo. App. 654.

In Jennings v. Van Schaick, 13 Daly, 7, a case not very materially different from the above, a verdict for $10,000 was set aside as excessive.

In Harold v. New York, etc. R. Co., 13 Daly, 378, external lacerations and internal injuries were received by a woman aged thirty-five whose earnings were $30 a month. She was confined to her bed several months, obliged to have medical services for months thereafter, and there was a strong probability that she would suffer permanently. On the first trial the verdict was for $4,500; on the second, for $8,000. This was sustained.

The injury to a married woman of forty-three was to the sciatic nerve, which produced inflammation of a uterian ligament, accompanied by obstinate constipation, nervous prostration and sexual difficulty, all resulting in suffering when she walked. A verdict for $10,000 was reduced by the court to $4,000. Lockwood v. Twenty-third St. Ry. Co., 15 Daly, 374.

A verdict for $10,000 for a broken leg, dislocated arm, injured back and shoulder, resulting in disability to work for a year, and which caused great suffering, was sustained in favor of a woman. Brown v. Sullivan, 71 Texas, 470. But a federal court in Louisiana, in determining the extent of the plaintiff's lien against the receiver of the railroad company which caused the injury, allowed only $5,000. Missouri P. Ry. Co. v. Texas P. Ry. Co., 41 Fed. Rep. 311.

Where a passenger's injury consisted of the fracture of the small bone of the leg at the ankle, in consequence of which he was laid up for about eight weeks, and there was no evidence that he would have future serious trouble as a consequence, a verdict of $4,000 was held excessive under pleadings which claimed compensation only for the pain and suffering. South Covington, etc. Ry. Co. v. Ware, 84 Ky. 267.

In The William Branfoot, 48 Fed. Rep. 914, a court of admiralty allowed

[1] Id. If a serious physical injury has been sustained there need be no verbal proof of the resulting pain in order that it may be an element of damages. Chicago, etc. R. Co. v. Warner, 108 Ill. 538; Brown v. Hannibal, etc. Ry. Co., 99 Mo. 310. In the case of a broken limb the fact may be shown that it was necessary, either because of the nature of the hurt or the condition of the patient, to reset it at different times, if it was proper to do so under the circumstances, and the original treatment was skilful. Goshen v. England, 119 Ind. 368.

§ 1243. Same subject. The jury is allowed to consider the case with all its facts, and to take into account for the purpose of compensation not only the physical pain, but also such mental suffering as they are satisfied must have been experienced as the natural result of the wrong done or injury inflicted.[1] When bodily pain is caused mental suffering fol-

$500 to a seaman one of whose legs was amputated below the knee as the result of a fracture as compensation for his suffering.

Where a man aged sixty-two had three ribs broken, his side bruised, and was for a time rendered insensible, but had so far recovered at the time of the trial as not to be a great sufferer, though his testimony showed impairment of his appetite and general health, a verdict for $3,750 was sustained. Missouri P. Ry. Co. v. Aiken, 71 Texas, 373.

Where there was a fracture of that portion of the pelvis called the crest of the *ilium*, and the plaintiff, a woman, suffered considerable pain and was confined to bed for ten months, and had not fully recovered at the time of the trial, more than three years after the accident, a verdict for $4,000 was sustained. Heucke v. Milwaukee City Ry. Co., 69 Wis. 401.

Where the injury resulted in the loss of three fingers of the left hand of a man employed at $1.50 per day, and his hand did not get well until eight months thereafter; and it was necessary to probe the hand and remove bone, some of which came out at the wrist, which was stiff at the time of the trial, a verdict for $6,000 was sustained. Murtaugh v. New York, etc. R. Co., 49 Hun, 456.

[1] Wolf v. Trinkle, 103 Ind. 355; Root v. Sturdivant, 70 Iowa, 55; Kendall v. Albia, 73 id. 241; Salina v. Trosper, 27 Kan. 544, 564; Central Passenger Ry. Co. v. Kuhn, 86 Ky. 578; Sloan v. Edwards, 61 Md. 89; Geveke v. Grand Rapids & I. R. Co., 57 Mich. 589; Winkler v. St. Louis, etc. Ry. Co., 21 Mo. App. 98; Randolph v. Hannibal, etc. Ry. Co., 18 id. 609; Wallace v. Western, etc. R. Co., 104 N. C. 442; Scott v. Montgomery, 95 Pa. St. 444; Robinson v. Marino, 3 Wash. St. 434; Seger v. Barkhamsted, 22 Conn. 290; Masters v. Warren, 27 id. 293; Lawrence v. Housatonic R. Co., 29 id. 390; Fenelon v. Butts, 53 Wis. 344; Craker v. Chicago, etc. R. Co., 36 id. 657; Mason v. Ellsworth, 32 Me. 271; Prentiss v. Shaw, 56 id. 427; Wadsworth v. Treat, 43 id. 163; Goddard v. Grand T. Ry. Co., 57 id. 202; Wyman v. Leavitt, 71 id. 229; Giblin v. McIntyre, 2 Utah, 384; McIntyre v. Giblin, book 25, p. 572, Lawyer's Co-op. ed. U. S. Sup. Court; Hanson v. Fowle, 1 Sawyer, 539, 546; Fairchild v. California Stage Co., 13 Cal. 599; Smith v. Holcomb, 99 Mass. 552; Canning v. Williamstown, 1 Cush. 451; Wright v. Compton, 53 Ind. 337; West v. Forrest, 22 Mo. 344; Ferguson v. Davis Co., 57 Iowa, 601; Muldowney v. Illinois, etc. R. Co., 36 Iowa, 462; McKinley v. Chicago, etc. R. Co., 44 id. 314; Blake v. Midland Ry. Co., 18 Q. B. 110; South & North A. R. Co. v. McLendon, 63 Ala. 266; Taber v. Hutson, 5 Ind. 322; Nossaman v. Rickert, 18 id. 350; Ford v. Jones, 62 Barb. 484; Smith v. Pittsburgh, etc. R. Co., 23 Ohio St. 10; Indianapolis, etc. R. Co. v. Stables, 62 Ill. 313; McMahon v. Northern C. R. Co., 39 Md. 438; Elkhart v. Ritter, 66 Ind. 136;

lows as a consequence, especially when the former is so severe as to create apprehension and anxiety.[1] The manner of committing the injury, or its very nature, may be such that com-
[713] pensation should be given largely, and perhaps principally, for injury to the feelings. This is the case where the personal wrong is a shock to the moral sensibilities, or tends to vex, disgrace or humiliate the injured party.[2] The injury may be

Indianapolis v. Gaston, 58 id. 224; Porter v. Hannibal, etc. R. Co., 71 Mo. 66; 36 Am. R. 454; McMillan v. Union P. B. W., 6 Mo. App. 434; Morris v. Chicago, etc. R. Co., 45 Iowa, 29; Quigley v. Central P. R. Co., 11 Nev. 350; Hamilton v. Third Avenue R. Co., 53 N. Y. 28. See Joch v. Dankwardt, 85 Ill. 331; Johnson v. Wells, etc. Co., 6 Nev. 225.

[1] Wyman v. Leavitt, 71 Me. 229; Webb v. Gilman, 80 id. 177; Brown v. Hannibal, etc. Ry. Co., 99 Mo. 310; Brown v. Sullivan, 71 Texas, 470; Kennon v. Gilmer, 131 U. S. 22; The Lord Derby, 17 Fed. Rep. 265.

So fixed is the union of mental suffering and physical pain "in the mind that an instruction which should direct a jury in estimating the damages to disassociate mental from physicial pain and agony would be the very acme of carrying the most abstruse metaphysics of the school-man into the practical deliberations of the jury room." Fell v. Rich Hill Coal M. Co., 23 Mo. App. 216.

It has been said that if no claim is made for mental suffering it will be better for the court not to instruct upon it; but if it is alleged that the injury deformed the plaintiff, such suffering necessarily results. Central R. & B. Co. v. Lanier, 83 Ga. 587. But the general rule is that damages for mental anguish need not be specially claimed where there is a physical injury. Groman v. Kukkuck, 59 Iowa, 18; Morgan v. Kendall, 124 Ind. 454; Brown v. Sullivan, 71 Texas, 470.

[2] Wolf v. Trinkle, 103 Ind. 355; Morgan v. Curley, 142 Mass. 107; Smith v. Holcomb, 99 id. 552; Craker v. Chicago, etc. Ry. Co., 36 Wis. 657; Fay v. Swan, 44 Mich. 544; Ford v. Jones, 62 Barb. 484; Wadsworth v. Treat, 43 Me. 163; Welch v. Ware, 32 Mich. 84; Elliott v. Van Buren, 33 id. 49; Kepler v. Hyer, 48 Ind. 499.

In Bovee v. Danville, 53 Vt. 190, the question was whether among other damages for a personal injury resulting from a defect in a highway, the plaintiff, a mother, was entitled to recover for injury to her feelings occasioned by the loss of a child by miscarriage. Ross, J., said: "Any injured feelings following the miscarriage, not part of the pain naturally attending it, are too remote to be considered an element of damage. If the plaintiff lamented the loss of her offspring, such grief involves too much an element of sentiment to be left to the conjecture and caprice of a jury. If, like Rachel, she wept for her children and would not be comforted, a question of continuing damage is presented too delicate to be weighed by any scales which the law has yet invented." Is this sense of loss more delicate than that of injury by disfigurement or maiming? In Smith v. Overby, 30 Ga. 241, action was brought against a physician for want of skill and care in a parturition case by which injury was inflicted on the mother and the life of

greatly enhanced by the motive of the wrong-doer; and the sense of justice of jurors will always incline them to fix a higher rate of compensation whenever the wrong was wantonly or maliciously committed. Damages for pain not being measurable by a money standard are in some degree retributive; every circumstance which increases the turpitude of the wrong-doer's conduct adds to the injury, and correspondingly to the injured party's right to compensation.[1] Personal injury may cause disfigurement, mutilation or permanently impaired health. When it does there is an element of mental pain for which there is no cure. When a healthy person is thus made permanently an invalid; deprived largely of his capacity to enjoy life; suddenly transformed from a mental state of cheerfulness and hope to another of melancholy by day, and unrest and bad dreams by night, is he not entitled to some compensation for this physical and psychical alteration in himself?[2] But in such cases the loss or decrease [**714**] of capacity to pursue one's calling and earn money is universally accepted as a proper subject of compensation. This feature of the injury will be presently considered.

the child unnecessarily destroyed. A new trial was granted because the jury were deemed to have been misled by the charge so as to overlook this latter element of the injury. Compare Augusta & S. R. Co. v. Randall, 85 Ga. 297, 322. Courts of admiralty do not award liberal damages for injuries inflicted upon seamen by the officers of vessels; compensation for the physical injury is the limit; the personal indignity is not considered important. The General Rucker, 35 Fed. Rep. 152.

[1] Id.; Root v. Sturdivant, 70 Iowa, 55; Armstrong v. Jackson, 37 La. Ann. 219; Webb v. Gilman, 80 Me. 177; Sloan v. Edwards, 61 Md. 89; Borland v. Barrett, 76 Va. 128; Sampson v. Henry, 11 Pick. 379; Ransom v. New York, etc. R. Co., 15 N. Y. 415.

[2] Walker v. Erie Ry. Co., 63 Barb. 260; The Oriflamme, 3 Sawyer, 397, 404; Stewart v. Ripon, 38 Wis. 584; Western & A. R. Co. v. Young, 81 Ga. 397; Scott v. Montgomery, 95 Pa. St. 444.

In a recent case the jury were instructed to give adequate compensation for all of the physical and mental pain and suffering which the plaintiff endured at the time of the accident, and which he is reasonably certain to suffer in the future by reason of his injuries; "also for the mortification and anguish of mind which he has suffered, and will in the future suffer, by reason of the mutilation of his body and the fact that he may become an object of curiosity or ridicule among his fellows." In considering an exception to the quoted words the reviewing court said: "It is urged that these words convey to the jury an idea different from that conveyed by the words 'mental pain and suffering' which

§ 1244. **Same subject.** In an action for personal violence or negligent injury it is no defense that the blows or acts of the defendant aggravated a disease which the plaintiff knew he was subject to, and that the defendant had no information

resulted from the injury. We think the learned judge only used the expressions excepted to as indicative of the causes from which the mental pain and suffering would be likely to arise from the injury received. There can be no doubt that the loss of the plaintiff's limbs would naturally cause mortification and anguish on the part of the plaintiff, and it is also quite certain that he would be to a considerable extent an object of curiosity, and to the thoughtless and unfeeling an object of ridicule. We think there was no error in the instructions excepted to." Heddles v. Chicago & N. R. Co., 77 Wis. 228, referring to Wilson v. Young, 31 id. 574; Craker v. Chicago, etc. R. Co., 36 id. 657, 677; Power v. Harlow, 57 Mich. 107; The Oriflamme, 3 Sawy. 397; Atlantic, etc. R. Co. v. Wood, 48 Ga. 565; Toledo, etc. R. Co. v. Baddeley, 54 Ill. 19; Ballou v. Farnum, 11 Allen, 73; Western & A. R. Co. v. Young, 81 Ga. 397; McMahon v. N. C. R. Co., 39 Md. 438.

"We do not mean to say that, tried by an absolute standard, there is any such thing as compensation in money for the loss of an arm, or for the pain and suffering occasioned by being dismembered under the crushing wheel of a car. Only a qualified or relative compensation is possible, and the law which is always practical, never visionary, contemplates the latter, not the former. It recognizes the restrictions imposed by many considerations, such as the limited wealth of the country, and the necessity of sparing the existence of industrial contrivances and agencies for carrying on great departments of business." Bleckley, C. J., in Western & A. R. Co. v. Young, 83 Ga. 512.

"There must be more or less of permanent annoyance from the mutilation of a limb, irrespective of the diminished usefulness, and the jury had a right to take this into account." Power v. Harlow, 57 Mich. 107, 119.

Where a man of twenty-eight years lost his left arm and was made deaf in one ear, and it appeared that his earning power was decreased $300 per year, a verdict for $8,000 was sustained. "If," said the court, "pecuniary loss were the measure of damages, they are excessive; but how can the compensation for pain and for the inconvenience and mortification of going maimed through life be measured? In truth money is no equivalent for such injuries, but it is the only reparation the law can give, and the amount must be left to the jury to fix, subject to correction in case of abuse.' Anglo-American P. & P. Co. v. Baier, 31 Ill. App. 653.

A verdict for $15,000 was sustained where a child of six years lost a leg and sustained other injuries. Admitting that the damages are large, the court observed: "Are they more than compensation? If the appellee is entitled to anything he is entitled to full compensation. Is that limited to making good the probable pecuniary loss to him from having but one leg to go upon, . . . or shall other deprivations which cannot be recited without the use of language which excludes arithmetic be taken into account? His life is wrecked, whether for business or pleasure. Hope is denied him." Chi-

in relation to it.[1] The general rule in tort is that the party who commits a trespass or other wrongful act is liable for all the direct injury resulting, although such injury could not have been contemplated as the probable result of the act done.[2]

cago City Ry. Co. v. Wilcox, 33 Ill. App. 450.

[1] Purcell v. St. Paul C. Ry. Co., — Minn. —; 50 N. W. Rep. 1034; Wieting v. Millston, 77 Wis. 523; Montgomery & E. Ry. Co. v. Mallette, 92 Ala. 209; Coleman v. New York, etc. R. Co., 106 Mass. 160; Louisville, etc. Ry. Co. v. Jones, 108 Ind. 551.

In an action against a physician for malpractice he cannot escape responsibility because the plaintiff's condition is only in part attributable to his wrong. The jury must distinguish, as best they can, the pain, suffering and injuries or ill-health of the plaintiff, so far as they are chargeable to the defendant, from such as he is not responsible for. Gates v. Fleischer, 67 Wis. 504. See next note.

[2] Per Taylor, J., in Brown v. Chicago, etc. R. Co., 54 Wis. 354, citing 1 Sedgw. Meas. Dam. 130, note; Eden v. Luyster, 60 N. Y. 252; Hill v. Winsor, 118 Mass. 251; Lane v. Atlantic Works, 111 id. 136; Keenan v. Cavanaugh, 44 Vt. 268; Little v. Boston, etc. R. Co., 66 Me. 239; Collard v. South Eastern Ry. Co., 7 H. & N. 79; Hart v. Western R. Co., 13 Met. 99, 104; Wellington v. Downer K. Oil Co., 104 Mass. 64; Metallic Compression C. Co. v. Fitchburg R. Co., 109 id. 277; Salisbury v. Herchenroder, 106 id. 458; Perley v. Eastern R. Co., 98 id. 414; Kellogg v. Chicago, etc. Ry. Co., 26 Wis. 223; Patten v. Chicago, etc. Ry. Co. 32 id. 524; S. C., 36 id. 413; Williams v. Vanderbilt, 28 N. Y. 217; Ward v. Vanderbilt, 34 How. Pr. 144; Bowas v. Pioneer Tow Line, 2 Sawyer, 21. See, also, vol. 1, § 13; Sharp v. Powell, L. R. 7 C. P. 258; Putnam v. Broadway, etc. R. Co., 55 N. Y. 108; McGrew v. Stone, 53 Pa. St. 436; Servatius v. Pichel, 34 Wis. 299; Hughes v. McDonough, 43 N. J. L. 461. The text is quoted with approval in Baltimore, etc. Ry. Co. v. Kemp, 61 Md. 74, where it is held that a tendency or predisposition to cancer is not an objection to a recovery for the suffering caused by it, if the cancer was the natural and proximate consequence of the injury. The doctrine of the text is applied in Louisville, etc. Ry. Co. v. Falvey, 104 Ind. 409, 426; Terre Haute & I. R. Co. v. Buck, 96 id. 346; McNamara v. Clintonville, 62 Wis. 270, quoting the text; Phillips v. London, etc. Ry. Co., 42 L. T. Rep. 6; Schumaker v. St. Paul & D. R. Co., 46 Minn. 39. *Contra*, Pullman Palace Car Co. v. Barker, 4 Colo. 344. See vol. 1, § 36.

In Stewart v. Ripon, 38 Wis. 591, Lyon, J., said: "The public streets and sidewalks in a city are not constructed and maintained for the sole use of healthy and robust people, but for the use of the infirm, the sick and the decrepit, as well. They may lawfully be traveled by every citizen without regard to age, sex or physical condition. If the city negligently permits such streets or sidewalks to remain out of repair, and any person (who is himself free from negligence) is injured thereby, the city is liable for the injury. It is chargeable with knowledge that people of different bodily conditions travel its streets, and that among these are the weak, the decrepit, and those with organic predisposition to disease. It is reasonable to expect that in cer-

[715] The plaintiff may show specific direct effects of the injury without specially alleging them; as that he was thereby made subject to fits.[1] If they were a part of the result of the injury, the plaintiff may recover for such damage without

tain cases, if an injury happen to one of the latter class, his full recovery therefrom may be retarded or prevented by such predisposition or tendency to disease. In the present case the defendant is chargeable with knowledge that persons with a constitutional tendency to scrofula (a very large class in any community) constantly travel its streets and sidewalks, and that such tendency to that disease might greatly aggravate a bodily injury. Hence it had reasonable grounds to expect that if one of that class were injured by reason of the admitted defect in the sidewalk, the disease might develop, and greatly retard and prevent a cure, as in this case. If these views are correct, it necessarily follows that the negligence of the defendant was the proximate cause of the whole injury for which the plaintiff recovered damages." See Oliver v. La Valle, 36 Wis. 592. The principle of the case quoted from has been often applied. Alabama, etc. R. Co. v. Yarbrough, 83 Ala. 238; Baltimore & L. Turnpike Co. v. Cassell, 66 Md. 418; Tice v. Munn, 94 N. Y. 621; Houston, etc. R. Co. v. Shafer, 54 Texas, 641; McNamara v. Clintonville, 62 Wis. 207; Ehrgott v. Mayor, 96 N. Y. 264, 281; Denver, etc. Ry. v. Harris, 122 U. S. 597; Driess v. Frederich, 73 Texas, 460.

A surgeon assumes to exercise the ordinary care and skill of his profession, and he is liable for injuries resulting from his failure to do so; yet if the patient neglects to obey his reasonable instructions and thereby contributed to the injury complained of, such patient cannot recover for such injury. Geiselman v. Scott, 25 Ohio St. 86.

In other places in this work the doctrine of remote and proximate cause has been sufficiently stated for general purposes. A recent New York case is referred to here because it illustrates the proposition stated in the text, and disapproves a series of cases with which the author is unable to agree. The plaintiff, driving on a rainy night, came to a ditch in a street, the axle of his vehicle was broken, and he was dragged over the dashboard. Another carriage was procured and he drove to his home, several miles distant, in the rain and cold. His evidence tended to show that the diseases from which he subsequently suffered were the result of the strain and shock; while the defendant's evidence tended to show that they were caused by the exposure to the cold and rain. It was held that the exposure was the direct and proximate result of the accident. Ehrgott v. Mayor, 96 N. Y. 264, disapproving Hobbs v. London, etc. R. Co., L. R. 10 Q. B. 111; McMahon v. Field, 7 Q. B. Div. 591; Waller v. M. G. W. Ry. Co., 12 Ir. L. T. 145; Pullman Palace Car Co. v. Barker, 4 Colo. 344; Indianapolis, etc. R. Co. v. Birney, 71 Ill. 391; Francis v. St. Louis T. Co., 5 Mo. App. 7.

[1] Tyson v. Booth, 100 Mass. 258; Ohio & M. R. Co. v. Hecht, 115 Ind. 443; Morgan v. Kendall, 124 id. 454; Sloan v. Edwards, 61 Md. 89; Hussey v. Ryan, 64 id. 426; H. & T. C. Ry. Co. v. Leslie, 57 Texas, 83.

specially alleging it, as well as the pain and disability which followed.[1] The obviously probable effects of the injury may be given in evidence though not laid in the declaration.[2] Thus, where one of the direct consequences of a wound was the loss of the power to have offspring, evidence of that fact was admissible, though the declaration did not specifically designate that consequence.[3] Under an allegation that plaintiff suffered great bodily harm, became and still continued to be sick, sore and disabled; was obliged to spend large sums in attempting to cure himself, and was prevented for a long time from attending to his business, the permanent character of the injury sustained may be proven.[4]

§ 1245. Same subject. Mental suffering alone, unconnected with any other injury to the person, will not support an action; it is only when some act is done which will constitute a cause of action that injury to feelings can be considered.[5] This is not a cause of action but an aggravation of damages when it naturally ensues from the act complained of. In Massachusetts a town is liable in damages for an injury to the person resulting from a defect in a highway; but an action cannot be maintained on account of a risk or peril merely which has caused fright and mental suffering.[6] The court say in such a case, "though the bodily injury may have been very small, yet if it was a ground of action within the statute, and caused mental suffering, that suffering was a part of the injury for which he was entitled to damages."[7] It was also held in an action on the case for simple negligence in blasting out [716] a ledge within the located limits of a railroad, whereby rocks were thrown upon the plaintiff's land and buildings, that his mental anxiety in relation to his own personal safety or

[1] Id.

[2] Avery v. Ray, 1 Mass. 12; Ohio & M. R. Co. v. Hecht, 115 Ind. 443; Johnson v. McKee, 27 Mich. 471; Delie v. Chicago, etc. R. Co., 51 Wis. 400; Stevenson v. Morris, 37 Ohio St. 10.

[3] Denver, etc. Ry. v. Harris, 122 U. S. 597.

[4] Ehrgott v. Mayor, 96 N. Y. 264. Compare Kalembach v. Michigan C. R. Co., 87 Mich. 509.

[5] Indianapolis, etc. R. Co. v. Stables, 62 Ill. 313; Keyes v. Minneapolis, etc. Ry. Co., 36 Minn. 290; Atchison, etc. R. Co. v. McGinnis, 46 Kan. 109. See vol. 1, §§ 21–24; vol. 3, §§ 975–980.

[6] Canning v. Williamstown, 1 Cush. 451. See vol. 1, §§ 21–24; vol. 3, §§ 975–980.

[7] Id.

that of his child is not, in the absence of personal injury, an element of damage.[1] "If the law were otherwise," said Virgin, J., "it would seem that not only every passenger on a train that was personally injured, but every one that was frightened by a collision, or by trains leaving the track, could maintain an action against the company."[2] Such mental anxiety as comes from apprehension concerning the future of the family of an injured man is not a natural result of the injury, but depends upon circumstances independent of it, as the pecuniary condition and social relations of the sufferer.[3] In an action to recover for an indecent assault the injury done to the plaintiff's good name, honor and reputation cannot be considered.[4] The award for mental suffering will be determined by the circumstances. In a Canadian case in which no physical injury was sustained as the result of a trifling assault, the fright being but momentary, and the plaintiff having repelled all advances for a settlement or apology, and began and then abandoned a prosecution before a magistrate and sued for damages, the court refused to permit the recovery of a larger sum than would have been imposed as a fine if the prosecution had not been discontinued.[5] Juries have no discretion to allow interest upon the amount awarded for pain and suffering.[6]

§ 1246. Loss of time, injury to business, diminished capacity. These heads of injury are similar and represent recoverable elements of damage where the facts show that they exist.[7] They represent in part, and often chiefly, the pecun-

[1] Wyman v. Leavitt, 71 Me. 227; 36 Am. R. 303.

[2] Id. In the note to this case in 36 Am. R. 306, the editor says, "there can be no doubt that mental suffering forms a proper element of damage in actions for intentional and wilful wrong, and in actions of negligence resulting in bodily injury; but whether it forms an independent ground of action, disconnected from these facts, is more doubtful." His note, however, does not afford an instance in which it was the ground of action. In all of the cases stated there was a legal cause of action independent of injury to feelings. See vol. 1, §§ 21–24; vol. 3, §§ 975–980.

[3] Texas M. Ry. Co. v Douglass, 69 Texas, 694.

[4] Atkins v. Gladwish, 25 Neb. 390.

[5] Papineau v. Taber, Montreal L. R. 2 Q. B. 107.

[6] Western A. R. Co. v. Young, 81 Ga. 397.

[7] Chicago & E. R. Co. v. Holland, 122 Ill. 461; Indiana Car Co. v. Parker, 100 Ind. 182; Louisville, etc. Ry. Co. v. Falvey, 104 id. 409, 430; Central Passenger Ry. Co. v. Kuhn, 86 Ky. 578; Morgan v. Curley, 142 Mass. 107; Huizega v. Cutler & S. L.

iary loss from personal injury. To the extent that it prevents the plaintiff from pursuing his accustomed employment or business, it deprives him of pecuniary benefits which he would otherwise have realized. If he was under employment at fixed wages or salary, the amount of loss during a reasonable term of engagement, or the temporary duration of such disability, may be readily determined.[1] Where the injured party was not so employed, but was conducting a business, the extent and nature of it may be shown, and in many cases, as when professional men and other laborers have an established patronage, the antecedent pecuniary results of their labors. These facts are not shown as affording a measure of damages, but to aid the jury in estimating a fair and just compensation for being prevented by the injury from engaging in or prosecuting such business or work.[2] If the plaintiff's earnings are the result of his personal skill and services, the amount he has realized for a series of years shows what he was worth to himself and what he was capable of earning, and affords the best basis from which the jury can estimate his loss from the inability to follow his vocation.[3] But this rule does not apply where his income has been made in trade or in manufactur-

Co., 51 Mich. 272; Wallace v. Western, etc. R. Co., 104 N. C. 442; Scott v. Montgomery, 95 Pa. St. 444.

[1] Mauerman v. St. Louis, etc. Ry. Co., 41 Mo. App. 348; McIntyre v. New York C. R. Co., 37 N. Y. 287; Grant v. Brooklyn, 41 Barb. 381.

[2] Alabama, etc. R. Co. v. Yarbrough, 83 Ala. 238; Carthage T. Co. v. Andrews, 102 Ind. 138; Ohio & M. R. Co. v. Hecht, 115 Ind. 443; Stafford v. Oskaloosa, 64 Iowa, 251; Joslin v. Grand Rapids Ice Co., 53 Mich. 322; Griveaud v. St. Louis C. & W. Ry. Co., 33 Mo. App. 458, 466; Alabama, etc. R. Co. v. Frazier, 93 Ala. 45; Nebraska City v. Campbell, 2 Black, 590; Atchison v. King, 9 Kan. 550; Nones v. Northouse, 46 Vt. 587; Caldwell v. Murphy, 1 Duer, 232; Ballou v. Farnum, 11 Allen, 73; Wilson v. Young, 31 Wis. 574; Howes v. Ashfield, 99 Mass. 540; Tefft v. Wilcox, 6 Kan. 46; Lincoln v. Saratoga, etc. R. Co., 23 Wend. 425; Ransom v. New York, etc. R. Co., 15 N. Y. 415; Hill v. Winsor, 118 Mass. 251; Morse v. Auburn, etc. R. Co., 10 Barb. 621; Indianapolis v. Gaston, 58 Ind. 224; Morris v. Chicago, etc. R. Co., 45 Iowa, 29; Clifford v. Dam, 44 N. Y. Supr. Ct. 391; New Jersey Exp. Co. v. Nichols, 33 N. J. L. 434; Tomlinson v. Derby, 43 Conn. 562; Baldwin v. Western R. Co., 4 Gray, 333; Jacques v. Bridgeport Horse R. Co., 41 Conn. 61; Walker v. Erie R. Co., 63 Barb. 260; Rockwell v. Third Avenue R. Co., 64 Barb. 438, affirmed, 53 N. Y. 625; Wade v. Leroy, 20 How. (U. S.) 34; Potter v. Metropolitan Ry. Co., 28 L. T. (N. S.) 735; Ingram v. Lawson, 6 Bing. N. C. 212; Ripon v. Bittel, 30 Wis. 614, 617; Goodno v. Oshkosh, 28 id. 300.

[3] Ehrgott v. Mayor, 96 N. Y. 264;

ing, if the profits thereof are of such a nature that they are uncertain.[1] It has been said that "in no case has it been permitted, where the profits of business arise from the investment of capital, that evidence of such profits should be offered for the purpose of enhancing damages. It is only in cases where the earnings proceed entirely from the plaintiff's labor that the evidence" of them becomes admissible.[2] Where the case is within the rule, the proof that future earnings will correspond to those previously received need not be very cogent in order that an award of damages for their loss may be sustained. In the well-known case of Phillips v. London, etc. Ry. Co., the plaintiff, a physician with a lucrative practice, as well as with a considerable income independently of it, recovered a verdict for 7,000*l.*, which was set aside and a new trial granted on the ground that the award was insufficient.[3] On a retrial the verdict was for 16,000*l.*, and was sustained. One of the principal elements of damage was the inability of the plaintiff to pursue his profession. For three years preceding the accident his net earnings had been about 5,000*l.* a year. It was contended that because of peculiar circumstances, which the following quotation from the summing up of Lord Coleridge, C. J., will disclose the nature of, that such earnings could not be considered in estimating damages. "But then it is said that is too much, because some of these are large payments which have come from nine clients, and in the nature of things it is not likely that these sums will recur. This 1,300*l.* from one person in three years, that 400*l.* from another in two years, and nearly 500*l.* from another in three, all these and other sums are not likely to recur. I do not see at all why the confidence of the gentlemen who made these large payments should diminish, or their generosity either, and I do not quite see why, in the class of patients this gentleman had, people who send 1,000*l.*, and 500*l.*, and so on (5,000*l.* in one case) to their doctor, without inquiry, to pay

Simoni v. New York, etc. R. Co., 36 Hun, 214; Parshall v. Minneapolis, etc. Ry. Co., 35 Fed. Rep. 649.

[1] Masterson v. Mount Vernon, 58 N. Y. 391; Marks v. Long Island R. Co., 14 Daly, 61; Bierbach v. Goodyear Rubber Co., 54 Wis. 208.

[2] Johnson v. Manhattan Ry. Co., 52 Hun, 111. See People's P. Ry. Co. v. Lauderbach, 4 Penny. (Pa.) 406.

[3] 4 Q. B. Div. 406; affirmed, 5 id. 78.

for the number of visits that had been made. I do not see why the same gentleman should not pay 5,000*l.* over again. . . . It is a lucky thing, if Dr. Phillips should recover, that his practice is among patients who do not care about money. I do not really see why these should be the only people in the world who do these things, and who will continue to do them, and why, if they cease to do so, they should not be succeeded by others equally generous; but you must give it such weight as you think fit." The court of appeal did not find anything in these observations which authorized it to interfere with the judgment.[1] It is said in an Iowa case[2] that the damages for future disability are to be measured by the facts as they exist at the time the injury is sustained. This observation was not called for by the question before the court, which involved the admissibility of evidence to show that the plaintiff was in the line of promotion, and that if promoted his earnings would be increased. Such evidence was not proper.[3] The same court has held that the capacity of the plaintiff to earn money is not to be measured by the employment he is engaged in at the time his right of action accrues; it is competent for him to show that he was able to earn more money at some other calling.[4] In Texas a request to give an instruction which ignored the plaintiff's power to acquire, but for the wrong done him, the mental or physical capacity to do more profitable work than he was able to do at the time, was held to have been properly refused.[5] But in order that this question shall be considered by the jury there must be some evidence,[6] as that the plaintiff was fitting himself for a particular vocation for which the injury incapacitated him.[7]

§ 1247. Same subject; pleading. Under the rule [717] that all damages which are not the necessary and proximate result of the act complained of are special and must be specially alleged, it is probably necessary to state any particular

[1] 42 L. T. Rep. 6.

[2] Brown v. Chicago, etc. Ry. Co., 64 Iowa, 652.

[3] Richmond & D. Ry. Co. v. Allison, 86 Ga. 145.

[4] Rayburn v. Central Iowa Ry. Co., 74 Iowa, 637.

[5] Houston, etc. Ry. Co. v. Boehm, 57 Texas, 152; Union P. Ry. Co. v. Young, 19 Kan. 488.

[6] Gulf, etc. Ry. Co. v. Gordon, 70 Texas, 80.

[7] Howard Oil Co. v. Davis, 76 Texas, 630.

facts in the condition of the plaintiff which would afford a more precise measure or evidence of his loss than his general ability to earn money.[1] In a Connecticut case,[2] under the general allegation that in consequence of the injury the plaintiff was "prevented from attending to his ordinary business," it was held that evidence that he was at the time of the injury earning $100 a month in carting and sawing timber was inadmissible. In another case[3] it was held that under a like averment the plaintiff could not show any particular employment requiring special skill and training.[4] This case and Baldwin v. Western R. Co. would seem to be in conflict with the numerous cases which hold that the injured party may show the nature and extent of the business he had been accustomed to do.[5] In Luck v. Ripon[6] objection was made on two grounds to proof of damage for injury to a woman in consequence of which she was unable to pursue her business of midwife: first, that the complaint failed to set out what the particular business of the plaintiff was; and second, she was not qualified to practice "physic and surgery" so as to recover com-[718] pensation for her services as such under a statute of Wisconsin. Taylor, J., speaking for the whole court, said of the first objection: "When the complaint states facts showing that the injury has been such as to render it impossible for the injured party to pursue his ordinary business and damages are claimed for loss of time in such business, the plaintiff should be permitted to show upon the trial what his business is and what damages he has suffered by reason of inability to

[1] Fuller v. Bowker, 11 Mich. 204.

[2] Tomlinson v. Derby, 43 Conn. 562.

[3] Taylor v. Monroe, 43 Conn. 36.

[4] Citing 2 Greenlf. Ev., § 254; 1 Chitty's Pl. (4th ed.) 328, 346; Bristol Manuf. Co. v. Gridley, 28 Conn. 201; Squier v. Gould, 14 Wend. 159; Baldwin v. Western R. Co., 4 Gray, 333.

Under an allegation that the plaintiff was greatly hindered and prevented from doing and performing his work and business and looking after and attending to his necessary affairs at home, there cannot be a recovery for the loss of hay ungathered because help could not be obtained to secure it. Heiser v. Loomis, 47 Mich. 16.

[5] See *ante*, § 1246, n.

[6] 52 Wis. 196.

An employee who has sustained injury through the negligence of his employer may recover on account of pain, physical injury and decreased power to labor, although no proof has been made of the value of his services in any capacity. Georgia S. R. Co. v. Neel, 68 Ga. 609.

pursue the same. Ordinarily the business of the plaintiff will be known to the defendant and he will not be surprised at the introduction of evidence upon that subject. If, however, the defendant has no knowledge of such business, and desires to be informed thereof in order to be prepared for trial, he must move to make the complaint more definite and certain in that particular. He will not be justified in lying by until the trial and then claiming that he is unable to meet that issue for want of notice."[1] Of the second objection he said: "Without discussing the question whether a female who practices the business of a midwife is practicing 'physic or surgery' within the meaning of said section, it is sufficient answer to the objection, . . . first, that in this action the plaintiff is not seeking to recover any compensation for her services as a midwife; and second, that the statute does not make it unlawful to practice either physic or surgery without having a diploma. In pursuing her business as a midwife the plaintiff was violating no law of this state, but was pursuing a lawful and laudable business. If she earned and received money for her services, she had a perfect right to such money. If her injuries deprived her of the income she derived from such lawful employment, there does not seem to be any more reason for saying she has not been damaged by her injury to the extent she has been deprived of such income than there would be for saying that she had not been damaged if she had been deprived of an income as a teacher, artist, seamstress, or in any other lawful employment. The income of most men and women, whether professional or otherwise, does not depend in any great measure on the fact that they can enforce payment for services rendered by an action at law, but rather upon that sense of justice which in most men is more potent than the constraints of the law, that the laborer is worthy of his hire. It does not follow by any means [719] that a man will not have any income in the pursuit of a lawful employment because he cannot enforce his claim to compensation for services by an action at law."[2]

§ 1248. Same subject; evidence. In such actions where there is claimed to be a permanent disability or decrease

[1] Columbia, etc. R. Co. v. Hawthorne, 3 Wash. Ty. 353.

[2] Holmes v. Halde, 74 Me. 28; Phillips v. London, etc. Ry. Co., 42 L. T. Rep. 6; McNamara v. Clintonville, 62 Wis. 207.

of mental or physical capacity for work, evidence should be given which will enable the jury to determine whether the injury is permanent, the health and condition of the plaintiff before, as compared with his health consequent upon, the injury; or how far and for what time it is calculated to have a disabling effect.[1] If the injury has resulted in the loss of an arm or other severe physical disability no effect will be given

[1] Alabama, etc. R. Co. v. Yarbrough, 83 Ala. 238; Joliet v. Conway, 119 Ill. 489; Geveke v. Grand Rapids & I. R. Co., 57 Mich. 589; McMahon v. Northern C. R. Co., 39 Md. 438; Ballou v. Farnum, 11 Allen, 73; Lincoln v. Saratoga, etc. R. Co., 23 Wend. 425; Tefft v. Wilcox, 6 Kan. 46; Kansas P. R. Co. v. Painter, 9 Kan. 620; New Jersey Exp. Co. v. Nichols, 33 N. J. L. 434; Tomlinson v. Derby, 43 Conn. 562; Luck v. Ripon, 52 Wis. 196; Jacques v. Bridgeport Horse R. Co., 41 Conn. 61; Cleveland, etc. R. Co. v. Sutherland, 19 Ohio St. 151; George v. Haverhill, 110 Mass. 506.

In Jacques v. Bridgeport Horse R. Co., 41 Conn. 61, the suit was brought to recover damages for an injury received in consequence of the defendants' railroad track being out of repair. The plaintiff was a practicing physician, and was permitted to show the value of his practice, and its loss by the disability caused by the injury. On the trial these questions were asked on the cross-examination of the plaintiff, and held erroneously excluded: "When you were absent in 1864 and 1865, was it not claimed that you were guilty of malpractice in your profession?" And "was your practice in 1863 and 1865 substantially the same as at the time of your injury?" The defendant also introduced a witness who was asked "what was the reputation of Dr. Jacques, as a physician, in 1871 [the year in which his injury occurred], and thereafter up to the time when he stopped business, as to the lawfulness or unlawfulness of his practice?" This question was also excluded by the trial court. On a motion for a new trial, on exception to these rulings, the supreme court held this language: "As the plaintiff sought to recover damages on account of being disabled from practicing his profession, his reputation, as to the lawfulness or unlawfulness of his practice, became a proper subject of inquiry. The value of that practice must have depended largely upon that reputation. If his practice was unlawful, no matter how lucrative it might have been, the loss of it would lay no foundation for the recovery of damages. The questions put to the plaintiff, and also the other witness, may not have been the best mode which could have been adopted for reaching the truth; still we think the questions should not have been excluded. The plaintiff's claim in effect put his professional reputation in issue and made these questions proper. The answers to them would tend to throw light upon the subject which the defendants had a right, under the circumstances, to investigate." This ruling is open to objection. The injured party would not lose his right to compensation for being prevented by his injury from pursuing his practice merely because it was "claimed" or reported that his practice was unlawful. Reputation is not proof that in fact one's practice is unlawful, nor was it legitimate proof to controvert the plaint-

to an exception based upon the absence of proof of impaired physical ability where the plaintiff was engaged in manual labor.[1] Where a claim is made for loss of time only a nominal sum can be recovered if the plaintiff does not prove the value of the time lost or facts upon which an estimate of its worth can be made.[2] It is established in Iowa that a person permanently disabled may show that he has no means of support except such as he earned.[3]

§ 1249. Same subject; measure of recovery. The [720] recovery for loss of time or decreased capacity for work will depend on the nature of the business or calling of the injured party, or the pecuniary value of his lost time, or of lost or diminished capacity.[4] A minor son owing service to his father cannot recover for loss of time or inability to labor or earn money during the period of his minority.[5] So a married

iff's evidence of the amount that practice had yielded.

In Baldwin v. Western R. Co., 4 Gray, 335, it was held that testimony that the person who was driving the carriage in which the plaintiff rode at the time of the accident, by common reputation, was a careless driver, was rightly rejected. It might have been competent for the defendant to show that he was in fact unskilful and careless. But evidence on this point must come from those who can testify to the fact from their own knowledge. It cannot be proved by reputation.

[1] Chicago, etc. R. Co. v. Warner, 108 Ill. 538; Fisher v. Jansen, 30 Ill. App. 91; 128 Ill. 549.

[2] Leeds v. Metropolitan Gas L. Co., 90 N. Y. 26; Staat v. Grand Street & N. R. Co., 107 id. 625.

[3] Stafford v. Oskaloosa, 64 Iowa, 251; Hunt v. Chicago, etc. R. Co., 26 id. 363; Moore v. Central R., 47 id. 689.

[4] Chicago v. Elzeman, 71 Ill. 131; McLaughlin v. Corry, 77 Pa. St. 109; Hammond v. Mukwa, 40 Wis. 36; Hall v. Fond du Lac, 42 id. 274; Indianapolis v. Gaston, 58 Ind. 224; Pennsylvania R. Co. v. Dale, 76 Pa. St. 47; Morris v. Chicago, etc. R. Co., 45 Iowa, 29; Chicago v. Jones, 66 Ill. 349; Chicago v. Langlass, id. 361; Nichols v. Brunswick, 3 Cliff. 81; Lombard v. Chicago, 4 Biss. 460; Gale v. New York, etc. R. Co., 13 Hun, 1; Howes v. Ashfield, 99 Mass. 540. See § 1246, *ante*.

[5] Stewart v. Ripon, 38 Wis. 584; Jordan v. Bowen, 46 N. Y. Super. Ct. 355; G., C. & S. F. Ry. Co. v. Evansich, 63 Texas, 54; Texas & P. Ry. Co. v. Morin, 66 id. 225. It is otherwise where a minor is residing with one under no legal or moral obligation to support him. Fort Worth St. R. Co. v. Witten, 74 Texas, 202. It is held in Kansas that primarily the right to compensation for loss of time and expenses belongs to the child; it is a part of his capital with which to procure his maintenance, support and education. But as the parent, as his guardian or trustee, is responsible for all these, he or she is allowed to recover such compensation. This is a privilege which may be waived, and it is

woman cannot recover for a similar loss, except pursuant to a statute, because her husband is entitled to her services.[1] What amount shall be allowed is left to the sound discretion of the jury; but it should be sufficient to compensate for the injury.[2] If the plaintiff was engaged at wages at the time of the injury, and his employer continued to pay them during the period of disability, there can be no recovery for loss of wages.[3] A member of a firm is entitled to recover the value of his time without regard to the extent of his interest as a partner.[4]

§ 1250. **Expenses for surgical and medical aid, etc.** Such expenses and also the cost of nursing, when necessary and reasonably incurred, are part of the injury, and may be recovered under proper pleadings.[5] Such damages are generally

waived where the parent commences the action to recover such compensation in the name of and as the next friend of the child. Abeles v. Bransfield, 18 Kan. 16. In this case the mother was the only surviving parent. The petition claimed compensation for loss of time. But a waiver of the parent's right will not be inferred from the fact that he sues as the next friend of his child, unless the pleadings indicate an intention to that effect on his part. Texas & P. Ry. Co. v. Morin, 66 Texas, 225.

[1] Atchison, etc. R. Co. v. McGinnis, 46 Kan. 109; Filer v. New York C. R. Co., 49 N. Y. 47; Minick v. Troy, 19 Hun, 253; Reynolds v. Robertson, 64 N. Y. 589; Blaechinska v. Howard Mission, etc., 130 N. Y. 497, reversing S. C., 56 Hun, 322; Thomas v. Brooklyn, 58 Iowa, 438 (unless she was doing business in her own right, independently of her husband). The rule has been changed by statute in some states. Jordan v. Middlesex R. Co., 138 Mass. 425. If for any reason the husband is not entitled to his wife's services the complaint by her must allege the fact. Uransky v. Dry Dock Co., 118 N. Y. 304.

[2] Filer v. New York C. R. Co., 49 N. Y. 47; Minick v. Troy, 19 Hun, 253.

[3] Montgomery & E. Ry. Co. v. Mallette, 92 Ala. 209; Drinkwater v. Dinsmore, 80 N. Y. 390. Compare Elmer v. Fessenden, 154 Mass. 427; 28 N. E. Rep. 299.

[4] Kendall v. Albia, 73 Iowa, 241.

[5] Gale v. New York, etc. R. Co., 13 Hun, 1; Sheehan v. Edgar, 58 N. Y. 631; Beardsley v. Swann, 4 McLean, 333; Missouri, etc. R. Co. v. Weaver, 16 Kan. 456; Forbes v. Loftin, 50 Ala. 396; Klein v. Thompson, 19 Ohio St. 569; Morse v. Auburn, etc. R. Co., 10 Barb. 621; Chicago v. Jones, 66 Ill. 349; Chicago v. Langlass, id. 361; Chicago v. O'Brennan, 65 id. 160; Peoria Bridge Ass'n v. Loomis, 20 id. 235; The Canadian, 1 Brown, Adm. 11; Indianapolis, etc. R. Co. v. Birney, 71 Ill. 391; St. Louis, etc. R. Co. v. Cantrell, 37 Ark. 519; Chicago & E. R. Co. v. Holland, 122 Ill. 461; Wall v. Livezay, 6 Colo. 465; Indiana Car Co. v. Parker, 100 Ind. 182; Central Passenger Ry. Co. v. Kuhn, 86 Ky. 578; Phillips v. London, etc. Ry. Co., 42 L. T. Rep. 6; Geveke v. Grand Rapids & I. R. Co., 57 Mich. 589; Scott v. Montgomery, 95 Pa. St. 444;

treated as special, because they do not necessarily result [721] from all personal injuries; but in case of severe bodily injury the assistance of physicians is so obviously necessary as to be provable under a general allegation of damages.[1] Where such expenses have been incurred by the injured party, so that he is liable therefor, he is entitled to recover for them though they have not been paid,[2] or though they have been voluntarily paid by another.[3] And it has been held in Indiana that wherever it is proper in such a case to prove the services of a physician or surgeon the fair value of such services is the rule, even though they may have been rendered gratuitously.[4] This ruling has been[5] and is questioned for carrying the allowance for compensation beyond the actual injury.[6] If payment

Hulehan v. Green Bay, etc. R. Co., 68 Wis. 520; Hart v. Railroad Co., 33 S. C. 427.

A claim for money expended for "nursing and medical attendance" covers expenditures for medicines used by physicians in giving such attendance. Knapp v. Sioux City & P. R. Co., 71 Iowa, 41. Under an allegation that plaintiff has suffered great expense, injury to bedding by the application of medicine to the wounded part may be proved. Fox v. Chicago, etc. R. Co., 53 N. W. Rep. 259 (Iowa).

[1] Folsom v. Underhill, 36 Vt. 581.

[2] Gries v. Zeck, 24 Ohio St. 329; Donnelly v. Hufschmidt, 79 Cal. 74.

[3] Klein v. Thompson, 19 Ohio St. 569.

[4] Indianapolis v. Gaston, 58 Ind. 227; Brosnan v. Sweetser, 127 id. 1.

[5] 2 Thompson on Neg. 1258.

[6] Duke v. Missouri P. Ry. Co., 99 Mo. 347.

In Drinkwater v. Dinsmore, 80 N. Y. 390, Earl, J., delivering the opinion of the court on the point that the injured party was entitled to nothing for loss of wages where they were paid to him during his disability, referred to the exclusion of evidence offered for the purpose of mitigation where money had been received on an accident insurance by reason of the injury in question, and of the receipt of money on other insurance in cases of suit for wrongful destruction or conversion of property. He said: "In such cases proof of the insurance actually paid would not tend to show that the damage claimed was not actually occasioned by the wrong-doer; but it would simply show that compensation had been received by the injured party, in whole or in part, from some other party,— not that the wrong-doer had made satisfaction which alone could give him a defense. Here the proof was offered, not in mitigation or satisfaction of any damage actually done the plaintiff, but to show that he did not suffer the damage claimed, to wit, the loss of wages. Before the plaintiff could recover for the loss of wages, he was bound to show that he lost the wages in consequence of the injuries, and how much they were. The defendant had the right to show that he lost no wages, or that they were not as much as he claimed. He had the right to show, if he could, that for some particular reason the plaintiff

has not been made and cannot be compelled because of the incapacity of the person who has rendered medical services to sue therefor, the amount of his charge cannot be recovered.[1] It is not a valid reason for not allowing the recovery of the amount paid for the services of a trained nurse that there were persons in the plaintiff's family who could have given him the care and attention needed without expense, unless it is proven that they were competent to do so.[2] Proof of the sum paid is some evidence of the value of the services rendered, and authorizes the consideration of the item in assess- [722] ing damages.[3] A married woman cannot recover in an action for personal injury the physician's and nurse's bills as items of damage because she is not liable for them.[4] In an action for a personal injury by a minor who has no father or guardian, he may recover as part of his damages bills for medical attendance during any illness resulting from such injury.[5] If the injured person dies the medical expenses incurred by him cannot be recovered by his personal representative.[6]

§ 1251. But one action maintainable; prospective damages. A personal injury from a single wrongful act or negligence is an entirety, and affords ground for only one action. In that action recovery may be had for all damages suffered up to the time of the trial, and for all which are shown to be

would not have earned any wages if he had not been injured, or that he was under such a contract with his employer that his wages went on without service, or that his employer paid his wages from mere benevolence. In either case, upon such showing, the plaintiff could not claim that the defendant's wrong caused him to lose his wages, and the loss of wages could form no part of his damage. So the expense of nursing may be recovered as an item of damage, if properly incurred. But the defendant may show that no such expense was incurred, as that the plaintiff was nursed by a sister of charity. So the doctor's bill may in such a case be recovered. But plaintiff must show what he paid the doctor, or was bound to pay. The defendant may show that the plaintiff was doctored at a charity hospital, or at the expense of the town or county, or gratuitously. In such case the doctor's bill could not be an element of his damage."

[1] Chicago v. Honey, 10 Ill. App. 535; Dixon v. Bell, 1 Starkie, 287.

[2] Kendall v. Albia, 73 Iowa, 241.

[3] Colwell v. Manhattan Ry. Co., 57 Hun, 452.

[4] Tompkins v. West, 56 Conn. 478; Lewis v. Atlanta, 77 Ga. 756; Moody v. Osgood, 50 Barb. 628.

[5] Forbes v. Loftin, 50 Ala. 396.

[6] Pulling v. Great Eastern Ry. Co., 9 Q. B. Div. 110.

reasonably certain or probable to be suffered in the future.[1] Such prospective damages may include compensation for pain, disability and expenses.[2] For this reason it is important in cases of serious injury to determine the permanence of any

[1] It is competent to prove by medical experts the probability that the injury will permanently impair the health and physical or mental ability of the plaintiff. Louisville, etc. Ry. Co. v. Falvey, 104 Ind. 409, 422, citing Tinney v. New Jersey Steamboat Co., 12 Abb. Pr. (N. S.) 1; Filer v. New York C. R. Co., 49 N. Y. 42; Wilt v. Vickers, 8 Watts, 227; Kent v Lincoln, 32 Vt. 591; Montgomery v. Scott, 34 Wis. 338; Toledo, etc. R. Co. v. Baddeley, 54 Ill. 19; Townsend v. Paoli, 41 Kan. 591; Sloan v. Edwards, 61 Md. 89; Lemoine v. Cook, 36 Mo. App. 193; Gainard v. Rochester, etc. R. Co., 50 Hun, 22; White v. Milwaukee City Ry. Co., 61 Wis. 536; Vicksburg & M. R. Co. v. Putnam, 118 U. S. 545.

[2] Elkhart v. Ritter, 66 Ind. 136; Indianapolis v. Gaston, 58 id. 224; Drinkwater v. Dinsmore, 10 Hun, 250; Tefft v. Wilcox, 6 Kan. 46; Howell v. Goodrich, 69 Ill. 556; Matteson v. New York C. R. Co., 62 Barb. 364; Beckwith v. Same, 64 id. 299; Stewart v. Ripon, 38 Wis. 584; McLaughlin v. Corry, 77 Pa. St. 109; Barbour County v. Horn, 48 Ala. 566; Goodno v. Oshkosh, 28 Wis. 309; Murray v. Hudson River R. Co., 47 Barb. 196; Curtis v. Rochester, etc. R. Co., 18 N. Y. 542; Ransom v. New York, etc. R. Co., 15 id. 415; Wiesenberg v. Appleton, 26 Wis. 56; vol. 1, § 120; Barlow v. Lowder, 35 Ark. 492; Atlanta, etc. R. v. Johnson, 66 Ga. 259; Chicago & E. R. Co. v. Holland, 122 Ill. 461; Macer v. Third Avenue R. Co., 47 N. Y. Super. Ct. 461; Cleveland, etc. R. Co. v. Newell, 104 Ind. 264; Morgan v. Kendall, 124 id. 454; Kendall v. Albia, 73 Iowa, 241; Wardle v. New Orleans, etc. R. Co., 35 La. Ann. 202; Feeney v. Long Island R. Co., 116 N. Y. 375; Staat v. Grand St. & N. R. Co., 36 Hun, 208; Wallace v. Western, etc. R. Co., 104 N. C. 442, Scott v. Montgomery, 95 Pa. St. 444; Walker v. Erie Ry. Co., 63 Barb. 260.

In considering the permanency of an injury the jury may take into account the plaintiff's liability to suffer more than he otherwise would from such ailments as ordinarily afflict mankind. Crank v. Forty-second St. etc. Ry. Co., 53 Hun, 425.

In Union P. Ry. Co. v. Jones, 49 Fed. Rep. 343, the circuit court of appeals for the eighth circuit held that where the injuries complained of were sustained six months previous to the trial and the plaintiff was then suffering from them, though the proof was that he would probably recover, compensation might be awarded for future suffering and disability which was reasonably certain to result, notwithstanding there was no evidence as to the length of time it would probably continue. The nature of the injury, its effect upon the plaintiff, and its continuance were proven, and afforded the jury the basis upon which its conclusion should rest.

To entitle apprehended future consequences to be considered by the jury, they must be such as in the ordinary course of nature are reasonably certain to ensue. Consequences which are contingent, speculative or merely possible are not to be considered in ascertaining the damages. It is not enough that the injuries received may develop into more serious

disability or reduction of working capacity, or impairing effect upon health resulting therefrom. Besides giving compensation for future pain and the anticipated expense of treatment and nursing, it appearing that they are reasonably certain [723] to occur, the pecuniary loss in respect of the diminution of ability to earn money is to be considered by the jury. The material inquiries on this subject will be, what is a pecuniary equivalent for this loss per year, and how long will it continue? The answer to them must be chiefly found in the nature of the injury, the age and general health of the injured party, and his antecedent earning capacity as indicated by his qualifications and the character of his business or calling. In respect to years to come the recovery will be like payment in advance, and the amount should be reduced to its present worth.[1] In a Texas case the trial court instructed the jury on the estimate of damages for the difference between the ability of the party injured before the injury and his ability afterwards to earn wages to find no greater sum than, put at interest, would produce annually a sum equal to the difference between what the plaintiff could earn before and what he can now earn in consequence of the injury. On appeal this instruction was deemed objectionable. Bonner, J., said: "If compensation for lessened ability to labor be assumed as the true measure of damages, then it would seem that it should not be such sum as would bring an annual interest corresponding with the annual value of this lessened ability, leaving the principal sum still belonging to the estate of plaintiff after his death, although he had then become wholly incapacitated for labor; but would be an amount which would purchase an annuity

conditions than those which are visible at the time of the injury, nor even that they are likely so to develop. To entitle a plaintiff to recover present damages for apprehended future consequences there must be such a degree of probability of their occurring as amounts to a reasonable certainty that they will result from the original injury. Per Rapallo, J., in Strohm v. New York, etc. R. Co., 96 N. Y. 305, citing Curtis v. Rochester & S. R. Co., 18 id. 541; Filer v. New York C. R. Co., 49 id. 45; Clark v. Brown, 18 Wend. 229; Lincoln v. Saratoga & S. R. Co., 23 id. 425, 435. See Mosher v. Russell, 44 Hun, 12; Johnson v. Manhattan Ry. Co., 52 id. 111; Gregory v. New York, etc. R. Co., 55 id. 303; Elsas v. Second Avenue R. Co., 56 id. 161; Crawford v. Delaware, etc. R. Co., 53 N. Y. Super. Ct. 255; Abbot v. Tolliver, 71 Wis. 64.

[1] Fulsome v. Concord, 46 Vt. 135; The William Branfoot, 48 Fed. Rep. 914.

equal to this interest during the probable life of the plaintiff, calculated upon a reliable basis of the average duration of human life."[1] In ascertaining this period the jury may consider standard life and annuity tables; but it is error to instruct that these are an absolute guide.[2]

In Illinois an objection was made to a recovery because of future incapacity on the ground that the evidence did not show the earning ability of the plaintiff. The proposition was answered thus: It was manifest that it would have been incompetent to have proved what he had made in business prior to his injuries, since that was the result of circumstances that might never be repeated. He had no employment at fixed wages for the future, and he is not shown to have possessed peculiar skill or knowledge, having a definite pecuniary value, which was destroyed or affected by his injuries. What he or any other business man, however competent and skilled, might make in the future in any line of trade is too much a matter of speculation and contingency to be susceptible of direct evidence. It follows, therefore, that appellee gave all the evidence of the damages he has sustained on account of his permanent disability and consequent future inability to labor or transact business of which that question is susceptible. The inquiry, then, must be, whether, under such circumstances, a person is entitled to recover any damages because of inability to labor or transact business in the future, resulting from his injuries. We think, very clearly, that he is entitled to recover — that it can upon no principle make any difference whether a person is, at the time he is injured, engaged in a business paying a definite amount, or is then not engaged in business, but is by the act of injury prevented from engaging in business in the future in which he might reasonably expect, but not be entirely certain, that he would have success."[3] The amount which may be recovered by an infant who has never earned anything and who does not possess the capacity

[1] Houston, etc. R. Co. v. Willie, 53 Tex. 318; S. C., 37 Am. Rep. 756; McDonald v. Chicago, etc. R. Co., 26 Iowa, 124; Kinney v. Folkerts, 78 Mich. 687; Gregory v. New York, etc. R. Co., 55 Hun, 303.

[2] Vicksburg & M. R. Co. v. Putnam, 118 U. S. 545.

[3] Fisher v. Jansen, 128 Ill. 549. Compare Britton v. Street Ry. Co., 51 N. W. Rep. 276 (Mich.). See Propsom v. Leatham, 80 Wis. 608.

to do labor for the loss of his earnings after he shall have attained his majority must, in the absence of direct evidence, be left to the judgment, common experience and enlightened conscience of the jurors under the facts.[1]

§ 1252. Husband's or parent's action. The action in such cases is generally for the pecuniary loss. A husband is entitled to the services and society of his wife, and is bound to take care of and provide for her in sickness as well as in health.[2] Therefore any wrongful injury to her, by which he is deprived of her services or society, is a legal injury to him, although the circumstances which gave rise to the right of action arose out of a contract between the wife and a third party;[3] and [724] this injury is enhanced if he has been obliged to incur expenses for her cure.[4] He has also been held entitled to recover the sum paid by him for necessary labor and services substituted for the ordinary service of the wife, and for his own services in attending upon her.[5] So far as the husband suffers loss in being deprived of his wife's services, and in being put to expense by her illness, the loss is pecuniary; but he is also entitled to her society. The wrong may entitle him to substantial compensation though the parties are in such circumstances that she is not accustomed or desired to do physical labor.[6] If she is voluntarily rendering service for her

[1] Rosenkranz v. Lindell Ry. Co., 18 S. W. Rep. 890 (Mo.).

[2] Grant v. Green, 41 Iowa, 88.

[3] Blair v. Chicago & A. R. Co., 89 Mo. 334; McKinney v. Western Stage Co., 4 Iowa, 420; Cregin v. Brooklyn C. R. Co., 75 N. Y. 192.

[4] Fuller v. Naugatuck R. Co., 21 Conn. 557; Barnes v. Martin, 15 Wis. 240; Kavanaugh v. Janesville, 24 Wis. 618; Filer v. New York C. R. Co., 49 N. Y. 47; Barnes v. Hurd, 11 Mass. 59; McKinney v. Western Stage Co., 4 Iowa, 420; Rogers v. Smith, 17 Ind. 323; Mowry v. Cheney, 43 Iowa, 609; Mewhirter v. Hatten, 42 Iowa, 288; Tuttle v. C., R. I. & P. R. Co., id. 518; Smith v. St. Joseph, 55 Mo. 456; Berger v. Jacobs, 21 Mich. 215; Matteson v. New York C. R. Co., 35 N. Y. 487; Eden v. Lexington, etc. R. Co., 14 B. Monroe, 204; Philippi v. Wolff, 14 Abb. (N. S.) 196; Stone v. Evans, 32 Minn. 243; Nier v. Missouri P. Ry. Co., 12 Mo. App. 35.

Prospective damages for loss of wife's services are recoverable. Hodsoll v. Stallebrass, 11 A. & E. 301; Fox v. Saint John, 23 N. B. 244.

[5] Smith v. St. Joseph, 55 Mo. 456; Blair v. Chicago & A. R. Co., 89 id. 334; Lindsey v. Danville, 46 Vt. 144. If a husband may recover for his services in waiting upon his wife the amount must not exceed their value as a nurse; the wages lost by abstaining from other employment is not the measure. Salida v. McKinna, 16 Colo. 523.

[6] Blair v. Chicago & A. R. Co., 89

husband by carrying on his business he is entitled to recover for the loss of her services therein, if the facts are properly alleged.[1] But he is not entitled to recover for her pain and suffering; she must sue with her husband for such elements of the injury.[2] Nor can he recover for his own mental [725]

Mo. 334; Ainley v. Manhattan Ry. Co., 47 Hun, 206; Cooley on Torts, 226.

In Furnish v. Missouri P. Ry. Co., 102 Mo. 669, it is held that the husband is entitled to his wife's society as she was before she was injured. By the term "society" is meant such capacities for usefulness, aid and comfort as a wife as she possessed at the time of the injury. The nature of the damage resulting from the loss of a wife's society does not admit of direct proof of value; the fact of loss being shown the assessment is committed to the discretion of a jury. Where the husband expended $800 in the care and treatment of his wife, she being wholly disabled, a verdict for $5,000 was sustained, there being no demand for compensation because of loss of service. It is said in a recent case that loss of a wife's society, companionship and solace are too sentimental and intangible for the law to measure. Hawkins v. Front Street Cable Ry. Co., 3 Wash. St. 592, 595.

[1] Citizens' Street Ry. Co. v. Tivinname, 121 Ind. 375.

[2] Hyatt v. Adams, 16 Mich. 180; Michigan C. R. Co. v. Coleman, 28 id. 440; Brooks v. Schwerin, 54 N. Y. 343; Filer v. New York C. R. Co., 49 N. Y. 47; Hunter v. Ogden, 31 Up. Can. Q. B. 132; Reeder v. Purdy, 41 Ill. 279.

In Minick v. Troy, 19 Hun, 253, it was held that in an action by a married woman she might recover for such loss of service as she sustained herself and towards herself. On this point Bockes, J., said: "Here, in effect, the jury were instructed that they should not allow such consequential damages as might result to the plaintiff's husband from her inability to labor. In this case, unlike Brooks v. Schwerin, 54 N. Y. 343, the plaintiff was engaged in no separate business or employment; still there remained to her many duties, privileges and services, *personal to herself*, which were proper subjects for the consideration of the jury, in connection with the suffering endured, in determining the damages to be awarded to her."

By the effect of certain statutes married women have in some states the right to sue alone for the damages for personal injury, so far as they are themselves affected. Chicago, etc. R. Co. v. Dunn, 52 Ill. 260; Hayner v. Smith, 63 id. 430; Hennies v. Vogel, 66 Ill. 401; Pancoast v. Bumell, 32 Iowa, 394; Musselman v. Gallagher, id. 383. See Gibson v. Gibson, 43 Wis. 23, 29.

The damages recoverable for her injuries, in a joint action, belong to the husband when recovered, and he may release them. Southworth v. Packard, 7 Mass. 95; Ballard v. Russell, 33 Me. 196; Shaddock v. Clifton, 22 Wis. 114.

Under statutes providing in effect that any person receiving any bodily injury through any defect in or want of repair of a highway may have a right of action against the town, a husband has not been permitted to maintain a separate action for any consequences of an injury to his wife. The action is given only to the party injured, and husband

distress on account of his wife's suffering.[1] His action will not abate by her death.[2] The elements of damage which form the basis of recovery in a suit by the husband alone are not to be considered when he joins with his wife for an injury to her.[3] It is held, however, in states in which the right to sue for a tort is property and where all property acquired by either spouse otherwise than by gift, bequest, devise or descent is common or community property, that the chose in action arising from an injury to the wife is suable by the husband when he is vested with the right of disposing of the community personalty. In such a case the wife is a proper but not a necessary party.[4] In these states all the damages naturally flowing from the wrong done the wife are recoverable.[5]

The parent's action for injury to his child is one for loss of services, and expenses of the illness and cure,[6] including his own time spent in taking care of the child,[7] and also that of

and wife must join to recover for injuries to her. Harwood v. Lowell, 4 Cush. 310; Starbird v. Frankfort, 35 Me. 89. In Sanford v. Augusta, 32 Me. 536, it was held that, in order to give the statute the beneficial effect for which it was designed, the jury might allow in such joint action compensation for loss of time from the injury to the wife, and the reasonable expenses incurred to obtain a cure.

[1] Hyatt v. Adams, 16 Mich. 180; Fillebrown v. Hoar, 124 Mass. 580.

[2] Hyatt v. Adams, *supra;* Eden v. Lexington, etc. R. Co., 14 B. Mon. 204; Green v. Hudson R. Co., 28 Barb. 9. See Long v. Morrison, 14 Ind. 509.

[3] Ohio & M. Ry. Co. v. Cosby, 107 Ind. 32.

[4] Hawkins v. Front Street Cable Ry. Co., 3 Wash. St. 592; Ezell v. Dudson, 60 Texas, 331; McFadden v. Santa Anna, etc. Ry. Co., 87 Cal. 464.

[5] Hawkins v. Front Street, etc. Ry. Co., *supra.*

[6] Dennis v. Clark, 2 Cush. 347; Durden v. Barnett, 7 Ala. 169; Cartanos v. Ritter, 3 Duer, 370; Whitney v. Hitchcock, 4 Denio, 461; Hall v. Hollander, 7 Dowl. & Ry. 133; Magee v. Holland, 27 N. J. L. 86; Karr v. Parks, 44 Cal. 46; Durkee v. Central P. R. Co., 56 Cal. 388; Frick v. St. Louis, etc. Ry. Co., 75 Mo. 542; Evansich v. Railway Co., 57 Texas, 123; County Comm'rs v. Hamilton, 60 Md. 340; Barnes v. Keene, 132 N. Y. 13; 29 N. E. Rep. 1090, quoting the text.

[7] County Comm'rs v. Hamilton, 60 Md. 340; Connell v. Putnam, 58 N. H. 534. In South Carolina an instruction that if the father had lost contract wages while caring for his injured child they might be recovered, but speculative and uncertain earnings could not, was held to be as liberal to the plaintiff as the law allows. Bridger v. Asheville & S. R. Co., 27 S. C. 456. It is error to allow a parent to testify that he lost lucrative employment in order to nurse his child. Barnes v. Keene, 132 N. Y. 13; 29 N. E. Rep. 1090.

his wife,[1] and the increased cost of its care and nurture on account of the injury.[2] The right of a parent to recover for the loss of his son's services during minority is not affected by the fact that the latter has recovered therefor in an action brought by himself.[3] If a female becomes of age for some purposes at an earlier date than for general purposes, the recovery for loss of services may be co-extensive with the age at which her majority is attained for the latter.[4] It has been held that a deduction must be made from the probable gross earnings equal to the expense of board, lodging and clothing for the minor.[5] This proposition has been departed from for the very good reason that a parent is bound to support his minor child regardless of his earnings. The later case was one in which there was a loss of a regular salary, and it was held that the wages which would have been received were not to be diminished because of the expense of support.[6] The recovery of damages must be controlled substantially by what the proof shows the loss to be.[7] Where the evidence showed that a boy aged five years would have been worth to his father from the time he became ten or eleven years of age $100 per year, a verdict for $4,500 was set aside.[8] But this strictness is not always observed.[9] Where the injury to a bright boy of fourteen years who was going to school at the time it occurred and was learning easily and well, who as a result of the wrong done him became stupid and nervous, and sometimes delirious, requiring careful nursing and medical attendance, with a prospect of continued epilepsy and ultimate premature death, a verdict for $5,000 was sustained. The expenses incurred up to the time of the trial aggregated $500 or $600.[10] In England the weight of authority is to the effect that in an action by a

[1] Schmitz v. St. Louis, etc. Ry. Co., 46 Mo. App. 380.

[2] Lang v. New York, etc. R. Co., 51 Hun, 603.

[3] Texas & P. Ry. Co. v. Morin, 56 Texas, 133.

[4] Hussey v. Ryan, 64 Md. 426.

[5] Matthews v. Missouri P. Ry. Co., 26 Mo. App. 75, 87.

[6] Mauerman v. St. Louis, etc. Ry. Co., 41 Mo. App. 348; Texas & P. Ry. Co. v. Morin, 66 Texas, 133; Schmitz v. St. Louis, etc. Ry. Co., 46 Mo. App. 381.

[7] Texas & P. Ry. Co. v. Morin, 66 Texas, 133; Schmitz v. St. Louis, etc. Ry. Co., 46 Mo. App. 381.

[8] Hurt v. St. Louis, etc. Ry. Co., 94 Mo. 255; Matthews v. Missouri P. Ry. Co., 26 Mo. App. 75.

[9] Dollard v. Roberts, 130 N. Y. 269.

[10] Strohm v. New York, etc. R. Co., 32 Hun, 20.

parent for injuries to a minor child under his care, the *gravamen* is the loss of service, as incidental to which he may recover the expense of nursing and healing the child; though if the child be of such tender years as to be incapable of rendering any service whatever there can be no recovery even for the expenses.[1] But in this country a more liberal rule has been adopted; and the best considered cases hold that inasmuch as it is a duty enjoined by the law of the land, as well as by the laws of nature, upon the parent to care for and heal his injured minor child, he who wilfully or negligently occasioned the injury should be held responsible for the expenses incurred, without reference to the capacity of the child to render service to the parent.[2] The recovery must be limited to such expenses as have been actually incurred, or which are immediately necessary to be incurred.[3] Wounded feelings of the parent cannot be taken into consideration,[4] nor can ex- [726] emplary damages be recovered.[5] The parent's action is thus restricted on the ground that a child has a right of action and may recover full damages, except such as are thus allowed to be recovered by the parent.[6] For abduction of a minor

[1] Grinnell v. Wells, 7 Man. & G. 1041; Add. on Torts, 902.

[2] Cuming v. Brooklyn C. R. Co., 109 N. Y. 95; Dennis v. Clark, 2 Cush. 347; Sykes v. Lawler, 49 Cal. 237, 238.

[3] Cuming v. Brooklyn C. R. Co., 109 N. Y. 95; Karr v. Parks, *infra*.

[4] Cowden v. Wright, 24 Wend. 429; Pennsylvania R. Co. v. Kelly, 31 Pa. St. 372; County Comm'rs v. Hamilton, 60 Md. 340. But see Trimble v. Spiller, 7 T. B. Mon. 394, and Magee v. Holland, 27 N. J. L. 86.

[5] In Whitney v. Hitchcock, 4 Denio, 461, it was held in trespass for assault and battery upon the child or servant of the plaintiff that the damage was the actual loss which the plaintiff had sustained; that exemplary damages could not be given, though the assault was of an indecent character and under circumstances of great aggravation.

[6] Id. The case of Karr v. Parks, 44 Cal. 46, is thus stated in the opinion of the court: "It appears from the evidence that the daughter of plaintiff, between ten and eleven years of age, was attacked and gored by the defendant's cow. A wound was inflicted upon her face which destroyed the sight of the right eye and lachrymal duct, and tore the lower lid from its attachment at the inner corner of the eye. She was immediately placed in the care of a surgeon, under whose treatment the wound healed; but there remained an eversion of the lower eyelid, which was an unseemly disfigurement of the face. The larger portion of the expense for which the plaintiff sought to recover was incurred in the endeavor to remove this disfigurement. For this purpose the child was taken to San Francisco and two surgical operations were performed — the first being an entire

child the parent may recover for reasonable expenses incurred in its pursuit, though no evidence be given that the act was malicious.[1]

§ 1253. Exemplary damages. Where the action is brought by one who suffered the injury in his own person exemplary damages may be allowed where the doctrine of such damages prevails, if the wrong was done wantonly or with malice.[2] There is much conflict of decision as to the allowance of such damages, and the reader is referred to the chapter on [727] that subject.[3] In actions for assault and battery, where the latter is proved and there is no justification or palliation, the plaintiff has a right to a fair compensation for the injury actually sustained, and this compensation, as we have seen, should include remuneration for bodily and mental pain, loss of time from any disability and the expenses of cure. The mental pain which will be considered for compensation is not only that which results from the corporal hurt, but also the insulting or humiliating incidents of the wrong as perpetrated.[4] The jury will be instructed to consider the entire transaction. The circumstances which would induce the allowance of punitory damages in one jurisdiction will elsewhere be generally considered as aggravations to enhance damages for compensation. Where there are such aggravations it is generally held admissible to show the wealth and social position of the

failure, and the other partially successful. The amount of the verdict found by the jury renders it certain that the expenses attending these operations entered largely into their estimate of damages. . . . There was evidence tending to show that the restoration of the eyelid to its normal condition would add to the child's comfort by affording protection to the eye. But the discomfort was the unavoidable result of the injury received, for which the child could recover compensation in her own suit, as she could for the immediate pain and suffering caused by the wound. There would be practically no limit to the liability of the defendant if the father could pursue at pleasure a series of expensive surgical operations for the purpose of removing every trace of the injury and charge the defendant with the entire cost."

[1] Rice v. Nickerson, 9 Allen, 478.

[2] Harrison v. Ely, 120 Ill. 83; Alabama, etc. R. Co. v. Frazier, 93 Ala. 45.

[3] Vol. 1, ch. 9.

[4] Root v. Sturdivant, 70 Iowa, 55; Remmler v. Shenuit, 15 Mo. App. 192; Tatnall v. Courtney, 6 Houst. 434; Sampson v. Henry, 11 Pick. 379.

In Draper v. Baker, 61 Wis. 450, a verdict for $1,200 was sustained for spitting in a woman's face in a public place in the presence of a large number of persons.

parties to affect damages therefor.[1] Any facts may be proven to enhance damages which tend to show actual malice. The plaintiff may show previous threats, and for this purpose it is immaterial whether he knew of them before the assault or not.[2] In some states exemplary damages may be mitigated in an action for trespass *vi et armis* by proof of the payment of a fine imposed in a criminal prosecution for the act which is the basis of the civil proceeding; but a conviction does not bar the right to recover such damages.[3] The general rule is that such a payment does not affect the amount which may be awarded as exemplary damages.[4]

§ 1254. Pecuniary circumstances of parties. The general rule is that compensatory damages are not affected by the financial circumstances of either party to the action or the number or ages of the plaintiff's children,[5] or the public position of the defendant at the time an assault is committed.[6] There are some exceptions to this rule. Thus, in Iowa it is held that a person who is permanently disabled may show that his only means of support were derived from his earnings.[7] In Maryland the pecuniary circumstances of the plaintiff and the extent and dependent condition of his family may be considered by the jury in arriving at his damages.[8] In ac-

[1] Sampson v. Henry, 11 Pick. 379; Webb v. Gilman, 80 Me. 177; Sloan v. Edwards, 61 Md. 89; Beck v. Dowell, 40 Mo. App. 71; Goldsmith's Adm'r v. Joy, 61 Vt. 488; Draper v. Baker, 61 Wis. 450; Brown v. Evans, 17 Fed. Rep. 912; Dailey v. Houston, 58 Mo. 361; Rowe v. Moses, 9 Rich. 423. See McKenzie v. Allen, 3 Strobh. 546; Reeder v. Purdy, 41 Ill. 279; Fatnall v. Courtney, 6 Houst. 434.

[2] Bartram v. Stone, 31 Conn. 159; Treat v. Barber, 7 Conn. 279.

[3] Flanagan v. Womack, 54 Texas, 45; vol. 1, § 402.

[4] Hoadley v. Watson, 45 Vt. 289; Cook v. Ellis, 6 Hill, 466; Read v. Kelly, 4 Bibb, 400; Wheatley v. Thorn, 23 Miss. 62; Phillips v. Kelly, 29 Ala. 628; Brown v. Swineford, 44 Wis. 282; McWilliams v. Bragg, 3 id. 424; vol. 1, § 402.

[5] Pennsylvania Co. v. Roy, 102 U. S. 451; La Salle v. Thorndike, 7 Ill. App. 282; Pittsburg, etc. R. Co. v. Powers, 74 Ill. 341; Moody v. Osgood, 50 Barb. 628; S. C., 60 id. 644; Shea v. Potrere, etc. R. Co., 44 Cal. 415; Kansas, etc. R. Co. v. Painter, 9 Kan. 621; McKenzie v. Allen, 3 Strobh. 546; Joliet v. Conway, 119 Ill. 489; Stephens v. Hannibal, etc. Ry. Co., 96 Mo. 207; Louisville & N. R. Co. v. Gower, 85 Tenn. 465; Rooney v. Milwaukee Chair Co., 65 Wis. 397; Vosburg v. Putney, 78 id. 84; Overholt v. Vieths, 93 Mo. 422.

[6] Hare v. Marsh, 61 Wis. 435.

[7] *Ante*, § 1248.

[8] Sloan v. Edwards, 61 Md. 89; Gaither v. Blowers, 11 id. 536.

tions in which insult and mortification bear a large proportion to the injury inflicted the jury may in Missouri, Mississippi and Illinois consider the financial circumstances of both parties.[1] The court say in the Illinois case: "It may be readily supposed that the consequences of a severe personal injury would be more disastrous to a person destitute of pecuniary resources, and dependent wholly on his manual exertions for the support of himself and family, than to an individual differently situated in life. The effect of the injury might be to deprive him and his family of the comforts and necessaries of life. It is proper that the jury should be influenced by the pecuniary resources of the defendant. The more affluent, the more able he is to remunerate the party he has wantonly injured."

§ 1255. Evidence in mitigation. In actions for assault and battery matters of provocation cannot be admitted in mitigation unless they happen at the time of the assault or immediately preceding it, so as to form part of the transaction.[2] The provocation, to entitle it to be proven for that purpose, must be so recent and immediate as to induce a presumption that the violence done was committed under the immediate influence of the feelings and passions excited by it.[3] The defendant may show that the plaintiff immediately before charged him with a crime;[4] and no inquiry can be permitted concerning

[1] Eltringham v. Earhart, 67 Miss. 488; McNamara v. King, 7 Ill. 432; Beck v. Dowell, 20 S. W. Rep. 209 (Mo.); Grable v. Margrave, 4 Ill. 372; Dailey v. Houston, 58 Mo. 361.

[2] Willis v. Forrest, 2 Duer, 310; Stellar v. Nellis, 42 How. Pr. 163; 60 Barb. 524; Corning v. Corning, 6 N. Y. 97; Chambers v. Porter, 5 Cold. 273; Avery v. Ray, 1 Mass. 12; Tatnall v. Courtney, 6 Houst. 434.

[3] Heiser v. Loomis, 47 Mich. 16; Groman v. Kukkuck, 59 Iowa, 18; Lee v. Woolsey, 19 Johns. 319.

[4] Bartram v. Stone, 31 Conn. 159; Bauman v. Bean, 57 Mich. 1.

There has been much discussion concerning the admissibility of evidence of the use of provocative words to reduce the actual damages in actions for assault and battery. The weight of authority is in favor of the admission of such evidence. Frazer v. Berkeley, 7 C. & P. 789; Perkins v. Vaughan, 5 Scott N. R. 881; Linford v. Lake, 3 H. & N. 275; Cushman v. Ryan, 1 Story, 100; Avery v. Ray, 1 Mass. 12; Lee v. Woolsey, 19 Johns. 241; Maynard v. Berkeley, 7 Wend. 560; Mowry v. Smith, 9 Allen, 67; Tyson v. Booth, 100 Mass. 258; Bonino v. Caledonio, 144 id. 299; Burke v. Melvin, 45 Conn. 243; Kiff v. Youmans, 86 N. Y. 324; Robinson v. Rupert, 23 Pa. St. 523; Thrall v. Knapp, 17 Iowa, 468. In Wisconsin the cases are not harmonious. The general rule was applied in Moreley

the truth or falsity of the charge.[1] The bad character of the plaintiff cannot be proved in mitigation unless it in some way contributed to the provocation[2] or is in issue upon the question of damages.[3] Where a female plaintiff in an action for assault and battery made proof in aggravation of damages that the defendant took indecent liberties with her person and attempted to have sexual intercourse with her, it was held that her character for chastity was in issue on the question of damages, and that it was competent to disparage it by prov- [729] ing specific acts of lewdness and immorality.[4] The in-

v. Dunbar, 24 Wis. 183, but in a later case (Wilson v. Young, 31 Wis. 574) it was held that the only compensatory damages which could be mitigated by provocation were those given for injury to the feelings; and more recent cases establish the rule that personal abuse of the party making the assault may be considered in mitigation of exemplary but not actual damages. Fenelon v. Butts, 53 Wis. 344; Corcoran v. Harran, 55 id. 120. This is the rule in some other jurisdictions. Donnelly v. Harris, 41 Ill. 126; Gizler v. Witzel, 82 id. 322; Goldsmith's Adm'r v. Joy, 61 Vt. 488; Johnson v. McKee, 27 Mich. 471; Prentiss v. Shaw, 56 Me. 712; Jacobs v. Hoover, 9 Minn. 204; Cushman v. Waddell, Baldwin, 57; McBride v. McLaughlin, 5 Watts, 375; Tatnall v. Courtney, 6 Houst. 434.

[1] Bartram v. Stone, 31 Conn. 159; Grace v. Dempsey, 75 Wis. 313, applying the rule to an action for false imprisonment. See Bull v. Gould, 34 Ind. 552; Marker v. Miller, 9 Md. 338.

[2] McKenzie v. Allen, 3 Strobh. 546. Thus, the defendant in an action for an assault and battery cannot show that the plaintiff was a fighting, high-tempered, quarrelsome man, who had previously assaulted him. Galbraith v. Fleming, 60 Mich. 403. Any benefit resulting to the plaintiff from a battery, as the loss of his teeth, cannot mitigate the defendant's liability. Hitchler v. Voelker, 8 Mo. App. 492.

[3] Ford v. Jones, 62 Barb. 484; Verry v. Watkins, 7 C. & P. 308; Indianapolis, etc. Ry. Co. v. Bush, 101 Ind. 582; Johnson v. Wells, etc. Co., 6 Nev. 224. *Contra*, Abbot v. Tolliver, 71 Wis. 64. See vol. 1, § 94.

The defendant's character is not in issue in an action to recover for an assault and battery. Brown v. Evans, 17 Fed. Rep. 912. Even to the extent of his being a peaceable and orderly citizen. Elliott v. Russell, 92 Ind. 526.

[4] Ford v. Jones, 62 Barb. 484. In this case Potter, J., said: "The ruling of the court upon the evidence . . . raises directly the much vexed question whether, when a person's character for chastity is in issue, it is competent to disparage it by proving specific acts of immorality. The question is raised here because the plaintiff's character for chastity is directly in issue upon the question of damages. It is directly a question of chastity and not of reputation. The material question in such a case is on the willingness or reluctance of the plaintiff to the act complained of. And the court has ruled that her character for chastity could be attacked

jured party cannot recover damages which result from his own acts or want of care. He is required to observe proper precautions against increasing the injury, and to reasonably exert himself to obtain a cure. Such part of the dam- [730]

only by proof of general reputation. I am satisfied that this was wrong. In the first place there is the *a priori* argument that it is the fact of chastity and not the *reputation* of that fact upon which the violence of the shock to the injured party's feelings depends; that the reputation does not accord with the fact, and, as a means of proof, is therefore inferior to that by specific acts. This argument has never been answered, except by a reason of convenience, merely; that the plaintiff cannot be expected to come prepared to disprove specific acts, a reason which is summarily disposed of by Justice Cowen in the case of The People v. Abbot, 19 Wend. 192, 197, by the statement that 'such a reason would go to show that every circumstance in a chain must be shown by reputation instead of ocular proof.' In the next place, I am entirely satisfied that the weight of authority is the same way. In this state there is the opinion of Justice Cowen in The People v. Abbot, *supra, obiter dictum* upon this point, it is true; but as an opinion, most able and exhaustive; besides, the cases of Bracy v. Kibbe, 31 Barb. 276, and Hogan v. Cregan, 6 Robt. 150, support the same view, while to the contrary there is only the case of The People v. Jackson, 3 Park. Cr. Rep. 391, which must be deemed to be overruled by the two cases above cited. And proof of specific acts has always been admitted under the seduction and abduction statutes, to show that the prosecutrix was not of 'previously chaste character.' See Carpenter v. The People, 8 Barb. 603; Crozier v. The People, 1 Park. Cr. R. 453; Safford v. The People, id. 474; People v. Kenyon, 5 id. 286; 26 N. Y. 203; People v. McArdle, 5 Park. Cr. R. 189. As the fact of a chaste character is as much at issue in this case as in those, they must be considered authorities. The shock to the plaintiff's feelings, it is natural to suppose, is proportioned to the sacred regard she entertained for her personal virtue; and the damages she would be entitled to recover ought to be regulated by the nature and extent of the injury received. Unless a distinction is permitted by the admission of evidence to this point, the lascivious wanton is put upon an equality with her of personal chastity and virtue, in her action for damages. Assault and battery is an action in which vindictive damages are allowed, depending upon the aggravation. How is this aggravation to be measured but by the degree of suffering? And how is the suffering to the feelings to be measured but by the moral sensibilities? Does the chaste and pure suffer no more in this respect than the prostitute? The rule would otherwise be unjust. In other states the cases upon this point of the admission of evidence are conflicting; Iowa and California holding the evidence of specific acts to be admissible; and those of New Hampshire, North Carolina and Arkansas the reverse. See Reed v. Williams, 5 Sneed, 580. A *dictum* to the same effect has also been uttered by the supreme court of Ohio, and a *semble* by that of Georgia. See 5 Sneed, 580: Smith v. Milburn, 17 Iowa, 30; People v. Benson, 6 Cal.

ages he sustains as the defendant can show has resulted from the plaintiff's fault will be deducted from his recovery.[1] The burden of proving an aggravation of the injury is upon the defendant.[2] The right to recover damages for an intentional and unlawful assault and battery is not affected because the plaintiff took no care to avoid an invasion of his rights.[3] The

221; State v. Knapp, 45 N. H. 148; State v. Jefferson, 6 Ired. 305; McCombs v. State, 8 Ohio St. 645; Camp v. State, 3 Ga. 417; Pleasants v. State, 15 Ark. 624.

"The authority of the English courts must also be held to be in favor of admitting the evidence of specific acts. The earlier cases of Rex v. Hodgson, Russ. & Ry. C. C. 211, and Rex v. Clarke, 2 Stark. 241, which presented much difficulty to Justice Cowen in his opinion in The People v. Abbot, have been doubted, and practically overruled by the later cases of Rex v. Barker, 3 Car. & P. 589; Verry v. Watkins, 7 id. 308; Reg. v. Robins, 2 M. & Rob. 512; Reg. v. Martin, 6 C. & P. 562; Reg. v. Terrington, 1 Cox C. C. 48; and Reg. v. Mercer, 6 Jur. 243. And in Carpenter v. Wall, 11 A. & E. 803, the reasoning of the court is to the same effect. Besides, in analogous cases, specific acts may be shown; as in passing counterfeit money, on the question of *scienter* (1 Phil. Ev. 179, 7th ed.); and in an action for breach of promise of marriage, acts pointing at lightness of character may be shown. Willard v. Stone, 7 Cowen, 23; Johnson v. Caulkins, 1 Johns. Cas. 116. I take it that where character is directly in issue, specific acts may be proved; but where the issue is collateral, as upon the credibility of a witness, the proof must be confined to general reputation. In the absence of authority, I think, upon principle, the evidence ought not to have been excluded. Facts and circumstances ought to be permitted in evidence, which go to regulate the amount of the verdict, so as to arrive at a just result. It is, in my opinion, manifestly unjust that facts should be withholden from a jury which would and ought to lessen the damages. While it may be proper for a jury to take into consideration and give damages for suffering in mind, and which they may justly estimate by necessary inference from facts calculated to produce such suffering, I think the evidence of such suffering, which is of the party's own making, should either be excluded, or, if admitted, the party responsible should be permitted to show by specific facts those matters which would rebut such pretended suffering. The probabilities of assent or of non-resistance are a legitimate inference from the fact of former promiscuous intercourse, or former particular acts of lewdness." Parker v. Coture, 63 Vt. 155. See *ante*, § 1226.

[1] Vol. 1, §§ 155, 156; Geiselman v. Scott, 25 Ohio St. 86; Nashville, etc. R. Co. v. Smith, 6 Heisk. 174; Gould v. McKenna, 86 Pa. St. 297; Gilman v. Holey, 7 Ill. App. 349; Moss v. Pardridge, 9 id. 490; Louisville, etc. Ry. Co. v. Falvey, 104 Ind. 409, 425; Goshen v. England, 119 id. 368; Crete v. Childs, 11 Neb. 252. See La Salle v. Thorndike, 7 Ill. App. 282; Foels v. Tonawanda, 59 Hun, 567.

[2] Goshen v. England, 119 Ind. 368.

[3] Steinmetz v. Kelly, 72 Ind. 442; Whitehead v. Mathaway, 85 id. 85.

damages for abducting a female child and causing her to be debauched may be mitigated by proof of the child's dissolute character and that of her family.[1] In actions to obtain damages for maiming, disfigurement or impairment of working capacity, if the injured person was employed in doing labor, or was able to fill an accustomed position, or any other to which he must resort as a consequence of the injury, everything which illustrates the effect thereof to lessen or enhance its prejudicial consequences is obviously admissible.[2]

§ 1256. Province of the jury, and instructions thereto. There being no legal measure of damages for pain and suffering the amount which a jury may award in an action for a personal injury is peculiarly within their discretion. They should exercise a calm and dispassionate judgment in view of all the facts established by the evidence under the instructions of the court. The parties are entitled to the judgment of the jury, and it is not within the province of the court to decide on the amount of damages.[3] Courts will not set aside verdicts either on the ground that the damages are excessive or inadequate unless it is apparent that the jury acted under some bias, prejudice or improper influence, or have made some mistake of fact or law.[4] In either case the verdict is subject to the control of the court; and where some of the elements of damage which might have been considered by the jury have been

[1] Dobson v. Cothran, 34 S. C. 518.

[2] The Oriflamme, 3 Sawyer, 397.

[3] Ward v. Blackwood, 48 Ark. 396; Georgia P. Ry. Co. v. Freeman, 83 Ga. 583; Kelsey v. Hay, 84 Ind. 189; Pittsburgh, etc. Ry. Co. v. Sponier, 85 id. 165; Redfield v. Redfield, 75 Iowa, 435; Chicago & A. R. Co. v. Fisher, 38 Ill. App. 33; Kimball v. Bath, 38 Me. 219; McKinley v. Chicago, etc. R. Co., 44 Iowa, 322; Butler v. Bangor, 67 Me. 385; Jacobs v. Bangor, 16 id. 187; Shartle v. Minneapolis, 17 Minn. 308; Wightman v. Providence, 1 Cliff. 530; Chicago v. Smith, 48 Ill. 107; Gale v. New York, etc. R. Co., 13 Hun, 1; Weisenberg v. Appleton, 26 Wis. 56; vol. 1, § 459. See Lane v. Holman, 145 Mass. 221.

[4] Id.; Coleman v. Southwick, 9 Johns. 45; Stephens v. Hudson Valley K. Co., 48 N. Y. St. Rep. 814; Hallack v. Johnson, 12 Colo. 244; Chicago, etc. Ry. Co. v. Barrett, 16 Ill. App. 17; East St. Louis & C. Ry. Co. v. Frazier, 26 id. 437; Welch v. McAllister, 15 Mo. App. 492; Honeycutt v. St. Louis, etc. Ry. Co., 40 id. 374; Bitner v. Utah C. Ry. Co., 4 Utah, 502; Corcoran v. Harran, 55 Wis. 120; Smalley v. Appleton, 75 id. 18; Lambkin v. Southeastern Ry. Co., 5 App. Cas. 352, reversing the judgment of the queen's bench division which awarded a new trial on the ground of the excessiveness of the damages. See Stephens v. Hudson Valley K. Co., *supra*.

ignored, and the verdict is for a less amount than the plaintiff is clearly entitled to, it will be set aside, although there has been no misdirection by the court, or misconduct or miscalculation on the part of the jury.[1] There is no absolute rule to determine whether a verdict awards an excessive amount or not. It has been held that if the sum allowed is much above or greatly below the average that it is fair to infer, unless the case presents extraordinary features, that partiality, prejudice, or some other improper motive has led the jury astray.[2] And if there have been two or more trials of an action and the evidence has not been materially different as to the extent of the plaintiff's injuries a large discrepancy between the final and the previous awards will authorize an appellate court to reverse a judgment for an amount greatly in excess of that first awarded.[3] But the application of this rule depends upon the fact that the evidence is substantially the same on each trial.[4] Elsewhere in this chapter are collected notes giving the amounts which have been awarded in various cases in which the principal elements of damage have been pain and suffering,[5] or loss of capacity to pursue business.[6] In a note hereto appended is given the result of the action of the courts in a considerable number of cases in which exceptions have been urged to judgments on the ground that the awards are excessive. The effort has been to include a variety of cases from a large number of courts, rather than to make the note represent even a large portion of the whole number of recent cases.[7] In determining whether an award is excessive the appellate court will regard the length of time

[1] Phillips v. Southwestern Ry. Co., 4 Q. B. Div. 406; S. C. *sub nom.* Phillips v. London, etc. Ry. Co., 5 id. 78; Moseley v. Jamison, 68 Miss. 336; Smith v. Dittman, 16 Daly, 427.

[2] Jennings v. Van Schaick, 13 Daly, 7; Lockwood v. Twenty-third St. Ry. Co., 15 id. 374.

[3] Baker v. Madison, 62 Wis. 137. See McLimans v. Lancaster, 63 id. 596.

[4] Bridge v. Oshkosh, 71 Wis. 363; Harold v. New York, etc. R. Co., 13 Daly, 378.

[5] *Ante*, § 1242.

[6] *Ante*, § 1246.

[7] *Damages where injuries permanent.* An injury to a woman in the prime of life whose pursuits required all her physical faculties and which permanently disabled her was not excessively compensated for by $3,500. Calder v. Smalley, 66 Iowa, 219.

A verdict for $5,000 for injuries which permanently destroyed the use of a lower limb of a healthy, active woman of seventy years was sus-

that has elapsed since the injury was sustained, the number of trials the case has had and the expense thereof to the

tained. Hinton v. Cream City R. Co., 65 Wis. 323.

A verdict for $10,000 was sustained in favor of a miner aged twenty-four years for the loss of his right foot. Bowers v. Union P. R. Co., 4 Utah, 215. An award of $11,000 in favor of a man advanced in years for a like injury was sustained. Jordan v. New York & H. R. Co., 16 Daly, 130. And $12,000 in favor of a brakeman. Trinity & S. Ry. Co. v. Lane, 79 Texas, 643. And $10,000 in a case in which a brakeman was permanently injured in one leg and a shoulder. Daniels v. Union P. Ry. Co., 6 Utah, 357.

Where a miner aged thirty-six years who had been before the injury in good health was so hurt that his lower limbs were paralyzed to such an extent that he had but little use of them and could do nothing to help himself, a verdict for $20,000 was reduced to $15,000 by the trial court and affirmed for the latter sum. Reddon v. Union P. Ry. Co., 5 Utah, 344.

A verdict for $6,000 was sustained in favor of a man of twenty-five years who lost the use of his right arm and who was educating himself for an engineer and earning $56 per month, and whose earning power was reduced one-half. Howard Oil Co. v. Davis, 76 Texas, 630.

A recovery of $13,000 was upheld in favor of a man of thirty-nine years whose earnings were $100 a month, for the loss of both legs, one being amputated four or five inches below and the other above the knee. Colorado M. Ry. Co. v. O'Brien, 16 Colo. 219, 230.

Where an engineer of thirty-four years, in good health, endowed with a vigorous constitution and earning from $165 to $195 per month, was so injured as to be incapacitated for the performance of any profitable labor, bereft of his hearing and made a physical wreck, $15,000 was not an excessive award. Texas P. Ry. Co. v. Johnson, 76 Texas, 421.

A verdict for $6,000 was sustained where a man employed in coupling cars lost the use of one hand. Missouri P. Ry. Co. v. Jones, 75 Texas, 151. And a $4,000 verdict was upheld where the flesh was torn from the thumb and finger of a carpenter. Galveston Oil Mills v. Malin, 60 Texas, 651.

Where a brakeman aged twenty-five lost his right hand at the wrist, and the case had been pending in the courts for nearly nine years, and two juries had awarded him substantially the same amount of damages, a judgment for $10,000 was affirmed. Union P. Ry. Co. v. Young, 19 Kan. 488.

A woman aged fifty-seven was permanently deprived of the use of her left arm, her power to move was impaired, a shoulder bone broken, her spine injured and her general health affected and her system rendered more liable to disease. A verdict for $5,000 was not excessive. Texas P. Ry. Co. v. Davidson, 68 Texas, 370.

A sailor aged thirty-two, earning from $12 to $20 a week, sustained a fracture of the ankle and a rupture, in consequence of which he was in a hospital eighty-five days; his injuries permanently incapacitated him for heavy work. The court awarded $6,500. Miller v. The W. G. Hewes, 1 Woods, 363; The D. S. Gregory, etc., 2 Bene. 226.

Where a physician negligently tied

plaintiff, so far as the defendant is responsible for these things.[1]

a ligature so tightly around the penis of a new-born child as to destroy nearly all the glands of that member, a verdict of $5,500 was sustained. When the actual damages, said the court, may include mental suffering through life, a verdict can rarely be set aside as excessive. Brooke v. Clarke, 57 Texas, 105.

In Groves v. Rochester, 39 Hun, 5, the suit was by a husband and his wife to recover for injuries to the latter, who was twenty-eight years of age when the accident occurred. The nature of the injuries is not fully disclosed by the report, except that they "were severe and her suffering has been very great. She still suffers from the effect of them; and medical opinion is that she may never fully recover, and that they may materially shorten her life." A verdict for $19,000 was sustained.

A railroad track foreman, aged thirty-five, had his right eye destroyed and suffered from the other eye at times; his ability to work was reduced about one-half. Judgment for $5,000 affirmed. Johnson v. Missouri P. Ry. Co., 96 Mo. 340.

A man aged forty was so injured by a collision that, besides many lesser hurts, he sustained a concussion of the spine, which resulted in chronic inflammation of the membranes enveloping the spinal cord; his faculties, mental and physical, were largely impaired at the time of the trial, the probability being that paralysis and premature death would result. A verdict for $30,000 was sustained. Harrold v. New York E. R. Co., 24 Hun, 184.

A child aged nine was rendered lame for life by an injury to one of its legs. A verdict for $10,000 was sustained. Galveston v. Posnainsky, 62 Texas, 118.

An infant aged nineteen months sustained an injury to his spine which resulted in an incurable disease, which would disable him from competition with laboring men, and would probably shorten his life. An award of $7,500 was affirmed. Galveston C. R. Co. v. Hewitt, 67 Texas, 473.

Where there was a loss of a foot and a sickness of three months at an expense of $750, a verdict for $20,750 was reduced to $10,750, the evidence showing that health was not endangered or that plaintiff was incapacitated from following his business as a bookkeeper. Kennon v. Gilmer, 5 Mont. 257; S. C., 9 id. 108.

A verdict for $25,000 in favor of a switchman aged seventeen years who lost his left leg and right foot was reduced to $20,000 by a *remittitur*, and affirmed. Waldhier v. Hannibal, etc. Ry. Co., 87 Mo. 37.

A verdict for $7,000 in favor of a switchman aged thirty, the father of a family, for the loss of one arm below the elbow, seemed large to the court but it was not disturbed. Sobieski v. St. Paul & D. R. Co., 41 Minn. 169.

A child aged eight years had both eyes burned out, both ears burned off, his hands burned almost to a crisp — "in short, the mental and physical functions of his person almost completely destroyed — everything that would make life either enjoyable or useful gone, and nothing left but the capacity to exist." A verdict of $50,000 was reduced to $25,000, and affirmed for the latter sum. Dunn

[1] Waterman v. Chicago & A. R. Co., 52 N. W. Rep. 247 (Wis.).

It is the duty of the court to direct the jury whether [731] they may consider the question of exemplary damages; when

v. Burlington, etc. Ry. Co., 35 Minn. 73.

In Shaw v. Boston & W. R. Corp., 8 Gray, 45, a woman lost one arm and the use of the other, and was much bruised and injured otherwise so as to greatly injure and impair her health and memory and cause constant pain. There were three trials which resulted in verdicts for $15,000, $18,000, and $22,250, respectively. The last amount was held not to be excessive.

The loss of the left arm just above the elbow by a girl of seven years is over-compensated by $12,000. The court reduced a verdict for that sum to $5,000. Lehman v. Louisiana W. R. Co., 37 La. Ann. 705. But where a boy of seven years, "the son of a laboring man, without property or means," was deprived of an arm, the court, though it at first thought the sum excessive, affirmed a judgment for $10,000. Ketchum v. Texas & P. R. Co., 38 La. Ann. 777.

A verdict for $8,000 as compensatory damages was sustained for the loss of a brakeman's leg, he being in the prime of young manhood, and unfitted for any employment save one of manual labor. L. & N. R. Co. v. Moore, 83 Ky. 675. In another case not notably different a verdict for $10,000 was sustained. Louisville & N. R. Co. v. Mitchell, 87 Ky. 327.

A brakeman, aged twenty-four, lost a leg below the knee; in the absence of proof of what he was earning, of the loss resulting, or the loss of time, or the extent of the impairment of his ability to earn money, $10,000 was held excessive; and the option given to remit $3,000 of the amount. Missouri P. Ry. Co. v. Dwyer, 36 Kan. 58.

The loss of the thumb and first finger of the right hand of a brakeman who was disabled for three or four months will not sustain a verdict for $6,500. Kansas P. Ry. Co. v. Pavey, 29 Kan. 169; S. C., 34 id. 472.

A brakeman aged twenty-seven, earning $60 per month, lost a leg below the knee; it had to be sawed off three times; he was confined to his room more than fifty days; had lockjaw for twelve or fifteen days, and suffered intensely. A verdict for $8,000 given on a former trial was increased to $10,000 on a retrial, and affirmed. Atchison, etc. R. Co. v. Moore, 31 Kan. 197. In another case not dissimilar except that the plaintiff was a locomotive fireman aged thirty-nine, a verdict for $12,000 was sustained. Missouri P. Ry. Co. v. Mackey, 33 Kan. 298.

A verdict for $8,000 was affirmed in favor of a brakeman aged nineteen years for an injury which affected his foot and ankle, and made him a cripple for life. Henry v. Sioux City & P. Ry. Co., 75 Iowa, 84.

A verdict for $8,250 was sustained where a farmer of sixty-five years had two or three ribs broken, so that they punctured one of his lungs to such an extent that air escaped therefrom and inflated the surrounding tissues. He was confined to his bed for three weeks and to his house for seven, and appeared to be permanently injured. Reed v. Chicago, etc. Ry. Co., 74 Iowa, 188.

A disability of the right arm of a railroad engineer forty years of age, earning $100 a month, who is not fitted for any pursuit which would bring him one-third of that sum, was not excessively compensated for by

it is submitted the jury may allow them or not according to their judgment.[1] It will be error if the court withhold that question from the jury in a case proper for such damages,[2] and a verdict which includes them in a case where only compensation should be given will be set aside.[3] It is matter

$9,500. Knapp v. Sioux City & P. Ry. Co., 71 Iowa, 41.

A farmer aged fifty years had a thigh bone broken, and was confined to his bed nine weeks; the fracture did not join, and the injured leg was shortened about two and one-half inches. A verdict for $8,000 sustained. Funston v. Chicago, etc. Ry. Co., 61 Iowa, 452.

A compound fracture of the left arm of a laboring man and a partial dislocation of the elbow of the same arm, impairing its usefulness permanently, was not over-compensated by $4,000. Van Winter v. Henry County, 61 Iowa, 684.

Where the injury to a boy of seven years necessitated the amputation of both his legs a verdict for $30,000 was held to be considerably in excess of what was right. Heddles v. Chicago & N. R. Co., 74 Wis. 239. A second verdict for $18,500 was sustained. S. C., 77 Wis. 228. See Waterman v. Chicago & A. R. Co., 52 N. W. Rep. 247 (Wis.).

A physician was disabled from pursuing the practice of his profession, which brought him $2,000 a year, by an injury to his spine which caused great suffering and was so serious as to make it reasonably certain that his life would be shortened. The court affirmed a judgment for $10,000. Carthage Turnpike Co. v. Andrews, 102 Ind. 138.

A verdict for $14,833 was held excessive where the plaintiff was aged twenty-one, and the injury was permanent; he was earning from $800 to $1,200 a year, and was deprived of employment by the accident. Southwestern R. v. Singleton, 66 Ga. 252.

The same court held a verdict for $13,750 to be "extreme if not excessive," where a boy of nine years lost an arm. Western & A. R. Co. v. Young, 83 Ga. 512.

A freight conductor's recovery of $6,500 for the loss of an arm at the shoulder was sustained in Chicago, etc. R. Co. v. Warner, 22 Ill. App. 62.

Where there was a loss of the second and third fingers of the left hand and an injury to the first finger of a man employed as a car-coupler at $45 a month, a verdict for $4,000 was sustained though it went to the extreme limit if not beyond it. Central R. & B. Co. v. Lanier, 83 Ga. 587.

A verdict for $4,700 was quite moderate for the loss of the right hand of a man of twenty-three years, he having sustained other severe wounds and bruises. Central R. v.

[1] Myers v. San Francisco, 42 Cal. 215; Owen v. Brockschmidt, 54 Mo. 289. See vol. 1, § 403.

[2] Bass v. Chicago, etc. R. Co., 30 Wis. 636.

[3] Chicago v. Langlass, 52 Ill. 256; Chicago v. Kelly, 69 id. 475; Decatur v. Fisher, 53 id. 407; Keightlinger v. Egan, 65 id. 235; Chicago, etc. R. Co. v. McKittrick, 78 id. 619; Nashville, etc. R. Co. v. Smith, 6 Heisk. 174; Goodno v. Oshkosh, 28 Wis. 304; Patry v. Chicago, etc. R. Co., 77 id. 218 (setting aside a verdict because of error in authorizing such damages, though it was not certain that they were allowed).

of law to determine the elements of damage. On the trial the evidence should not be permitted to embrace any elements not proper to be considered; but incidentally on the trial of proper questions irrelevant matters sometimes creep in. By

De Bray, 71 Ga. 406; Grannis v. Chicago, etc. Ry. Co., 81 Iowa, 444.

A verdict for $25,000 was sustained where a man of thirty years, employed as a conductor, was so injured as to be incurable, and suffered greatly from nervous prostration and debility, and had lost to a great extent the use of his lower limbs, and was troubled with gradual failure of his mind and memory. Chicago, etc. R. Co. v. Holland, 18 Ill. App. 418.

Where a young man employed as a laborer in a saw-mill lost one of his legs above the knee $9,650 was not considered exorbitant. Nadau v. White River L. Co., 76 Wis. 120. And $7,500 was sustained for the loss of the right hand of a man whose life expectancy was forty-six years, and was similarly employed. Sprague v. Atlee, 81 Iowa, 1.

An employee on a gravel train retained a verdict for $8,000 for the loss of a leg near the thigh. Schumacher v. St. Louis, etc. R. Co., 39 Fed. Rep. 174.

The testimony tended to show that the injuries, a broken leg and bruised shoulder, were permanent in their nature, that for four years after they were sustained plaintiff had been able to labor but half the time, and his weight had been reduced thirty-five pounds. A verdict for $7,500 was sustained. Hallack v. Johnson, 12 Colo. 244.

A verdict for $5,000 was affirmed, after seriously questioning its correctness, where a switchman's hand was so injured that he could never use it naturally, and would never be able to do any kind of labor for which he could realize any considerable amount of wages. Before the injury plaintiff's earnings were $55 a month. Toledo, etc. Ry. Co. v. Fredericks, 71 Ill. 294.

A $3,000 judgment in favor of a boy of fourteen years for the loss of three fingers sustained. Neilon v. Marinette & M. P. Co., 75 Wis. 579.

An award of $7,000 for the loss of a railroad laborer's leg was not excessive. Ohio & M. Ry. Co. v. Collarn, 73 Ind. 261.

An injury to a woman of sixty years, which resulted in progressive paralysis and disabled her from following her business as a midwife (which was lucrative) was not excessively compensated for by $6,000. Wardle v. New Orleans, etc. R. Co., 35 La. Ann. 202.

A child of five years sustained the fracture of an arm, which became and remained disfigured at the elbow. A verdict for $6,600 was reduced to $3,000. Ryder v. Mayor, 50 N. Y. Super. Ct. 220.

Plaintiff was fifty-four years of age; three of his ribs were fractured, he had a crushing wound on the lower part of one leg, was injured above such wound, confined six or seven weeks and was troubled with pain on one side when he breathed, and was so troubled and lame at the time of the trial, nine months after the accident. A $5,000 verdict was sustained. Quinn v. Long Island R. Co., 34 Hun, 331.

In Standard Oil Co. v. Tierney, 17 S. W. Rep. 1025, the Kentucky court reversed a judgment for $25,000 in favor of a railroad conductor of thirty years, who was burned about the face so as to disfigure him for life

instructions the court should, as far as practicable, eliminate them, and direct the jury to those elements on which their estimate should be made. It is error to submit such cases with the general instruction that the jury may find such dam-

and whose left arm was permanently disabled; his right hand was also injured and his feet were badly burned. The court say: "It is by comparison with verdict after verdict in this state where more flagrant wrongs were committed and punitive damages claimed, in which juries composed of men, as we have the right to assume, of like intelligence, passion and feeling, have made their findings for a much less amount; and without enumerating the cases it will be found that $10,000 is the extent to which a verdict has been sustained by this court. . . . While we do not pretend to adjudge that no verdict would or ought to be sustained for a larger amount than $10,000, we do say that some moderation should be indulged in when arriving at verdicts in this class of cases."

In Brown v. Southern P. R. Co., 26 Pac. Rep. 579, the Utah court refused to affirm a judgment for $10,000 in favor of a man of twenty-two years who lost a hand and received other injuries, and who had been earning $75 a month. He was not educated for a profession, but had so far recovered at the time of the trial as to be able to do light work. On remitting $6,000 the judgment was affirmed for the balance.

Where the injuries sustained by an able-bodied and industrious mechanic rendered him a physical and mental wreck, after great suffering, which would probably continue, a verdict for $20,000 was sustained. International, etc. Ry. Co. v. Brazzil, 78 Texas, 314.

In Hall v. Chicago, etc. R. Co., 46 Minn. 439, an able-bodied young railroad engineer was so injured as to be almost a cripple and was made an invalid for life. The suffering endured was very severe. A verdict for $40,000 was reduced to $25,000, and judgment for the latter amount was affirmed.

Judgment for $9,000 was sustained where a laborer in a quarry lost both eyes as the result of an explosion. Stearns v. Reidy, 33 Ill. App. 246.

A brakeman aged twenty-three years, earning from $500 to $600 a year, was made a physical wreck through the loss of one leg, the toes on the other foot, a dislocation of the hip and an injury to his chest. A verdict for $12,000 was sustained. Kentucky C. Ry. Co. v. Ryle, 18 S. W. Rep. (Ky.) 938.

Damages where injuries temporary. Where a young woman sustained injuries which resulted in broken ribs, and injured spine, and was under medical treatment for many weeks, though not confined to her room, and suffered at intervals of about six weeks pains resembling those of child-birth, which continued to the time of the trial, $6,933 was not excessive. Houston, etc. Ry. Co. v. Lee, 69 Texas, 556.

An injury to a knee-cap, resulting in the loss of three or four weeks' time and a good deal of pain, was more than compensated for by $4,000, it appearing probable that there would be a recovery. Chicago v. Colman, 33 Ill. App. 557.

An award of $4,500 for the fracture of an arm, the only proof of permanent injury being the testimony of the plaintiff and a fellow-workman to the effect that the former could

ages as in their judgment, from the evidence in the cause, the plaintiff ought to recover; thus giving the jury free scope to give such damages as, according to their individual notions of

not do the work of an able-bodied laborer, was set aside. There was no evidence of decreased earnings. Chicago, etc. Ry. Co. v. Hughes, 87 Ill. 94. See Chicago, etc. R. Co. v. Avery, 10 Ill. App. 210.

For the fracture of a lady's leg in two places and the dislocation of her ankle, resulting in confinement to her room for four and the use of crutches for eight months, and from the effects of which she had not recovered at the time of the trial, $6,000 was held not excessive. Penniston v. Chicago, etc. R. Co., 34 La. Ann. 777.

A verdict for $800 was sustained for the impaling of a man's hand upon a point of a railing in consequence of a fall. Bushnell v. Metz, 18 Ill. App. 84.

A man aged fifty-two years, earning $540 per year, was so injured as to cause a "knot" on his head of the size of a hen's egg, and afterwards was troubled with slight attacks of vomiting, pain in his head and dizziness; there was some evidence to the effect that injury to the hearing was probable. A verdict for $2,500 was reduced to $1,250. Yates v. Southwestern, etc. Co., 40 La. Ann. 467.

Where the plaintiff was seriously injured, suffered great pain, was exposed to loss of time and business and large expenses, but improved rapidly under medical treatment, was able for months before the trial to attend to his business and to earn his livelihood, and there was strong evidence that he would be completely cured, a verdict for $25,000 was set aside, and judgment for $5,000 rendered. Peyton v. Texas & P. Ry. Co., 41 La. Ann. 861.

A girl aged nine was set upon by a dog, thrown down and bit so that a wound nearly two inches in length and half an inch in depth was inflicted upon her hip; she was confined to bed for several weeks, and was lame at the time of the trial. A verdict for $1,450 (which was to be doubled pursuant to a statute) was affirmed. Fitzgerald v. Dobson, 78 Me. 559.

Where the injury to a man of twenty-five years was a concussion of the spinal cord, resulting in an abnormal condition of the nervous system which affected his health and rendered him unfit to follow the avocation of a railroad engineer, but he had so far recovered as to engage in business and be able to devote most of his time to it, and the evidence was conflicting as to the probability of an ultimate recovery, a verdict for $6,250 was reduced to $3,000. Sioux City & P. R. Co. v. Finlayson, 16 Neb. 578.

One of plaintiff's eyes was injured by glass being thrown into it; he was confined to his house five weeks and suffered pain. He was able to work for the twenty months intervening between his recovery and the trial, and the condition of the eye, though it was permanently weakened, did not become worse. In the absence of proof showing to a reasonable certainty that his condition would grow worse, a verdict for $9,000 was reduced to $4,000. Jewell v. Union P. Ry. Co., 16 Phila. 64.

Where the injury resulted in a miscarriage and other suffering a verdict for $2,000 was sustained. Joliet v. Conway, 17 Ill. App. 577.

right and wrong, they might think the plaintiff ought to have, unguided by any legal rule as to the elements.[1] In a late Connecticut case[2] Loomis, J., said: "The parties made no requests in relation to the damages. And it may not be perfectly clear that we ought to grant a new trial on account of the charge as given on this subject. It was, however, somewhat objectionable as not giving the jury any rule at all on the subject except 'their own sense of right and justice,' and that, too, in a case where sympathy for the plaintiff would naturally produce a powerful effect. There was danger that the jury might take the charge as meaning that their power over the damages was practically unlimited by any other rule."

§ 1257. False imprisonment. The injury of being illegally restrained of one's liberty is akin to that suffered from as- [732] sault and battery.[3] The injured party in such cases, even though the act complained of be done without malice, is entitled to recover the expenses reasonably incurred to procure discharge from the restraint, for loss of time, interruption of his business, and the suffering, bodily and mental, which the wrong may have occasioned.[4] A married woman cannot recover expenses paid by her husband in consequence of her false imprisonment; he must bring an independent action therefor.[5] The filthy condition of the jail in which the plaintiff was confined or any other discomfort or deprivation may be shown to enhance compensatory damages for mental anguish and discomfort.[6] But not wrongful acts done by an officer, if

[1] Keightlinger v. Egan, 65 Ill. 235; Hawes v. Kansas City, etc. Co., 103 Mo. 10; Gulf, etc. Ry. Co. v. Head, 15 S. W. Rep. 504. Compare Augusta & S. R. Co. v. Randall, 85 Ga. 297, 322.

[2] Wilson v. Granby, 47 Conn. 47.

[3] Cooley on Torts, 169; Comer v. Knowles, 19 Kan. 440, 441.

[4] Parsons v. Harper, 16 Gratt. 64; Fenelon v. Butts, 53 Wis. 344; Stewart v. Maddox, 63 Ind. 51; Jay v. Almy, 1 Woodb. & M. 262; Bonesteel v. Bonesteel, 30 Wis. 511; Blythe v. Tompkins, 2 Abb. Pr. 468; Abrahams v. Cooper, 81 Pa. St. 232; Ocean Steamship Co. v. Williams, 69 Ga. 251; Blanchard v. Burbank, 16 Ill. App. 375; Wheeler & W. Manuf. Co. v. Boyce, 36 Kan. 350; Wentz v. Bernhardt, 37 La. Ann. 636; Ross v. Leggett, 61 Mich. 445; Rown v. Christopher, etc. R. Co., 34 Hun, 471; Hays v. Creary, 60 Tex. 445; Ogg v. Murdock, 25 W. Va. 139; Clarke v. American Dock & I. Co., 35 Fed. Rep. 478; Kilbourn v. Thompson, MacArthur & M. (D. C.) 491; Hewlett v. George, 68 Miss. 703.

[5] Burnham v. Webster, 54 N. Y. Super. Ct. 30.

[6] Fenelon v. Butts, 53 Wis. 344; Kindred v. Stitt, 51 Ill. 401; Abrahams v. Cooper, 81 Pa. St. 232;

they were unauthorized by the defendant.[1] If the arrest is made after the suit has been begun the expense of defending the latter cannot be recovered.[2] The plaintiff may recover for loss of work not only up to the time of the suit, but also for the time lost thereafter, if by the arrest he failed to get the work he otherwise would have obtained.[3] Where the master of a vessel unjustifiably imprisoned a seaman until his effects on board were lost or sold it was held that the damages should not be vindictive unless the motives of the master were bad; but compensation should usually be made for the time of the imprisonment, the value of the articles lost or sold, and interest on the amount, and passage home.[4] There cannot be a recovery for a loss resulting from sickness which is experienced after the imprisonment has ceased unless the petition sets forth the fact of the sickness or facts from which it may be inferred, or from which the law will imply that it would necessarily follow from the facts alleged.[5] The arrest being unlawful, it is not necessary to prove malice;[6] and probable cause is only material in mitigation of damages.[7] A declaration which alleges that the imprisonment was by means of threats and violence, without any reasonable cause and unlawful, states the ingredients of malice, and is broad enough to support a charge on that basis.[8] And in such cases, when there is no possible way of measuring damages with any certainty, the sound discretion of the jury under all the circumstances is the only measure practicable.[9]

Clarke v. American Dock & I. Co., 35 Fed. Rep. 478.

[1] Ocean Steamship Co. v. Williams, 69 Ga. 251.

[2] Gibbs v. Randlett, 58 N. H. 407.

[3] Thompson v. Ellsworth, 39 Mich. 719.

[4] Jay v. Almy, 1 Woodb. & M. 262.

[5] Atchison, etc. R. Co. v. Rice, 36 Kan. 593.

[6] Wentz v. Bernhardt, 37 La. Ann. 636; Gross v. Rice, 71 Me. 241; Chismon v. Carney, 33 Ark. 316; Painter v. Ives, 4 Neb. 122.

[7] Norman v. Manciette, 1 Sawyer, 484; Sleight v. Ogle, 4 E. D. Smith, 445; Brown v. Chadsey, 39 Barb. 253.

[8] Brushaber v. Stegemann, 22 Mich. 266, 270.

[9] Id. See Josselyn v. McAllister, 22 Mich. 300; Farman v. Lauman, 73 Ind. 568; Harris v. Louisville, etc. R. Co., 35 Fed. Rep. 116. In the following cases excessive verdicts were set aside: Woodward v. Glidden, 33 Minn. 108; Dodge v. Alger, 53 N. Y. Super. Ct. 107; Fotheringham v. Adams Exp. Co., 36 Fed. Rep. 252; Brown v. Chadsey, 39 Barb. 253; Reuck v. McGregor, 32 N. J. L. 70; McConnell v. Hampton, 12 Johns.

§ 1258. Same subject. If the defendant was actuated by [733] actual malice in causing the arrest, damages will be aggravated on that account.[1] But the absence of malice and proof of good faith will be no justification of an unlawful imprisonment, nor exempt the wrong-doer from the payment of actual damages.[2] Exemplary damages should not be allowed against an officer who makes or causes an illegal arrest unless he acts in bad faith, or is guilty of some oppression or misconduct.[3] But where an officer is guilty of bad faith, or one not an officer sets the law in motion and causes an arrest on process in bad faith, the jury will be warranted in allowing liberal damages.[4] Exemplary damages may be awarded in a proper case, though there is no proof of actual damage.[5] So far as damages depend on malice and would be enhanced by it, they will be reduced by proof which negatives malice. Evidence of good faith is therefore generally admissible in

234; Kilbourn v. Thompson, MacArthur & M. (D. C.) 401. Where an arrest was justifiable, but the detention of the prisoner continued for an unreasonable length of time, and he was handcuffed and carried out of the county without a warrant, it was held erroneous to instruct that nominal damages were legally possible. Potter v. Swindle, 77 Ga. 419.

[1] Ross v. Leggett, 61 Mich. 445; Woodward v. Glidden, 33 Minn. 108; Grace v. Dempsey, 75 Wis. 313; Parsons v. Harper, 16 Gratt. 64; Parsons v. Lloyd, 3 Wils. 341; S. C., 2 W. Bl. 845; Turner v. Telgate, 1 Lev. 95; Barker v. Braham, 3 Wils. 368; Codrington v. Lloyd, 8 A. & El. 449; Curry v. Pringle, 11 Johns. 444; Gold v. Bissell, 1 Wend. 210; Fellows v. Goodman, 49 Mo. 62; Warwick v. Foulkes, 12 M. & W. 507; Josselyn v. McAllister, 22 Mich. 300; Thorpe v. Wray, 68 Ga. 359.

A plea of justification if not proved authorizes the jury to allow additional damages. Ocean Steamship Co. v. Williams, 69 Ga. 251.

[2] Mitchell v. Malone, 77 Ga. 301; Patzack v. Von Gerichten, 10 Mo. App. 424; Painter v. Ives, 4 Neb. 122; Comer v. Knowles, 17 Kan. 440, 441; Newton v. Locklin, 77 Ill. 103; Carey v. Sheets, 60 Ind. 17; Van Deusen v. Newcomer, 40 Mich. 90; McCall v. McDowell, Deady, 233.

A person was convicted before a justice of two distinct offenses, and committed to the house of correction under two warrants, one legal and the other illegal, and confined under both warrants during the whole period of his imprisonment; held, his imprisonment was lawful, and that if the justice was liable at all for issuing the illegal warrant he was liable only for nominal damages. Doherty v. Munson, 127 Mass. 495.

[3] Hamlin v. Spaulding, 27 Wis. 360; La Roe v. Roeser, 8 Mich. 537; McCall v. McDowell, Deady, 233; Dinsman v. Wilke, 12 How. 405.

[4] Marsh v. Smith, 49 Ill. 399; Fellows v. Goodman, 49 Mo. 62; Harris v. Louisville, etc. R. Co., 35 Fed. Rep. 116; Union Depot R. Co. v. Smith, 16 Colo. 361.

[5] Blanchard v. Burbank, 16 Ill. App. 375.

mitigation; but this mitigation will be limited to the damages it tends to controvert.[1] Evidence of provocation can be received only in mitigation of exemplary damages.[2] If it is shown in mitigation that the plaintiff was strongly suspected and accused by the public of the crime for which he was arrested, the latter may show his good character and reputation in rebuttal.[3] If money or property has been taken from the plaintiff by the defendant it may be recovered if it is declared for.[4] The plaintiff's ability to have paid the fine imposed and avoided the imprisonment complained of does not affect the measure of his recovery.[5]

[1] Barnes v. Viall, 6 Fed. Rep. 661; Brown v. Chadsey, 39 Barb. 262; Fenelon v. Butts, 53 Wis. 344.

In Brown v. Chadsey, *supra*, Emott, J., said: "In an action for false imprisonment the gist of the action is an unlawful detention. Malice in the defendant will be inferred, so far at least as to sustain the action; and the only bearing of evidence to show or disprove malice is upon the question of damages. So, also, probable cause, or reasonable grounds of suspicion, against the party arrested afford no justification of an arrest or imprisonment which is without authority of law."

In Comer v. Knowles, 17 Kan. 441, Valentine, J., said: "Malice and wilfulness are not essential elements of false imprisonment; and in this the action of false imprisonment differs from that of libel, slander, malicious prosecution, and perhaps some others. [734] It is true, however, that malice and wilfulness may belong to any particular case of false imprisonment; but when they do so belong to such particular case, they belong to it as a portion of the *special* facts of that case, for which special or exemplary damages may be awarded, and do not belong to the case as a portion of the general and essential facts of the case for which general damages may be awarded. In the present case I should think that the plaintiff below did not claim that the defendant below acted wilfully or maliciously, and did not claim that he, the plaintiff, had any right to recover enhanced damages on account of any wilfulness or malice. If I am correct in this, the court below did not err in excluding the defendant's evidence. For all that such evidence tended to prove was that the defendant acted honestly and in good faith in temporarily depriving the plaintiff of his liberty. Such evidence did not tend to prove that the defendant acted legally; and it could not be introduced for the purpose of diminishing the general and actual damages which the plaintiff sustained. Now, if the plaintiff had claimed enhanced damages, or, in other words, exemplary damages, on account of any wilfulness or malice on the part of the defendant, then said evidence would have been admissible in mitigation of such damages, and the court below in that case could not rightfully have excluded the evidence."

[2] Grace v. Dempsey, 75 Wis. 313.

[3] American Exp. Co. v. Patterson, 73 Ind. 430.

[4] Blanchard v. Burbank, 16 Ill. App. 375.

[5] Barker v. Anderson, 81 Mich. 508.

CHAPTER XXXVII.

DAMAGES RESULTING FROM DEATH.

§ 1259. No action for at common law.
1260. Nature of the statutory action.
1261. Diversities as to beneficiaries.
1262. Only pecuniary losses compensated in England and Canada.
1263. Same subject; rule in the United States.
1264. At least nominal damages recoverable.
1265. Recovery by widow.
1266. Recovery by husband.
1267. Children's loss from death of parents.
1268–1271. Facts and circumstances to be considered in estimate of damages.
1272–1275. Recovery for death of child.
1276. Damages recoverable by collateral kindred.
1277. Damages to the deceased's estate.
1278. Special damages.
1279. Contracts exempting from liability.
1280. Where the injury is done in another state.

§ 1259. No action for at common law. By the common law all right of action for personal injury, whether it be the cause of death or not, is extinguished by the death of the injured party; the cause of action dies with the person entitled to sue.[1] By that law the death of a human being is not a private wrong and no compensation therefor or for any resulting loss is recoverable.[2] Various reasons have been suggested to account for this rule; and it is probable that they have not wholly lost their force. The rule does not, however, prevent an action by the master for the loss of the services of his apprentice or by the husband for those of his wife by a wrongful

[1] Broom's Leg. Max. 400; Zabriskie v. Smith, 13 N. Y. 322.

[2] Insurance Co. v. Brame, 95 U. S. 754; The Harrisburg, 119 id. 199; Nickerson v. Harriman, 38 Maine, 277; Carey v. Berkshire R. Co. 1 Cush. 475; Connecticut Mut. Ins. Co. v. New York R. Co., 25 Conn. 272; Green v. Hudson R. R. Co., 28 Barb. 9; S. C., 2 Keyes, 294; Worley v. Cincinnati R. Co., 1 Handy, 481; Pennsylvania R. Co. v. Adams, 55 Pa. St. 499; Selma R. Co. v. Lacey, 49 Ga. 106; Long v. Morrison, 14 Ind. 595; Indianapolis, etc. R. Co. v. Keely, 23 Ind. 133; Hyatt v. Adams, 16 Mich. 180; Kramer v. San Francisco St. R. Co., 25 Cal. 434; Grosso v. Railroad Co., 50 N. J. L. 317; Eden v. Lexington R. Co., 14 B. Mon. 204.

personal injury though death ensue; since in these cases the action accrued to the master or husband, and no reasons exist for holding that the death of the injured servant or wife could affect it.[1] By parity of reason, why should not the parent

[1] In Hyatt v. Adams, 16 Mich. 191, Christiancy, J., said: "For myself I think — and the form of expression in which the principle is announced by Lord Ellenborough (in Baker v. Bolton, 1 Camp. 493) would indicate that such was his opinion — that the reason of the rule is to be found in that natural and almost universal repugnance among enlightened nations to setting a price upon human life, or any attempt to estimate its value by a pecuniary standard, a repugnance which seems to have been strong and prevalent among nations in proportion as they have been or become more enlightened or refined, and especially so where the Christian religion has exercised its most beneficent influence, and where human life has been held most sacred. Among barbarous and half civilized nations it has been common to find a fixed and prescribed standard of value or compensation for human life, which is often found to be carefully graduated by the relative importance of the position in the social scale which the deceased may have occupied. While this has been the natural result, it has at the same time been, to some extent, the *cause* of their inhuman customs, their barbarous manners and social degradation, and the comparatively low estimate in which human life has been held among them." Grosso v. Railroad Co., 50 N. J. L. 317; Worley v. Cincinnati R. Co., 1 Handy, 481.

Such cases are distinguishable from those in which death is the fact on which the right of action depends, as in Connecticut Mut. L. Ins. Co. v. New York, etc. R. Co., 25 Conn. 265. In that case a life insurance company sought to recover from a railroad company damages for negligently causing the death of a person whose life it had insured, and thereby subjecting it to the payment of the policy. Storrs, J., thus discourses on the subject of actions depending on the death of a human being: "It is clear from the declaration that a pecuniary injury has been sustained by the plaintiffs in consequence of the unlawful conduct of the defendants. If the injury thus set forth be actionable, or an injury in a legal sense, there must be a recovery. But we are of the opinion that the wrong complained of is not the proper subject of a suit at law, both for reasons appertaining to the peculiar nature of the injury, and to the manner in which its consequences are brought home to the party claiming redress. The act complained of is the producing of death. We are at once met with the inquiry whether under the common-law system a party is liable, *civiliter*, for the destruction of human life, whatever the nature of the consequences may be, or however clearly such a wrong may involve pecuniary damage. The whole history of the common law of England discloses no recognition of such liability, although instances of pecuniary loss resulting from death, designedly or negligently produced by human agency, must have been almost without number. In one or two cases the suggestion of such a liability has been summarily contradicted by the courts, with such a meagerness or total absence of argu-

have his action for a like loss in case of injury to his infant child, notwithstanding the death of such child?[1] In these cases the damages are not the result of the death but of the wrongful act disabling the person from whom the plaintiff had

ment as almost to give the contradiction the semblance of an *obiter dictum*. Lord Ellenborough (Baker v. Bolton, 1 Camp. 493) said briefly, when a husband sought to recover damages against a wrong-doer who had caused his wife's death, for the loss of her society and for the benefit of her services, that in a civil court the death of a human being cannot be complained of as an injury. It is manifestly not one reason but many which lie at the basis of the common-law rule. Considerations of the most varied and grave character would present themselves to the mind of any court, even though the matter should be submitted to them as an original question, to dissuade them from entertaining any action sounding in damages and seeking a recovery on account of the destruction of life. Should damages be demanded in right of the deceased for the injury to him, in the name of his representative, a right would clearly be claimed by the mere representative, which, from the nature of things, could never have inhered in the principal for one instant of time. No contract even could be made recognizing such a right, and providing for the compensation for the loss of one's life. The contract of insurance upon lives was tolerated, not on the ground that death was a proper subject of pecuniary remuneration, but as a mere wager, which might, if lawful, as all wagers once were, depend as well upon the duration of life as upon any other contingency. Or if a suit should be brought to recover for the mental suffering, loss of society, comfort, support and protection resulting from the death of another person, we should see at once, so intertwined is the web of human affection, interest and relationship, that the author of his death, however slight or accidental his default, would be responsible in numberless actions brought on behalf of wives, children, friends, brothers, sisters and dependents of all degrees, to say nothing for the present of creditors; and for an injury of such incalculable extent writers on jurisprudence, perhaps without strict accuracy, have assigned the awful magnitude of the wrong as the reason why neither court nor jury have ever been trusted by the law with the function of estimating it. The experiment of seeking legal redress for the consequences of death from the wrong-doer has sometimes been tried; always in cases where the pecuniary consequences of the injury were so clearly traceable as to make a right

[1] Eden v. Lexington, etc. R. Co., 14 B. Mon. 204; Hyatt v. Adams, 16 Mich. 191.

In Baker v. Bolton, 1 Camp. 493, Lord Ellenborough ruled that the husband might recover for distress of mind and loss of society from the moment of the injury to his wife up to the time of her death, but that in a civil court the death of a human being could not be complained of as an injury; and the damages to the plaintiff because of the injury to his wife must stop with the period of her existence.

the right to service, and the recovery is limited to the loss during the interval between the injury and the death.

The common-law rule has been abrogated by statutes in all or nearly all the states of the Union as well as in England. These provide that compensation may be recovered for the injury or pecuniary loss resulting from the death of a person, caused by the wrongful act or negligence of another. For reasons connected with the public good this modern legislation has in special cases, and for the benefit of particular persons and to a limited amount, created a liability for injuries resulting from death where caused by misconduct of a certain specified character. These enactments subject the wrong-doer to damages which are to be appropriated as is just for the benefit of those who, in ordinary cases, would be the greatest pecuniary sufferers.[1]

§ 1260. Nature of the statutory action. By statute in some states the right of action of the injured party survives for all damages which he was entitled to recover. The right of action of the deceased is preserved notwithstanding his death. But there is not recoverable in an action which so survives any damages which resulted from the death. Such legislation and the rights accruing thereunder are therefore not germane to the subject of this chapter.[2] In Tennessee provision is made by statute for the survival of the action which accrued to the deceased for all the damages he was entitled to recover; and also damages resulting to the parties for whose use and benefit the action survives from the death, consequent upon the injuries received.[3] The latter damages

to compensation very like a logical necessity; as, for instance, where a husband has lost his wife, to all whose manual services he was entitled (1 Camp. 493); and where a father has been deprived of his child, all whose labor with all its avails belonged exclusively to his parent. Carey v. Berkshire R. Co., 1 Cush. 475. But such actions, if countenanced, would furnish no sound apology for a limitation of the principle which they involved, and when tested by argument have invariably been discouraged. The case of Ford v. Monroe, 20 Wend. 210, is not only an anomaly on the score of principle, but anomalous by reason of the fact that a question so momentous as the right to treat death as an actionable injury was overlooked both by counsel and the court in every stage of the case."

[1] Connecticut Mut. L. Ins. Co. v. New York, etc. R. Co., 25 Conn. 275.

[2] See Goodsell v. Hartford, etc. R. Co., 33 Conn. 51.

[3] Code of Tennessee, §§ 2291, 2292,

are those generally provided for in statutes which are the subject of this chapter. In this country they are chiefly modeled after the English statute commonly called Lord Campbell's

act of March, 1883; Illinois C. R. Co. v. Crudup, 63 Miss. 291; Louisville, etc. R. Co. v. Burke, 6 Cold. 45; Nashville, etc. R. Co. v. Prince, 2 Heisk. 580; Holton v. Daly, 106 Ill. 131.

In Michigan the right of action given by Howell's Statutes (vol. 2, § 8314) to the personal representatives of the deceased person for the personal injury resulting from his negligent killing and that which survives under 3 id., § 7397, for negligent injuries to persons, are separate and distinct causes of action, and the latter cannot be introduced into a cause based upon the right under the statute first cited by amendment to the declaration. Hurst v. Detroit City R., 84 Mich. 539.

In Kentucky one statute provides for the survival of actions for personal injuries and another for the recovery of damages resulting from death when it is caused by any wrongful act or negligence. Under the former there can be no recovery where the injury causes immediate death, for then there was in the decedent no right of action to survive. It is otherwise if there was an appreciable interval. It is held in that state, where the personal injury causes death not instantly, that there is an election to sue under either provision; but recovery under one bars recovery under the other. Hansford v. Payne, 11 Bush, 380; Conner v. Paul, 12 id. 144.

In Illinois, under similar provisions, it is held that an action which survives is for a personal injury which does not cause death; that an action given for recovery of damages which result from death is the only action for the negligence or fault which causes it. Holton v. Daly, 106 Ill. 131.

The same is held in Kansas. McCarthy v. Railroad Co., 18 Kan. 46. See Hulbert v. Topeka, 34 Fed. Rep. 510.

In Maine the damages resulting from death are allowed only in cases where the death was instantaneous; and where the injured person does not die immediately the action survives and no other remedy is needed. State v. Maine C. R. Co., 60 Me. 490; State v. Grand Trunk Ry., 61 id. 114.

The language of the statutes where survival of actions for personal injury is provided for and there is also provision for recovery of damages resulting from death is broad enough to entitle the personal representative to recover the damages which accrue to the decedent and also those which result from the death ensuing from the same injury. As appears by the foregoing cases, there is a reluctance in the states from which those citations are taken to allow damages in this broad sense; or to regard those statutes as affording a right to cumulative damages. The actions thus provided for give damages mostly of a different nature, and it would seem quite consistent with the policy of the statutes, if not necessary to their natural force and operation, to allow both classes of damages. To hold otherwise, if death ensues from the personal injury for which the injured person has a right of action, is unwarrantably to restrict the operation of the statute. There is nothing on the face of these statutes to make one operate to repeal the other or to require an election under which the action should be brought, with the

Act, the text of which will be found in a note below.[1] There has been some diversity of expression as to the limits of the cause of action thus created.[2] A personal injury by the defendant's wrongful act, neglect or default is the basis of his liability, but only because it produces death, and the liability is only for the damages which result from the death to those for whose use and benefit the statutory action is given. It is a new cause of action because there is an element in it additional to that which constituted the cause of action in favor of the person injured, viz.: death must ensue as a consequence of the injury to him.[3] It is a different cause of action also, because only the damages which ensue from the death are recoverable. It is essential that the personal injury which causes the death appear to have proceeded from the wrongful act, neglect or default of the defendant. Any evidence therefore which would be admissible in an action by the injured person to controvert that charge is equally admissible as a defense to the statutory action.[4] And it has been held that any subsequent matter of discharge, arising in the

effect of renouncing the right given by the other. In Needham v. Grand Trunk Ry. Co., 38 Vt. 294, the court held that these statutes afford cumulative remedies for the same wrong; that both were available. See remarks of Brewer, J., in Hulbert v. Topeka, 34 Fed. Rep. 510; Mr. Darling's Article, 28 Am. Law Reg. 385.

[1] 9 and 10 Vict., ch. 93. It recites that no action at law is now maintainable against a person who by his wrongful act, neglect or default may have caused the death of another person, and it is oftentimes right and expedient that the wrong-doer in such case should be answerable in damages for the injury so caused by him; and enacts that whensoever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the person who would have been liable if death had not ensued shall be liable to an action for damages notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony.

[2] Blake v. Midland Ry. Co., 18 Q. B. 93; Read v. Great Eastern Ry. Co., L. R. 3 Q. B. 555; Barnett v. Lucas, Irish Rep. 6 C. L. 247; Pym v. Great Northern Ry. Co., 2 B. & S. 759; Leggott v. Great Northern Ry. Co., 1 Q. B. Div. 599; Safford v. Drew, 3 Duer, 627; Whitford v. Panama R. Co., 23 N. Y. 465; Holton v. Daly, 106 Ill. 131.

[3] Andrews v. Hartford, etc. R. Co., 34 Conn. 57.

[4] Kelly v. Hendrie, 26 Mich. 255; Michigan C. R. Co. v. Campau, 35 id. 468; Bresnahan v. Michigan C. R. Co., 49 Mich. 410; Tucker v. Chap-

life-time and by the act of the injured party, sufficient to satisfy, bar or release his action, will be fatal to the new action by his personal representatives if death ensue.[1]

§ **1261. Diversities as to beneficiaries.** The statutes under consideration do not provide uniformly for the same distribution of the fruits of recoveries. The most noticeable difference and the one which affects greatly the elements of damage is that between statutes which provide that the damages shall be distributed to the widow, husband and near kin of the deceased and those which provide that they shall be part of his estate. Under the former the beneficiaries may recover the amount of loss resulting to them from the death; under the latter no such inquiries are relevant, but the question is how much has his estate suffered by his death. The subject of damages under statutes in the first category will be now considered.

§ **1262. Only pecuniary losses compensated in England and Canada.** There is no dissent in the English decisions made since 1852 from the rule that damages cannot be awarded for mental suffering or loss of society, but must be restricted to pecuniary loss only. The language of Lord Campbell's act on this point is: "The jury may give such damages as they may think proportionate to the injury resulting from such death to the parties respectively for whom or for whose benefit such action shall be brought." Its title is "an act for compensating the families of persons killed."

lin, 2 Car. & Kir. 730; Willetts v. Buffalo, etc. R. Co., 14 Barb. 588.

In McCue v. Klein, 60 Tex. 168, it was held killing a man by inducing him to drink a pint of whisky was actionable.

If the person entitled to the benefit of the recovery contributed to cause the death it will defeat the action. Williams v. Railroad Co., 60 Tex. 205; Pittsburgh, etc. R. Co. v. Vining, 27 Ind. 513; Baltimore, etc. R. Co. v. State, 30 Md. 47; Railway Co. v. Snyder, 24 Ohio St. 670. In the latter case the contributory negligence of the father in the exposure of his infant child to the injury which caused its death was held fatal to his action, though it would not have affected the action if the infant had survived.

[1] Read v. Great Eastern Ry. Co., L. R. 3 Q. B. 555; Dibble v. Railroad Co., 25 Barb. 183. A settlement with the decedent held a bar. Whitford v. Panama R. Co., 23 N. Y. 484, per Comstock, J., dissenting. His release given the same effect. Holton v. Daly, 106 Ill. 131. So a recovery by him in his life-time and the judgment paid. Littlewood v. Mayor, 89 N. Y. 24.

It also provides that the amount recovered shall be divided amongst the parties mentioned in it in such shares as the jury by their verdict shall find and direct. These provisions in it and the difficulty of apportioning the damages for *solatium* materially influenced the court in reaching the conclusion that only pecuniary losses are within the intent of the law.[1] The Canadian statute is not unlike the English. The courts of Ontario have differed greatly as to the signification of the word "injury." The majority of the judges of the queen's bench division held that the damages resulting from the loss of a wife or mother, no matter how excellent her qualities or how faithful she might be in discharging her duties and promoting the material and moral condition and prospects of her children, are purely sentimental and not of a sufficiently pecuniary character to support an action. A majority of the judges of the court of appeal differed from this view and held that what is meant by pecuniary loss in all the decided cases in which the expression has been used is the loss of some benefit or advantage which is capable of being estimated in money as distinguished from mere sentimental losses. A majority of the supreme court of the Dominion of Canada concurred in this view.[2] The same court holds that no recovery can be had for *solatium* merely. This is the rule under the code of Lower Canada.[3]

§ 1263. Same subject; rule in the United States. In some states the statutes provide in terms for the recovery of damages for a pecuniary injury, and in others the word pecuniary is not used, but the construction given is the same, restricting the damages to such injury. The theory of the statutes is that those for whom compensation is provided have a pecuniary interest in the life of the person killed, and consequently the amount of recovery is limited to the value of that interest.[4] The rule confining recoveries to pecuniary losses is

[1] Black v. Midland R. Co., 18 Q. B. 93.

[2] St. Lawrence, etc. Ry. v. Lett, 11 Can. Sup. Ct. 422; Lett v. St. Lawrence, etc. Ry., 11 Ont. App. 1; S. C., 1 Ont. 545.

[3] Canadian P. Ry. Co. v. Robinson, 14 Can Sup. Ct. 105.

[4] Kesler v. Smith, 66 N. C. 154; Telfer v. Northern R. Co., 30 N. J. L. 188; Quin v. Moore, 15 N. Y. 434; Chicago v. Major, 18 Ill. 349; Chicago, etc. R. Co. v. Morris, 26 id. 400; Conant v. Griffin, 48 id. 412; Illinois C. R. Co. v. Weldon, 52 id. 295; Chicago v. Scholten, 75 id. 468; Baltimore,

not applied in a strict sense. "When we consider," says Fullerton, "the defect which the statute was designed to remedy, it is taking too narrow a view of the matter to say that the word *pecuniary* was used in so limited a sense as to embrace only losses of money."[1] Nothing can be recovered for the mental suffering of a beneficiary or as a *solatium;*[2] although exemplary damages are by the terms of the statutes recoverable in several states.[3]

etc. R. Co. v. State, 24 Md. 271; S. C., 33 id. 542; Paulmier v. Erie R. Co., 34 N. J. L. 151; Kelley v. Chicago, etc. R. Co., 50 Wis. 381; Regan v. Chicago, etc. R. Co., 51 id. 599; McKeigue v. Janesville, 68 id. 50; Barley v. Chicago, etc. R. Co., 4 Biss. 430; Murphy v. New York, etc. R. Co., 88 N. Y. 445; Donaldson v. Mississippi & M. R. Co., 18 Iowa, 280; Long v. Morrison, 14 Ind. 595; James v. Christy, 18 Mo. 162; Owen v. Brockschmidt, 54 Mo. 285; Porter v. Hannibal, etc. R. Co., 71 Mo. 66; Pennsylvania R. Co. v. McCloskey, 23 Pa. St. 526; Same v. Butler, 57 id. 335; Huntingdon, etc. R. Co. v. Decker, 84 id. 419; Catawissa Ry. Co. v. Armstrong, 52 id. 282; Pennsylvania R. Co. v. Bantom, 54 id. 495; Nashville R. Co. v. Stevens, 9 Heisk. 12.

[1] McIntyre v. New York C. R. Co., 37 N. Y. 295; Tilley v. Hudson R. R. Co., 24 id. 471; Pennsylvania R. Co. v. Keller, 67 Pa. St. 300.

[2] Kansas P. Ry. Co. v. Miller, 2 Colo. 465, 466; Chicago v. Major, 18 Ill. 349; Chicago, etc. R. Co. v. Morris, 26 id. 400; Chicago, etc. Ry. Co. v. Shannon, 43 id. 346; Illinois C. Ry. Co. v. Weldon, 52 id. 290; Holton v. Daly, 106 id. 131; Chicago, etc. Ry. Co. v. Harwood, 80 id. 88; Covington St. Ry. Co. v. Packer, 9 Bush, 455; Barley v. Chicago, etc. R. Co., 4 Biss. 430; Etherington v. Prospect Park etc. Ry. Co., 88 N. Y. 641.

In California the rule that the actual pecuniary injury sustained by the plaintiff measures the damages recoverable for the death is not very strictly adhered to. In every action under the statute of that state such damages may be given as under all the circumstances of the case may be just. In Beeson v. Green Mt. G. M. Co., 57 Cal. 20, Myrick, J., said: "We think that the social and domestic relations of the parties, their kindly demeanor toward each other, the society, were parts of 'all the circumstances of the case' for the jury to take into consideration in estimating what damages would be just from a pecuniary point of view, especially as there is nothing in the case to show that the jury were instructed that they might give damages by way of solace." See Cook v. Clay St. R. Co., 60 Cal. 604; Nehrbas v. Central P. R. Co., 62 Cal. 320. In Munro v. Dredging Co., 84 Cal. 527, the court say: "In our opinion the damages should be confined to the pecuniary loss suffered by the mother, and the loss of the comfort, society, support and protection of the deceased."

[3] Louisville, etc. R. Co. v. Orr, 8 South. Rep. 360; Thompson v. Louisville, etc. R. Co., id. 406; Kansas P. R. Co. v. Miller, 2 Colo. 467; Same v. Lundin, 3 id. 100.

In California the act of 1872, the object of which was "to prevent homicides," justifies the allowance of exemplary damages. See *post*, § 1269

§ 1264. At least nominal damages recoverable. In England it seems that some actual damages must be shown as essential to the maintenance of the action; that merely to show that in other respects the facts bring the case within the statute will not entitle the plaintiff to nominal damages.[1] In this country at least nominal damages may be recovered. "The only condition," says Comstock, J., "on which the right of the administrator to sue under the statute depends is the common-law right of the injured person to maintain an action if he were living."[2] "It may be added," he said, "that, as the statute expressly gives the right of action, nominal damages at least could be recovered."[3] And where the action is given for the benefit of the widow or next of kin, and it appears that there are such, there may be a recovery to that extent, though no actual or substantial loss to them be shown.[4] Actual damages resulting from the death are made recoverable by a variety of expressions in the several statutes, but they are all interpreted in general to indicate substantially the same view on phases of the injury. The main inquiry is, what is the pecuniary loss to those persons for whose benefit in a particular case the action is brought? What aid or advantage, having a pecuniary value, have these persons lost by reason of the death? This inquiry is considerably diversified by the different relationships embraced by the statute. This consideration justifies separate generalization of the action relative to each class of beneficiaries.

§ 1265. Recovery by widow. The recovery by a widow of damages resulting to her from the death of her husband will be governed by the general rule applicable to all the beneficiaries provided for by the statute, which is the present value

and note 5; Savannah & M. R. Co. v. Shearer, 58 Ala. 672.

[1] Duckworth v. Johnson, 4 H. & N. 653; Boulter v. Webster, 13 W. R. 289.

[2] Quin v. Moore, 15 N. Y. 434.

[3] Id.; Lyons v. Cleveland, etc. R. Co., 7 Ohio St. 337. Compare Regan v. Chicago, etc. R. Co., 51 Wis. 599.

[4] 2 Thompson on Neg. 1293; Rockford, etc. R. Co. v. Delaney, 82 Ill. 198; Johnson v. Missouri P. R. Co., 18 Neb. 690; Chicago v. Scholten, 75 Ill. 468; Chicago, etc. R. Co. v. Shannon, 43 id. 338; Grotenkemper v. Harris, 25 Ohio St. 510; Railroad Co. v. Barron, 5 Wall. 90; Pennsylvania R. Co. v. Keller, 67 Pa. St. 300; North Pennsylvania Ry. Co. v. Kirk, 90 id. 15; Howard v. Delaware & H. R. C. Co., 40 Fed. Rep. 195. But see Hurst v. Detroit City Ry., 84 Mich. 539–548.

of her reasonable expectation of pecuniary advantage from the continuance of the life of the deceased.[1] The damages recoverable by her will include the value of her support by and the protection of her husband during the time he would probably have lived and supported her but for his death. The jury may also consider the addition that the earnings of the deceased would probably have made to his wealth and property had he continued to live, and the reasonable expectation which the widow had of pecuniary advantage by ultimately receiving a share of such earnings as one of his heirs.[2] The amount of his probable accumulations would depend on his age, occupation, habits, bodily health and ability.[3] A wife has a right to support during her life out of her husband's estate.[4] She partakes of the benefits of his affluence while they both live, and if she survive, her share of the estate is always augmented by its increase. So long as the legal relation of husband and wife exists, without reference to the will of the husband, the wife not having forfeited her right as such by her own wrong, she is entitled to support from him in accordance with her station in life. Hence, the damages to which she is entitled are not affected by the facts that her husband may have left her a year or more before his death and had no communication with her in the meantime, and may have intended never to return

[1] David v. Southwestern R. Co., 41 Ga. 223; Potter v. Chicago, etc. R. Co., 21 Wis. 372; Louisville, etc. R. Co. v. Case, 9 Bush, 728; Railroad Co. v. Barron, 5 Wall. 93; Telfer v. Northern R. Co., 30 N. J. L. 188; Rafferty v. Buckman, 46 Iowa, 195; Louisville, etc. R. Co. v. Stacker, 86 Tenn. 343; Central R. Co. v. Thompson, 76 Ga. 770.

[2] Lawson v. Chicago, etc. R. Co., 64 Wis. 448; Castello v. Landwehr, 28 id. 522; Annas v. Milwaukee, etc. R. Co., 67 id. 48; Kaspari v. Marsh, 74 id. 563.

[3] Kansas Pac. R. Co. v. Lundin, 3 Colo. 94; Holmes v. Oregon, etc. R. Co., 6 Sawy. 262; Au v. New York, etc. R. Co., 29 Fed. Rep. 72; Shaber v. St. Paul, etc. R. Co., 28 Minn. 103; Chicago v. Scholten, 75 Ill. 468; Chicago, etc. R. Co. v. Moranda, 93 id. 302; Roose v. Perkins, 9 Neb. 304; Taylor v. Western P. R. Co., 45 Cal. 323; McIntyre v. New York Cent. R. Co., 37 N. Y. 287; Catawissa R. Co. v. Armstrong, 52 Pa. St. 282; Mansfield, etc. Co. v. McEnery, 91 id. 185; Kesler v. Smith, 66 N. C. 154; Burton v. Wilmington, etc. R. Co., 82 id. 504; Nashville, etc. R. Co. v. Prince, 2 Heisk. 580; Central R. Co. v. Thompson, 76 Ga. 770; Baltimore, etc. R. Co. v. Wightman, 29 Gratt. 431; Opsahl v. Judd, 30 Minn. 126; Ohio, etc. R. Co. v. Voight, 122 Ind. 288.

[4] Bish. Marr. Women, §§ 57, 58, 892.

to her or to contribute to her support.[1] Life tables may be used to ascertain the gross amount of the value of life; but such amount must be reduced to its present value; in other words, where the value of the life, less the personal expenses of the deceased, is the measure of damages, the sum awarded must not exceed the amount which would be realized each year during the estimated continuance of life by his net earnings.[2] The number of children dependent upon a widow for support is a proper subject of proof in an action by her to recover for the death of her husband. It shows her loss. In his life he was bound to support them; after his death that obligation, to the extent of her pecuniary ability, devolved upon their mother.[3] The widow's remarriage will not preclude her from maintaining the action.[4] Insurance received by a widow from a policy on her husband's life is not to be deducted from the damages assessed in her favor in an action to recover for his death.[5]

§ 1266. Recovery by husband. The right of a husband to damages resulting from the death of his wife extends to all elements of his loss which have a pecuniary value. He cannot recover damages of a sentimental character;[6] as for loss of her

[1] Dallas & W. Ry. Co. v. Spicker, 61 Texas, 427.

[2] Atlanta, etc. R. Co. v. Newton, 85 Ga. 517; Rowley v. London, etc. R. Co., L. R. 8 Exch. 221.

[3] Mulcairns v. Janesville, 67 Wis. 24.

[4] International, etc. R. Co. v. Kuehn, 70 Texas, 582; S. C., 35 Am. & Eng. R. Cas. 421.

The Georgia code provides that "a widow, and if no widow, a child or children, may recover for the homicide of the husband or parent," and gives the right of survivorship to the children if the widow dies. A right of action in a widow does not die on her remarriage; and the fact that thereby she becomes the wife of a wealthy man does not lessen the amount which she is entitled to recover. Georgia R. & B. Co. v. Garr, 57 Ga. 277. In Georgia the damages may be mitigated by proof of the deceased's contributory negligence. Atlanta, etc. R. Co. v. Newton, 85 Ga. 517.

[5] Grand Trunk Ry. Co. v. Jennings, 13 App. Cas. 800; vol. 1, § 158.

[6] Davis v. Guarnieri, 45 Ohio St. 470, 482; Bolinger v. St. Paul, etc. R. Co., 36 Minn. 418; Chicago v. Major, 18 Ill. 349, 360; Holton v. Daly, 106 id. 131, 138; Chicago, etc. R. Co. v. Morris, 26 id. 400; Gaither v. Kansas City, etc. R. Co., 27 Fed. Rep. 544; Little Rock, etc. R. Co. v. Barker, 39 Ark. 491; St. Louis, etc. R. Co. v. Freeman, 36 id. 41; Au v. New York, etc. R. Co., 29 Fed. Rep. 72; Demarest v. Little, 47 N. J. L. 28; Rains v. St. Louis, etc. R. Co., 71 Mo. 165. See Cook v. Clay St. Hill R. Co., 60 Cal. 604; Beeson v. Green Mountain G. M. Co., 57 id. 20; Munro v. Dredging, etc. Co., 84 id. 515; Atchison, etc. R. Co. v. Wilson, 48 Fed. Rep. 57.

society or companionship,[1] nor anything which cannot be measured by money and satisfied by a pecuniary recompense;[2] but the loss of household service accustomed to be performed by the wife, which would have to be replaced by hired services, is a substantial loss for which damages may be recovered, as is also the loss to the children of the care and moral training of their mother.[3] The statute looks to prospective advantages of a pecuniary nature which have been cut off by the premature death; and the word pecuniary is used in distinction to those injuries to the affections and sentiments which arise from the death of relatives, and which, though most fearful and grievous to be borne, cannot be measured or recompensed by money.[4] Evidence that the husband had married again, and that his second wife performed like services and duties and contributed in like manner as the first to the support of the family and the accumulation of property, is not admissible in mitigation of damages.[5] Nor is the fact that the life of the deceased was insured for the benefit of those in whose favor the action is brought.[6]

§ 1267. Children's loss from death of parent. During minority children may ask compensation for such loss on the same principles, by the same measure and ascertained by

[1] Bolinger v. St. Paul, etc. R. Co., *supra;* Tilley v. Hudson River R. Co., 24 N. Y. 474; McIntyre v. New York C. R. Co., 37 id. 295; Telfer v. Northern R. Co., 30 N. J. L. 188; Etherington v. Prospect Park, etc. R. Co., 88 N. Y. 641; Board of Commissioners v. Legg, 93 Ind. 523.

[2] Telfer v. Northern R. Co., *supra.* Under a statute of Virginia in an action by a husband for the death of his wife testimony is properly received to show that she was loving, tender, dutiful, thrifty, industrious, economical and prudent. These qualities constitute an element of damages in fixing the *solatium* to be awarded to him. Simmons v. McConnell, 86 Va. 494.

[3] St. Lawrence, etc. Ry. Co. v. Lett, 11 Can. Sup. Ct. 422; S. C., 26 Am. & Eng. R. Cas. 454; Pennsylvania R. Co. v. Goodman, 62 Pa. St. 332; Board of Commissioners v. Legg, 93 Ind. 523.

In Delaware, etc. R. Co. v. Jones, 128 Pa. St. 308, the court held that the husband in a suit for the negligent killing of his wife sixty-six years of age, he having shown that the deceased had always been a healthy woman, was not bound to prove special damages, as if the subject of his loss had been a horse or other animal; and he was entitled to recover substantial damages for the pecuniary loss to him without making such proof.

[4] Tilley v. Hudson River R. Co., *supra.*

[5] Davis v. Guarnieri, 45 Ohio St. 470.

[6] § 1265.

proof of the same facts as a widow for the death of her husband. There is a legal right to support, and a like expectancy of benefit from the distribution of the parent's estate. The jury is not confined in estimating the damage to any exact mathematical calculation, but is vested with considerable discretion, with which the courts will not interfere unless it has been abused.[1] The law will imply a pecuniary loss in some amount to the wife and children by the death of the husband and father who was at the time employed and presumably receiving wages, and therefore able to discharge his obligation to support them.[2] Recovery may be had in behalf of a child *en ventre sa mere* if it is born within due time.[3] Ordinarily children are expected to survive their parents and to inherit whatever property they leave undisposed of, and to transmit their own property to their children. The mere fact that the children are all of age at the time of the parent's death does not preclude them from recovering for the loss of such pecuniary benefits as they had a reasonable expectation of securing from additional accumulations had he not been injured.[4] The jury may take into consideration the earnings of the deceased, and the question whether the minor children had other means of support after his death is wholly immaterial.[5] The damages may include compensation for the loss of physical care and mental and moral training, where the father was fitted to furnish such training, for this is among the most important of parental duties.[6] But it should be shown that the father is capable of fulfilling this duty.[7] If some of the children of the deceased are in poor health the fact may be shown, although others of them who are in good health may be benefited by the evidence.[8]

[1] Stoher v. St. Louis, etc. R. Co., 91 Mo. 509.

[2] Louisville, etc. R. Co. v. Buck, 116 Ind. 566; McKeigue v. Janesville, 68 Wis. 50.

[3] The George & Richard, L. R. 3 Ad. & Ecc. 466. See Dietrich v. Northampton, 138 Mass. 14.

[4] Tuteur v. Chicago, etc. R. Co., 77 Wis. 505; Mansfield Coal & Coke v. McEnery, 91 Pa. St. 185.

[5] Heyer v. Salsbury, 7 Ill. App. 93.

[6] Board of Comm'rs v. Legg, 93 Ind. 523; McIntyre v. New York C. R. Co., 37 N. Y. 287; Tilley v. Hudson River R. Co., 29 id. 252; Baltimore, etc. R. Co. v. Wightman, 29 Gratt. 431; Illinois C. R. Co. v. Weldon, 52 Ill. 290.

[7] Illinois C. R. Co. v. Weldon, *supra;* Chicago, etc. R. Co. v. Austin, 69 Ill. 426.

[8] McKeigue v. Janesville, 68 Wis. 50.

§ 1268. Facts and circumstances to be considered in estimate of damages. These are the age, health, condition in life, occupation, habits of industry and sobriety, mental and physical capacity, disposition to frugality, opportunities and customary earnings of the deceased and his expectation of life.[1] The evidence of pecuniary injury need not be very strong in order that the case may go to the jury. Where the action was brought by a father for the death of an adult but unmarried son the testimony was to the effect that the former was fifty-nine years of age, nearly blind and was otherwise injured; he worked when he could; that some five or six years before the son's death he had assisted him pecuniarily, but had not done so since. It was held that there was evidence of pecuniary injury.[2] A reasonable probability of pecuniary benefit is all that is required.[3] A less liberal construction has been given the statute by the Irish court, which has held, in effect, that no injury is within its contemplation unless the deceased person has in fact rendered pecuniary assistance to the plaintiff.[4] The age of the deceased, the

[1] 48 Am. Dec. 639; Louisville, etc. R. Co. v. Stacker, 86 Tenn. 343, 353; Holmes v. Oregon, etc. R. Co., 6 Sawy. 262; S. C., 5 Fed. Rep. 75; Taylor v. Western P. R. Co., 45 Cal. 323; Macon, etc. R. Co. v. Johnson, 38 Ga. 409; Central R. Co. v. Thompson, 76 Ga. 770, 782; Chicago v. Scholten, 75 Ill. 468; Chicago, etc. R. Co. v. Moranda, 93 id. 302; Donaldson v. Mississippi & M. R. Co., 18 Iowa, 280; State v. Cecil Co. Comm'rs, 54 Md. 426; Shaber v. St. Paul, etc. R. Co., 28 Minn. 103; Roose v. Perkins, 9 Neb. 304; Telfer v. Northern R. Co., 30 N. J. L. 188; McIntyre v. New York C. R. Co., 37 N. Y. 287; Kesler v. Smith, 66 N. C. 154; Burton v. Wilmington, etc. R. Co., 82 id. 504; Catawissa R. Co. v. Armstrong, 52 Pa. St. 282; Mansfield Coal & C. Co. v. McEnery, 91 id. 185; Nashville, etc. R. Co. v. Prince, 2 Heisk. 580; Baltimore, etc. R. Co. v. Wightman, 29 Gratt. 431; Atchison, etc. R. Co. v. Wilson, 48 Fed. Rep. 57. See vol. 1, § 455, as to the value of life and annuity tables as evidence.

[2] Hetherington v. Northeastern Ry. Co., 9 Q. B. Div. 160.

[3] Pym v. Great Northern Ry. Co., 4 B. & S. 406; Franklin v. Southeastern Ry. Co., 3 H. & N. 213; Dalton v. Same, 4 C. B. (N. S.) 296.

[4] Bourke v. Cork & M. R. Co., 4 L. R. Ire. 682; Holleran v. Bagnell, 6 id. 333.

In Rowley v. London & N. Ry. Co., L. R. 8 Exch. 221, the mode of calculating damages under Lord Campbell's act was considered, the facts being that one of the persons who claimed compensation was the mother of the deceased, she being at his death sixty-one and he forty years of age. The mother held the deceased's personal covenant to allow her an annuity of 200*l.* a year during their joint lives. The jury were directed that they might allow her

probability of his being able, in view of advancing years, to continue to pursue his occupation, are matters concerning which the jury must be instructed.[1] In considering them the jury must take into account the constitution, habits, heredity and such experience of the effect of age on muscle and nerve and endurance as they may have had themselves.[2] The mental and physical capacity of the deceased to earn money in his vocation may be proven, but the opinions of witnesses as to the amount he might earn in pursuits in which he had never engaged are not admissible.[3] The existence of disease in the deceased which would probably have shortened his life is a proper matter of proof.[4] Where damages proportioned to the injury may be given, funeral expenses may be recovered.[5]

§ 1269. **Same subject.** Under the code of Georgia the plaintiff, whether widow or child or children, may recover the full value of the life of the deceased.[6] This excludes the wants of the family as an element of damages, and leaves for the consideration of the jury the age, habits, health, occupation, expectation of life, ability to labor, probable increase or diminution of that ability with the lapse of time, rate of wages,

such a sum as would purchase such an annuity for a person of her age according to the average duration of human life. The elements for determining this sum were insurance tables showing such duration and a calculation of the value of such an annuity on government or other very good security. The majority of the court considered that the general rule of placing the injured party in the same pecuniary position as she would have occupied but for the casualty applied. An error was committed in calculating the annuity solely upon the probable duration of the mother's life; the contingency of the son dying before her being overlooked; and it was also error not to take into account the fact that the covenant was a personal one, and presumably of less value than a government obligation. The probable duration of the mother's life should have been calculated with reference to her health; but the facts concerning that ought to have been brought out by the party who would or might have been benefited by them. In the absence of anything showing the contrary, it was not error to direct the jury to consider the life as an average one, and to value it upon the basis of the tables.

[1] Central R. & B. Co. v. Roach, 64 Ga. 635; Georgia R. v. Pittman, 73 Ga. 325.

[2] Central R. v. Thompson, 76 Ga. 770.

[3] Atlanta, etc. R. Co. v. Newton, 85 Ga. 517.

[4] Columbus & W. Ry. Co. v. Bridges, 86 Ala. 448.

[5] Petrie v. Columbia & G. R. Co., 29 S. C. 303, 324.

[6] Act of 1878, p. 59; § 2971, Code of 1882.

etc., and the necessary personal expenses of the deceased as the elements entering into the damages.[1] A subsequent statute excludes a deduction from the value of the life on account of the necessary or personal expenses of the deceased had he lived.[2] The question was raised, but not decided, in an earlier case whether the damages recoverable by a child for the death of its parent might be reduced by the amount which the child could earn before becoming of age. Jackson, C. J., said: It is true that a parent may make the child, when able, work, but that is the privilege of the parent. It does not follow that the defendant may set off that ability against the duty to support the child and thus lessen her recovery. How much could she work? When would she be able to work? Is she now healthy? Will she be so a year or five years hence? The field of conjecture is too wide and too far off — too remote to be set off against that support which is the child's measure of damages.[3] In an action by a child to recover for the loss of a parent the measure of damages has been held to be its support during minority; the computation should begin from the parent's death, not from the date of the injury which caused it.[4]

In estimating damages for the death of a man who is earning money the jury are not limited solely to the consideration of his age, life expectancy and earnings at the time of his decease. They may take into account the additional experience and skill which he might have acquired and a consequent increase of compensation.[5]

[1] Central R. v. Rouse, 77 Ga. 393.

[2] Clay v. Central R. & B. Co., 84 Ga. 345.

[3] Atlanta, etc. R. v. Venable, 67 Ga. 697.

[4] Atlanta, etc. R. v. Venable, 67 Ga. 697; St. Louis, etc. Ry. Co. v. Johnston, 78 Tex. 536.

[5] L. & G. N. Ry. Co. v. Ormond, 64 Texas, 485; East Line, etc. Ry. Co. v. Smith, 65 Texas, 167; St. Louis, etc. Ry. Co. v. Johnston, 78 Texas, 536.

In a recent case a man aged thirty-five years and earning $1.25 a day left a wife and two small children. His chief qualifications for earning money were that he was "stout, healthy and sober." The jury gave a verdict for $10,000 compensatory damages. In reply to an objection that the award was excessive the court observed: "If it was our duty to calculate from these facts the pecuniary value of his life to his wife and children at the date of his death we would not be able to make it reach near the sum given by the verdict. While the law does not, in this character of action, intend to give compensation for anything but

§ 1270. Same subject. The South Carolina statute provides that the "action shall be for the benefit of the wife, husband, parent and children of the person whose death shall have been caused, . . . and in every such action the jury

pecuniary loss by estimating the money value of the life of the relative, and while it necessarily results that regard must in each instance be paid to such facts and conditions as cast light upon the subject, yet it must be admitted the inquiry is not intended to be narrowed down by the law to a result that can be exactly accounted for by the facts in evidence. Every parent and husband has, for his wife and children, a pecuniary value beyond the amount of his earnings by his labor or vocation. That value may to some but not to every extent be susceptible of allegation and proof, and to the extent that it can be alleged and proved it ought to be done. The difficulties of proof are known to the law-maker. In some states an attempt has been made to remove them by placing limits to the amount that may be recovered. In establishing such rules the idea of making compensation in each instance for the pecuniary value of the lost life is necessarily abandoned. When no amount is fixed by law and no rule is prescribed for making the valuation upon facts incapable of exact ascertainment, we think that the law-maker intended that, having reference as far as practicable to conditions existing at the time of the death, juries from their own knowledge, experience and sense of justice should fix and assess the proper sum. They are expected to act uninfluenced by passion, prejudice or partiality, and to pay due regard to the ascertained facts and conditions surrounding the subject. When it appears to the court that they have disregarded these requirements their verdict should be set aside. On the other hand, when the court is unable to determine that these things have not been observed by the jury, and when it does not appear that the verdict is not the result of the honest endeavor of the jury to follow their own convictions in the exercise of a power not precisely defined, we think that the law intends that the jury's estimate, rather than the equally undefined one of the judges, shall prevail." Missouri Pacific Ry. Co. v. Lehmberg, 75 Texas, 61. In St. Louis, etc. Ry. Co. v. Johnston, 78 Texas, 536, a verdict for $5,000 each in favor of a widow and a daughter seven years old was sustained; the deceased having been earning $125 per month.

The Texas statute gives an action for "actual damages" when death is caused by the negligence or carelessness of the proprietor, owner, charterer or hirer of any railroad, . . . or by the unfitness, gross negligence or carelessness of their servants or agents; when it is caused by the wrongful act, negligence, unskilfulness or default of another; and in a separate section provides that when death is caused by the wilful act or omission or gross negligence of the defendant, exemplary as well as actual damages may be recovered. These provisions are construed to authorize exemplary damages only for the defendant's wilful act, omission or gross negligence; if the defendant is a corporation the act, omission or negligence must be attributable to one who represented it in its corporate capacity, as its offi-

may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively for whom, and for whose benefit, such action shall be brought, and the amount so recovered shall be divided among the before-mentioned parties in such shares as they would have been entitled to if the deceased had died intestate, and the amount recovered had been personal assets of his or her estate." Claims on behalf of adult children who were not living with their parents are not excluded, though such claims are not legal; the "injury" referred to is not restricted to the deprivation of a legal right.[1]

§ 1271. Same subject. The Virginia statute authorizes the jury to award such damages as to it may seem fair and just. It is said to be remedial in its character and to be entitled to a liberal construction. Where nothing but compensation for pecuniary loss was claimed these rules were laid down: The damages were to be assessed with reference to the pecuniary loss sustained by the wife and children of the deceased. "First, by fixing them at such sum as would be equal to the probable earnings of the deceased, taking into consideration the age, business capacity, experience and habits, health, energy and perseverance of the deceased during what would probably have been his life-time if he had not been killed. Second, by adding these to the value of his services in the superintendence, attention to and care of his family, of which they have been deprived by his death. As was very properly said in Tilley v. Hudson River R. Co.,[2] 'all these are elements of pecuniary success — component parts of that pecuniary capital of the continued exercise and employment of which the children were entitled to the benefits, and of which the wrongful act of the defendants deprived them.'"[3] Under that

cer, not of a mere ordinary servant or agent. Houston, etc. Ry. Co. v. Cowser, 57 Texas, 293; International, etc. Ry. Co. v. McDonald, 75 id. 41. The retention in the defendant's service of the servant whose negligence has caused a death is not sufficient to constitute a ratification of his act so as to authorize the imposition of exemplary damages. International, etc. Ry. Co. v. McDonald, 75 Texas, 41.

The right to exemplary damages is given by the constitution of Texas to a certain class of persons, and cannot be claimed by any others. Winnt v. International, etc. R. Co., 74 Texas, 32.

[1] Petrie v. Columbia & G. R. Co., 29 S. C. 303.

[2] 29 N. Y. 252.

[3] Baltimore & O. R. Co. v. Wightman's Adm'r, 29 Gratt. 431; Same v. Noell's Adm'r, 32 id. 394.

statute the jury are not restricted to the consideration of pecuniary loss; they may award punitive damages;[1] and damages by way of solace and comfort to the family of the deceased.[2]

§ 1272. Recovery for death of child. Under the Georgia statute of 1887 a parent cannot recover for the death of a child unless he or she "contributes to his or her support."[3] The dependence need not have been entirely upon the deceased.[4] Under the Texas statute which proportions the damages to the injury resulting from the death it is not necessary that they be confined, in every case, to the time of the minority of the deceased child; they may or may not extend beyond that period.[5] In assessing damages more than ordinary discretion must be allowed the jury; yet, so far as possible, they should be aided by evidence. If in any case the damages may be estimated without evidence, it can only be done on the principle of necessity, as where the child is of tender years. It is suggested that, in other cases, the nearest approximation to the necessary reasonable certainty for estimating damages is such sum as would purchase an annuity equal to the value of the pecuniary aid which the plaintiff would have derived from the deceased, calculated upon the basis of all the facts and circumstances which can reasonably be adduced and including the probable duration of his life.[6] This measure is not, however, conclusive upon the jury, if they find from the circumstances that an adult son might have increased his earnings or that his parents' needs might have become greater and that his disposition would have been to supply them.[7] In an action by a parent to recover for the death of an adult son the former's pecuniary condition may be shown for the purpose of estab-

[1] Matthews v. Warner's Adm'r, 29 Gratt. 570.

[2] Baltimore & O. R. Co. v. Noell's Adm'r, 32 Gratt. 394.

[3] Clay v. Central R. & B. Co., 84 Ga. 345.

[4] Daniels v. Savannah, etc. Ry. Co., 86 Ga. 236.

[5] Houston, etc. Ry. Co. v. Cowser, 57 Texas, 293; Texas & P. Ry. Co. v. Lester, 75 id. 56.

[6] Houston, etc. Ry. Co. v. Cowser, 57 Texas, 293.

[7] International, etc. R. Co. v. Kindred, 57 Texas, 491; Texas & P. Ry. Co. v. Lester, 75 id. 56, sustaining a verdict of $4,200 in favor of a widow for the death of her only child, a son of twenty-six years, who contributed $200 a year to her support, she being fifty-one years of age. In another case the mother was sixty; the de-

lishing a reasonable expectation of financial aid from the deceased, but not to increase the amount of damages.[1]

In the case of the death of a minor child the pecuniary benefit its parents had a reasonable expectation of receiving from him, had he lived, is the measure of damages; and in addition thereto, the cost of medical aid and other like expenses necessarily incurred[2] were held recoverable, but those were not items of pecuniary injury resulting from the death.[3] Under the Texas statute "the jury may give such damages as they may think proportioned to the injury resulting from" the death. In an an action to recover for the death of a child of six years the court say: "First, where the killing of the child was wrongful, etc., the parents are entitled to at least nominal damages. Second, where the testimony shows the bodily health and strength, the sprightliness, or want of it, of mind; the aptitude and willingness to be useful in performing services, the mode such faculties are exercised, as in useful labor or otherwise; and when, from the age and undeveloped state of the child any estimate of the value of the services until majority would be matter of opinion in which no particular or especial knowledge in the way of expert testimony could be procured better than the judgment and common sense of the ordinary juror called to the duty of determining such value, then, upon such testimony, the sound discretion of the jury can be relied on to determine the value without any witness naming a sum. Third, as the age of the child increases and his faculties develop, testimony to actual services can and should be produced, giving a wider basis of induction to the jury in calculating the damage from the loss. Fourth, the circumstances of the parents suing, as in this case, often become necessary as evidence; not as a basis for increasing or diminishing the amount, but to illustrate the acts of the child as useful or otherwise. In this case the parents kept a dairy; all the family worked. The child, by attending to some duties,

ceased son twenty-two; his earnings were from $60 to $65 per month, about one-half of which was given her. A verdict for $3,550 was held to be proper. Missouri P. Ry. Co. v. Henry, 75 Texas, 220.

[1] International, etc. R. Co. v. Kindred, 57 Texas, 491.

[2] Galveston v. Barbour, 62 Texas, 172; Brunswig v. White, 70 Texas, 504. *Contra*, § 1278.

[3] See Murray v. Usher, 117 N. Y. 542.

relieved the mother so that she could engage in other necessary labor."[1] The character of a minor child for industry, economy and sobriety and his devotion to his parents may be considered in determining the pecuniary benefit they would have derived from him.[2]

§ **1273. Same subject.** In several states the damages for the death of a child have been limited to the pecuniary benefits the parent had a legal right to claim from the child's services, and therefore the courts have confined the estimate to the period of minority.[3] This restriction is believed to be contrary to the general principles on which pecuniary damages are allowed in favor of all classes who are next of kin to the deceased. That principle is that the jury should calculate the damages in reference to a reasonable expectation of benefits as of right or otherwise from the continuance of the life.[4] Legal liability alone is not the test of the injury in respect of which damages may be recovered under the statutes; but the reasonable expectation of pecuniary advantage by the relative remaining alive may be taken into account.[5]

§ **1274. Same subject.** Statutes which give the right to recover for the benefit of the next of kin permit the parents to recover for the death of adult children on the principle just

[1] Brunswig v. White, 70 Texas, 504, 511.

[2] Missouri Pacific Ry. Co. v. Lee, 70 Texas, 496.

[3] State v. Baltimore, etc. R. Co., 24 Md. 84, 107; Agricultural, etc. Ass'n v. State, 71 Md. 86; Hurst v. Detroit City R. Co., 84 Mich. 539; Pennsylvania Co. v. Lilly, 73 Ind. 252; Chicago v. Scholten, 75 Ill. 468; Rockford, etc. R. Co. v. Delaney, 82 id. 198; Caldwell v. Brown, 53 Pa. St. 453.

[4] Chicago v. Keefe, 114 Ill. 222.

[5] Dalton v. S. E. Ry. Co., 4 C. B. (N. S.) 296; Franklin v. S. E. Ry. Co., 3 H & N. 211; Pym v. G. N. Ry. Co., 2 B & S. 759; Illinois Cent. R. Co. v. Crudup, 63 Miss. 291; Hutchins v. St. Paul, etc. R. Co., 44 Minn. 5; Shaber v. St. Paul, etc. R. Co., 28 id. 103; Robel v. Chicago, etc. R. Co., 35 id. 84; Scheffler v. Minneapolis, etc. R. Co., 32 id. 518; Hall v. Galveston, etc. R. Co., 39 Fed. Rep. 18; Gunderson v. Northwestern E. Co., 47 Minn. 161; Paulmier v. Erie R. Co., 34 N. J. L. 151; Johnson v. Chicago, etc. R. Co., 64 Wis. 425; Tuteur v. Chicago, etc. R. Co., 77 id. 505; Schadewald v. Milwaukee, etc. R. Co., 55 Wis. 569; Lehigh Iron Co. v. Rupp, 100 Pa. St. 95; North Pennsylvania R. Co. v. Kirk, 90 id. 15; Penn. R. Co. v. Adams, 55 id. 499; Birkett v. Knickerbocker Ice Co., 110 N. Y. 504; Fordyce v. McCants, 51 Ark. 509; St. Joseph, etc. R. Co. v. Wheeler, 35 Kan. 185; Walters v. Chicago, etc. R. Co., 36 Iowa, 458; Munro v. Dredging, etc. Co., 84 Cal. 515; Pennsylvania Co. v. Lilly, 73 Ind. 252; Lockwood v. New York, etc. R. Co., 98 N. Y. 523.

stated. Why, therefore, when a minor is killed should the estimate of damages stop arbitrarily at majority? It is true that in the former case there may be evidence to support the expectation of benefit, and none in the latter except such as is afforded by the fact of relationship and the general experience. Where the deceased is a minor and leaves a parent entitled to his services, the law presumes there has been a pecuniary loss for which compensation under the statute may be given. In such cases the pecuniary loss may be estimated from the facts proven, in connection with the knowledge and experience possessed by all persons in relation to matters of common observation. No doubt the estimate of damages may be aided by proof of the personal characteristics of the deceased. Evidence of his mental and physical capacity to be of service to his parent, his past earnings, habits of industry and sobriety, where the deceased is old enough to have established a character, are all facts to be considered in calculating the pecuniary loss sustained.[1] When the circumstances of the case afford a safe standard by which the compensation in damages can be measured, such standard should be given to the jury by stating the reasonable limits within which these calculations should be confined. Where no reliable standard can be laid down for the measurement of damages, much must be left to the judgment of the jury and their finding will not be disturbed unless it is such as to show that it is the result of prejudice or passion.[2]

[1] Rockford, etc. R. Co. v. Delaney, 82 Ill. 198; Stafford v. Rubens, 115 id. 196; Birkett v. Knickerbocker Ice Co., 41 Hun, 404; Russell v. Sunbury, 37 Ohio St. 372; Houghkirk v. Delaware, etc. Canal Co., 92 N. Y. 219; Etherington v. Prospect Park, etc. R. Co., 88 id. 641; Robel v. Chicago, etc. R. Co., 35 Minn. 84; Vicksburg v. McLain, 67 Miss. 4; Johnson v. Chicago, etc. R. Co., 64 Wis. 425; Cook v. Clay St. Hill R. Co., 60 Cal. 604; Munro v. Dredging, etc. Co., 84 id. 515; Schadewald v. Milwaukee, etc. R. Co., 55 Wis. 569; Paulmier v. Erie R. Co., 34 N. J. L. 151; Illinois C. R. Co. v. Crudup, 63 Miss. 291; Van Brunt v. Railroad Co., 78 Mich. 530; Scheffler v. Minneapolis, etc. R. Co., 32 Minn. 518; Opsahl v. Judd, 30 id. 126; Shaber v. St. Paul, etc. R. Co., 28 id. 103; Hall v. Galveston, etc. R. Co., 39 Fed. Rep. 18; Hutchins v. St. Paul, etc. R. Co., 44 Minn. 5; Kansas Pac. R. Co. v. Lundin, 3 Colo. 94; Houghkirk v. Delaware, etc. Co., 28 Hun, 407; S. C. on appeal, 92 N. Y. 219; Pineo v. New York, etc. R. Co., 34 Hun, 80; Quinn v. Power, 29 id. 183; Bowles v. Rome, etc. R. Co., 46 id. 324; Johnson v. Missouri Pac. R. Co., 18 Neb. 690.

[2] Parsons v. Missouri Pac. R. Co., 94 Mo. 286.

§ 1275. Same subject. In Ihl v. Forty-second Street, etc. R. Co.,[1] Rapallo, J., said: "It is within the province of the jury who had before them the parents, their position in life, the occupation of the father and the age and sex of the child, to form an estimate of the damages with reference to the pecuniary injury, present and prospective, resulting to the next of kin. Except in very rare instances it would be impracticable to furnish direct evidence of any specific loss occasioned by the death of a child of such tender years [three years and two months]; and to hold without such proof the plaintiff cannot recover would in effect render the statute nugatory in most cases of this description. It cannot be said as matter of law that there is no pecuniary damage in such a case, or that the expense of maintaining and educating the child would necessarily exclude any pecuniary advantage which the parent could have derived from his services had he lived. These calculations are for the jury, and any evidence on the subject beyond the age and sex of the child, the circumstances and condition in life of the parents,[2] or other facts existing at the time of the death or trial, would necessarily be speculative and hypothetical and would not aid the jury in arriving at a conclusion. It has been held by this court in several similar cases that the statute does not limit the recovery to the actual pecuniary loss proved on the trial."[3] Damages should be no more and no less than the widow of the decedent and next of kin have suffered from his death. Where there is no dependent connection between them their poverty and his wealth should not be considered. But where as head of the family he is the family support, the jury are entitled to the fullest insight into the family circumstances, and in the absence of special instructions they are at liberty to use their best judgment in arriving at results.[4]

§ 1276. Damages recoverable by collateral kindred. The general principle which underlies all recoveries under the

[1] 47 N. Y. 321.

[2] Ewen v. Chicago, etc. R. Co., 38 Wis. 625.

[3] Citing Oldfield v. New York, etc. R. Co., 14 N. Y. 310, 319; O'Mara v. Hudson River R. Co., 38 id. 445, 450. Grogan v. Broadway F. Co., 87 Mo. 321; Nagel v. Missouri Pac. R. Co., 75 id. 653; Owen v. Brockschmidt, 54 id. 289, are to the same effect.

[4] Staal v. Grand Rapids, etc. R. Co., 57 Mich. 239; Serensen v. Northern Pac. R. Co., 45 Fed. Rep. 407; Gill v. Rochester, etc. R. Co., 37 Hun, 107;

statute applies with force and is especially emphasized in actions by collateral kindred, that the recovery extends to the value of the reasonable expectation of what they might have received from the deceased had he lived.[1] In Chicago & Alton R. Co. v. Shannon[2] the court said: "If the next of kin are collateral kindred of the deceased and have not been receiving from him pecuniary assistance, and are not in a situation to require it, it is immaterial how near the degree of relationship may be, only nominal damages can be given, because there has been no pecuniary injury. If, on the other hand, the next of kin have been dependent on the deceased for support, in whole or in part, it is immaterial how remote the relationship may be, there has been pecuniary loss, for which compensation under the statute must be given."[3] This reasoning is correct if no benefit from the eventual distribution of the estate of the deceased, had he lived, is to be taken into account. Any such benefit depends on three contingencies: that he would have increased his estate, that he would not have made a will to disinherit the widow and next of kin, and that they would survive him.[4]

§ **1277. Damages to the deceased's estate.** Under statutes like those of Oregon and some other states, which authorize the recovery of such damages as result from the death to the estate of the decedent, the damages assessed are confined to the pecuniary loss to the estate. If the decedent be a minor

Phelps v. Winona, etc. R. Co., 37 Minn. 485; Shaber v. St. Paul, etc. R. Co., 28 Minn. 103; Opsahl v. Judd, 30 Minn. 126.

In Lockwood v. New York, etc. R. Co., 98 N. Y. 526, Earl, J., said: "In but few cases arising under this act is the plaintiff able to show direct specific pecuniary loss suffered by the next of kin from the death, and generally the basis of the allowance of damages has to be found in proof of the character, qualities, capacity and condition of the deceased and in the age, circumstances and condition of the next of kin. The proof may be unsatisfactory and the damages may be quite uncertain and contingent, yet the jurors in each case must take the elements thus furnished and make the best estimate of damages they can."

[1] Steel v. Kurtz, 28 Ohio St. 191; Davis v. Guarnieri, 45 id. 470, 481; Opsahl v. Judd, 30 Minn. 126; Shaber v. St. Paul, etc. R. Co., 28 id. 103; Phelps v. Winona, etc. R. Co., 37 id. 485.

[2] 43 Ill. 346.

[3] Holton v. Daly, 106 Ill. 131, 138; Chicago v. Scholten, 75 id. 469; Chicago, etc. R. Co. v. Swett, 45 id. 197, 204.

[4] Railroad Co. v. Barron, 5 Wall. 96; Howard v. Delaware & H. Canal Co., 40 Fed. Rep. 195.

no loss on account of his earnings during minority can be taken into account for they would not belong to his estate.[1] In such cases the age, health, habits of industry and sobriety, and mental and physical skill of the deceased, so far as they affect his capacity for rendering useful service to others or acquiring property, must be considered.[2]

§ 1278. Special damages. If some special injury results proximately from the death to one of the beneficiaries, or all of them who are provided for in the statutes, recovery may be had therefor. Thus, in Pym v. Great Northern Ry. Co.,[3] a change in the mode of distributing property among the members of a family, produced by the death complained of, although no pecuniary loss to the family in the aggregate would result and none would have arisen from the injury to the decedent had he lived, yet it being an injury resulting from the death, it was held to be an injury to be compensated. So in a Wisconsin case where a widow's pension was reduced by the death of her child, in an action under the statute for damages resulting to her from the death of that child she was entitled to have this loss included in her recovery.[4] But in a late New Jersey case the damages resulting from the dissolution of a valuable partnership, by the death complained of, was not within the scope of the statute, which was held to give damages resulting from the severance of a relation of kinship, and not of contract.[5] It has also been ruled that funeral expenses, if recoverable at all, must be claimed in the pleadings as special damages.[6] The medical expenses incurred by or on behalf of the deceased cannot be recovered.[7]

§ 1279. Contracts exempting from liability. The cases bearing upon the validity of contracts between master and

[1] Morris v. Chicago, etc. R. Co., 26 Fed. Rep. 23. In this case a married woman was also killed, and an action was brought to recover damages to her estate on account of her death. The right of the husband to her earnings was not mentioned as affecting the question of damages.

[2] Holmes v. Oregon, etc. Ry. Co., 6 Sawy. 293; S. C., 5 Fed. Rep. 528; Andrews v. Chicago, etc. Ry. Co., 53 N. W. Rep. 399 (Iowa).

[3] 2 B. & S. 759; affirmed in Exchequer Chamber, 4 B. & S. 396.

[4] Ewen v. Chicago, etc. R. Co., 38 Wis. 613; Rowley v. London, etc. R. Co., L. R. 8 Exch. 221.

[5] Demarest v. Little, 47 N. J. L. 28.

[6] Gay v. Winter, 34 Cal. 153.

[7] Pulling v. Great Eastern Ry. Co., 9 Q. B. Div. 110. See § 1272.

servant which affect the liability of the former to the family of the latter for damages under Lord Campbell's act and the American statutes modeled upon it are collected elsewhere.[1]

§ 1280. **Where the injury is done in another state.** These statutes have no extraterritorial effect. It is, however, a general principle that where, either by common law or statute, a right of action has become fixed and a legal liability incurred, if transitory, it may be enforced in the courts of any state in which jurisdiction of the defendant can be obtained, provided it is not against the public policy of the state where it is sought to be enforced. In such cases the law of the place where the right was acquired or the liability was incurred will govern as to the right of action,[2] while all that pertains merely to the remedy will be controlled by the law of the state where the action is brought.[3] This rule applies to the amount recoverable if a limitation is fixed by the law of the forum.[4] As the remedy given by these statutes is one for a loss which the common law is generally regarded as defective in not providing compensation for, it would seem to come within this comity to permit a recovery for such a cause accruing in another state under the laws thereof, though in the state where the action is brought no such correction of the common law had been adopted, or a law for that purpose had been enacted which was materially different from that under which the alleged cause of action

[1] Vol. 1, § 6.

[2] Suth. on Stat. Const., § 14; Herrick v. Minneapolis, etc. R. Co., 31 Minn. 11; S. C., 47 Am. Rep. 771; Dennick v. Railroad Co., 103 U. S. 11; Wooden v. Western, etc. R. Co., 126 N. Y. 10; Leonard v. Columbia St. Nav. Co., 84 N. Y 48; S. C., 38 Am. Rep. 491; Knight v. West Jersey R. Co., 108 Pa. St. 250; S. C., 56 Am. Rep. 200; Central R. Co. v. Swint, 73 Ga. 651; Morris v. Chicago, etc. R. Co., 65 Iowa, 727; S. C., 54 Am. Rep. 39; Shedd v. Moran, 10 Ill. App. 618; Hanna v. Grand Trunk Ry. Co., 41 id. 116; Ramsey v. Glenn, 33 Kan. 271; Boyce v. Wabash Ry. Co., 63 Iowa, 70; S. C., 50 Am. Rep. 730; Keenan v. Stimson, 32 Minn. 377; Bishop v. Globe Co., 135 Mass. 132; Taylor v. Pennsylvania Co., 78 Ky. 348; S. C., 39 Am. Rep. 244. See Willis v. Missouri P. Ry. Co., 61 Tex. 432; Vawter v. Missouri P. Ry. Co., 84 Mo. 679; S. C., 54 Am. Rep. 105.

The statutes of one state giving a right of action for wrongful death may be enforced in the federal courts of another state if not inconsistent with the statutes and policy thereof. Texas & P. Ry. Co. v. Cox, 145 U. S. 593.

[3] Id.; Burlington, etc. R. Co. v. Thompson, 31 Kan. 180; S. C., 47 Am. Rep. 497; Mooney v. Union Pac. R. Co., 60 Iowa, 346.

[4] Wooden v. Western, etc. R. Co., 126 N. Y. 10.

arose.[1] But in a majority of the cases decided in the state courts it is regarded as necessary, where the action is brought in another state than that where the death was caused, that the laws of the latter be shown and that they provide a remedy substantially the same as do the laws of the state where the action is brought.[2]

If a foreign corporation extends its railroad into an adjoining state on condition that suit may be brought against it in the state into which it goes on all claims upon it, suits may be brought there by citizens of the state of its domicile, upon a cause of action arising in the latter under its statute. If such statute does not require a prosecution as a condition precedent to recovery for the death it will not be required by the court of the state in which the action is brought.[3] The homicide of a person in another state on a line of railroad owned and operated by a Georgia company is actionable in the latter state.[4] A right of action given by the laws of one state will not be enforced in the courts of another if it is denied by the common law and is not given by the statutes of the latter.[5]

[1] Dennick v. Railroad Co., 103 U. S. 11; Herrick v. Minneapolis, etc. R. Co., 31 Minn. 11; S. C., 47 Am. Rep. 771; The E. B. Ward, Jr., 16 Fed. Rep. 255; King v. Sarria, 69 N. Y. 24; Wall v. Hoskins, 5 Jred. L. 177, Lowry v. Inman, 46 N. Y 119.

[2] Vawter v. Railway Co., 84 Mo. 679; Richardson v. New York Cent. R. Co., 98 Mass. 85; St. Louis, etc. R. Co. v. McCormick, 71 Tex. 660; McCarthy v. Chicago, etc. R. Co., 18 Kan. 46; Missouri Pac. R. Co. v. Lewis, 24 Neb. 848; Selma, etc. R. Co. v. Lacy, 43 Ga. 461; State v. Pittsburgh, etc. R. Co., 45 Md. 41; Oates v. Union Pac. Ry. Co., 16 S. W. Rep. 487; Barker v. Railway Co., 91 Mo. 86; Woodard v. Michigan, etc. R. Co., 10 Ohio St. 121; Wooden v. Western, etc. R. Co., 126 N. Y. 10; Cincinnati, etc. R. Co. v. McMullen, 117 Ind. 439; S. C., 10 Am. St. Rep. 67; O'Reilly v. New York, etc. R. Co., 17 Atl. Rep. 906; S. C., 5 Lawy. Rep. Ann. 364; Hover v. Penn. Co., 25 Ohio St. 667; Whitford v. Panama R. Co., 23 N. Y. 465; Nashville, etc. R. Co. v. Eakin, 6 Cold. 582; Vanderwerkin v. N. Y. etc. R. Co., 6 Abb. Pr. 239; Lockwood v. New York, etc. R. Co., 98 N. Y. 523; Needham v. Grand Trunk R. Co., 38 Vt. 294; Mackay v. Central R. Co., 4 Fed. Rep. 617; Taylor v. Penn. Co., 78 Ky. 348 (compare Bruce's Adm'r v. Cincinnati R. Co., 83 id. 174); Western, etc. R. Co. v. Strong, 52 Ga. 461; Chicago, etc. R. Co. v. Doyle, 60 Miss. 977; Nashville, etc. R. Co. v. Sprayberry, 8 Baxt. 341; Patton v. Pittsburgh, etc. R. Co., 96 Pa. St. 169; Knight v. West Jersey R. Co., 108 id. 250.

[3] South Carolina R. Co. v. Nix, 68 Ga. 572.

[4] Central R. v. Swint, 63 Ga. 651.

[5] Texas & P. Ry. Co. v. Richards, 68 Texas, 375.

CHAPTER XXXVIII.

SEDUCTION.

§ 1281. The technical not the real gist of the action.
1282. Who may maintain the action.
1283. Evidence for plaintiff and damages recoverable.
1284. Evidence for defendant in mitigation.
1285. Criminal conversation.

§ 1281. The technical not the real gist of the action. [735] At common law this action rests on the relation of master and servant, and proceeds in form for loss of service. Trespass *vi et armis* is deemed proper where the servant resides with the master or parent; case may also be brought where the injury is not committed with force, or where the servant is only constructively in the master's service.[1] Slight evidence will establish sufficiently the relation, and the extent of the loss of service is not the measure of damages. The allegations and proof on these points are almost an unmeaning formula — an obeisance to a shadow of the past — to reach the actual grievance. The action in reality is to afford redress for the injury done to the parent or other near relative or person standing *in loco parentis* for the dishonor and degradation suffered by the family in consequence of the seduction.[2] And large damages, which the court will seldom relieve against,[3] are recoverable, both for recompense to the plaintiff and punishment to the defendant. Caton, J., said: "Technically, the ground of recovery is the loss of the services of the daughter, and the rule of the books seems to be that the father must prove some service in order to entitle him to maintain the action. This is nominally the ground on which the plaintiff's right of action rests, while practically, the right

[1] Briggs v. Evans, 5 Ired. L. 16; Parker v. Meek, 3 Sneed, 29; Mercer v. Walmsley, 5 Har. & J. 27; Magninay v. Saudek, 5 Sneed, 146; Sutton v. Huffman, 32 N. J. L. 58; Greenwood v. Greenwood, 28 Md. 369; Bartley v. Richtmyer, 4 N. Y. 38; Cooley on Torts, 232, 233; Emery v. Gowen, 4 Me. 33; Clough v. Tenney, 5 id. 446.

[2] Coon v. Moffitt, 3 N. J. L. (*583), 169; Badgley v. Decker, 44 Barb. 577; Holliday v. Parker, 23 Hun, 72, 73.

[3] Bennett v. Beam, 42 Mich. 346; Sargent v. ———, 5 Cow. 106.

to recover rests on far higher grounds, that is, the rela- [736] tion of parent and child, or guardian and ward, or husband and wife, as well as that of master and servant; and it seems almost beneath the dignity of the law to resort to a sort of subterfuge to give the father a right of action which is widely different from that for which he is really allowed to recover damages. But the law may still require proof of service, or at least the right to service when the child is a minor; but this, as well as any other fact, may be proved by circumstances sufficient in themselves to satisfy the jury that the party seduced did actually render service to the plaintiff, and the most trivial service has always been held sufficient."[1] Even in England, where stricter proof of service is required, Blackburn, J., said: "In effect the damages are given to the plaintiff as standing in the relation of parent; and the action has at present no reference to the relation of master and servant beyond the mere technical point on which the action is founded."[2] This is according to the general current of authority.[3] While the courts adhere so far to the original distinctive character of the action as to require proof that the seduced female was in the service of the plaintiff at the time of the seduction, they do not require strict proof; very slight evidence of loss of service suffices in favor of one standing *in loco parentis*, and who is affected by the graver consequences of the seduction.[4] The actual loss sustained by the plaintiff, through the diminished ability of his daughter, relative or ward to yield him personal service, as well as the servile position of the supposed servant herself in the family of her protector, is ordinarily little more than a mere fiction. It is one of those cases in which an action devised for one purpose has been found to serve a different one by the aid of the discretion which [737]

[1] Doyle v. Jessup, 29 Ill. 462; Badgley v. Decker, 44 Barb. 589; Martin v. Payne, 9 Johns. 387; Hewit v. Prime, 21 Wend. 79; White v. Nellis, 31 Barb. 279; Kennedy v. Shea, 110 Mass. 147; Herring v. Jester, 2 Houst. 66.

[2] Terry v. Hutchinson, L. R. 3 Q. B. 602.

[3] Ellington v. Ellington, 47 Miss. 329; Patterson v. Thompson, 24 Ark. 55; Keller v. Donnelly, 5 Md. 211; Paterson v. Wilcox, 20 Up. Can. C. P. 385; Phillips v. Hoyle, 4 Gray, 568; White v. Murtland, 71 Ill. 250.

[4] Davidson v. Goodall, 18 N. H. 427; Hewit v. Prime, 21 Wend. 79; Clark v. Fitch, 2 Wend. 459; Gray v. Durland, 51 N. Y. 424.

courts have assumed in instructing the jury, and the readiness of the jury to render substantial justice by their verdict, where the forms of law imposed by the instructions of the court admit of their doing so.[1]

§ 1282. **Who may maintain the action.** The person seduced, whether a minor or of full age, cannot maintain an action for her own seduction; she, being a partaker in the offense, cannot, it is said, come into court to obtain satisfaction for a supposed injury to which she consented.[2] The only mode in which the action has ever been maintained, except in pursuance of some statute,[3] has been by bringing it in the name of some person having a right to the services of the person seduced; and in that action damages are recoverable, not only for actual loss of service, but for a sum sufficient to punish the seducer.[4] The cause of action given an infant female by statute does not bar an action by her father for the same act for which she may sue.[5] He has a right to the services of his minor daughter; and may maintain the action without proof of actual service, and though she were at service away from home, if he had not divested himself of the right to recall her to his service.[6] He will not be deprived of his remedy though death results from the pregnancy following the seduction.[7] If the daughter marries another person than her seducer prior to her father's loss of service or expenditure on account of the seduction, he cannot maintain an action because

[1] Davidson v. Goodall, 18 N. H. 427.

[2] Paul v. Frazier, 3 Mass. 71; Woodward v. Anderson, 9 Bush, 624; Hamilton v. Lomax, 26 Barb. 615; Smith v. Richards, 29 Conn. 232, 240. See Fidler v. McKinley, 21 Ill. 308.

[3] Provision has been made by statutes in Michigan, Indiana, California, Alabama, Iowa, Oregon, Tennessee, and perhaps other states, for actions by the female seduced, in which she is permitted to recover such damages as juries will allow her. See 4 Am. Rep. 406; Breon v. Henkle, 16 Ore. 494; Franklin v. McCorkle, 16 Lea, 609.

[4] Hamilton v. Lomax, 26 Barb. 615.

[5] Bartlett v. Kochel, 88 Ind. 425.

[6] Simpson v. Grayson, 54 Ark. 404; Lawyer v. Fritcher, 130 N. Y. 239; Martin v. Payne, 9 Johns. 387; Nickleson v. Stryker, 10 id. 115; Bartley v. Richtmyer, 4 N. Y. 38; Mulvehall v. Millward, 11 id. 343; Dain v. Wycoff, 7 id. 191; Kennedy v. Shea, 110 Mass. 147; Hewit v. Prime, 21 Wend. 79; Greenwood v. Greenwood, 28 Md. 369; Boyd v. Byrd, 8 Blackf. 113; Keller v. Donnelly, 5 Md. 211; Kendrick v. McCrary, 11 Ga. 603; Vassel v. Cole, 10 Mo. 634; White v. Murtland, 71 Ill. 250; Mohry v. Hoffman, 86 Pa. St. 358.

[7] Ingerson v. Miller, 47 Barb. 47.

he has no claim to her services after marriage,[1] unless his consent thereto was obtained by fraud.[2] A mother in case of the father's death has the same right to the services of her child as the father would have if living;[3] and may sue [738] for her seduction. There are, however, some adverse decisions.[4]

A father loses the right to his daughter's service when she arrives of age; but if afterwards she still continues to reside with him, and is to some extent in his service, he may sue for her seduction happening during the time of such service.[5] The mere relation of parent and child will not give a right of action for the seduction of an unmarried female; that of master

[1] Humble v. Shoemaker, 70 Iowa, 223.

[2] Lawyer v. Fritcher, 130 N. Y. 239.

[3] Gray v. Durland, 50 Barb. 100; S. C., 50 N. Y. 424; Furman v. Van Sise, 56 id. 435; Dedham v. Natick, 16 Mass. 135; Blanchard v. Ilsley, 120 id. 487; Matthewson v. Perry, 37 Conn. 435; Damon v. Moore, 5 Lans. 454; Keller v. Donnelly, 5 Md. 211; Villipique v. Shuler, 3 Strobh. 462.

[4] South v. Denneston, 2 Watts, 474; Bartley v. Richtmyer, 4 N. Y. 38.

In Badgley v. Decker, 44 Barb. 577, it was held that at common law the mother could not maintain an action for the seduction of the daughter while the father was living. But since the recent statutes of that state respecting married women, where a husband has abandoned his wife and family, and resides in another state, the wife, owning a house and being engaged in the business of keeping boarders, on her sole and separate account, may sue alone for the seduction of her daughter, over twenty-one years of age, who resides with and performs service for her about the house.

In George v. Van Horn, 9 Barb. 523, it was held that an action cannot be maintained by a mother, after the death of her husband, for seduction of their daughter in his life-time, when the daughter at the time of the seduction was over twenty-one years of age, and was residing with her brother at his residence, and taking charge of his family. The court also held that the executors and administrators of a deceased father or mother cannot maintain this action for the seduction of their daughter in their life-time. As well might the action lie, say the court, for criminal conversation with his wife. They cannot represent his aggravated feelings, and the personal disgrace heaped upon him by such events. These causes of action are purely personal, and like assaults, libel and slander die with the person. Logan v. Murray, 6 S. & R. 175. See Holliday v. Parker, 23 Hun, 71; Noice v. Brown, 39 N. J. L. 569; Coon v. Moffitt, 3 id. 436.

[5] Nickleson v. Stryker, 10 Johns. 115; Briggs v. Evans, 5 Ired. 21; Millar v. Thompson, 1 Wend. 447; Lee v. Hodges, 13 Gratt. 726; Sutton v. Huffman, 32 N. J. L. 58; Wilhoit v. Hancock, 5 Bush, 567; Bartley v. Richtmyer, 2 Barb. 182; Dain v. Wycoff, 7 N. Y. 191; Patterson v. Thompson, 24 Ark. 55; George v. Van Horn, 9 Barb. 523.

and servant, either actual or constructive, must exist. She must be under his actual or constructive control and dominion. If such a relation exists, it matters not to the cause of action whether the plaintiff be the parent, or merely stands in the relation of parent. An uncle, an aunt, a step-father, a brother, or one having no relationship or affinity to the in- [739] jured female, can sustain the action.[1] It is not necessary that the arrangement by which the relation of master and servant is established should have any permanent binding force between the parties to it. If it exists in fact and the immediate parties are acting under it at the time of the seduction, however imperfect its obligation may be, the defendant, who by his wrongful act has interrupted it, cannot set up that it was liable to be revoked at any time without the assent of the master.[2]

§ 1283. Evidence for plaintiff, and damages recoverable. The rule as to damages is the same whether the daughter be a minor or of full age; the plaintiff is not limited in his recovery to such as are merely compensatory. He may recover exemplary damages when he is so connected with her as to be capable of receiving injury through her dishonor.[3] In estimating the injury the jury may take into consideration, besides the loss of services and the disbursements for medical treatment and other necessary expenses, the wounded feelings and affections of the parent, the wrong done to him in his domestic and social relations, the stain and dishonor brought upon his family, and the grief and affliction suffered in conse-

[1] Furman v. Van Sise, 56 N. Y. 441; Clark v. Fitch, 2 Wend. 459; Martin v. Payne, 9 Johns. 387; Millar v. Thompson, 1 Wend. 447; Davidson v. Goodall, 18 N. H. 423; Ball v. Bruce, 21 Ill. 161; Roberts v. Connelly, 14 Ala. 235; Bartley v. Richtmyer, 4 N. Y. 38; Mulvehall v. Millward, 11 id. 343; Dain v. Wycoff, 18 id. 45; Fernsler v. Moyer, 3 W. & S. 416; Coon v. Moffitt, 3 N. J. L. 436; Manwell v. Thomson, 2 C. & P. 303; Edmunson v. Machell, 2 T. R. 4; Irwin v. Dearman, 11 East, 23; Ingersoll v. Jones, 5 Barb. 661; Bracey v. Kibbe, 31 id. 273; Knight v. Wilcox, 15 id. 279; Paterson v. Wilcox, 20 Up. Can. C. P. 385; Magninay v. Saudek, 5 Sneed, 146.

[2] Lipe v. Eisenlerd, 32 N. Y. 229, 234; Gray v. Durland, 51 id. 124; Riddle v. McGinnis, 22 W. Va. 253.

[3] Russell v. Chambers, 31 Minn. 54; Lawyer v. Fritcher, 130 N. Y. 239; Lipe v. Eisenlerd, 32 N. Y. 229; Damon v. Moore, 5 Lans. 454; Badgley v. Decker, 44 Barb. 577; Wilson v. Sproul, 3 Pen. & W. 49; Hornketh v. Barr, 8 S. & R. 36; Knight v. Wilcox, 18 Barb. 212.

quence of it, and give damages accordingly.[1] If the action is brought by any other person than a parent standing in the relation of parent it will be governed by the same principles and rules of evidence; and the court and jury at the [740] trial will make the proper discrimination as respects the *quantum* of compensation.[2] Damages for wounded feelings, including a sense of personal and family disgrace, are inferred as a natural and necessary consequence of the seduction, and need not be specially alleged.[3] There cannot be a recovery of damages based on the future condition of the daughter and the offspring of the seduction, or for the former's loss of marriage.[4] In an action by the seduced woman the publicity given to the fact of seduction by the defendant may be proven in aggravation of damages if it has been pleaded.[5]

As the action is not maintainable on the mere relation of parent and child, there must be some proof of loss of service, or other loss resulting from the seduction. Proof of sexual intercourse, or even of seduction, will not sustain the action.[6] The plaintiff must show that there resulted therefrom some direct injury to his rights as master.[7] It will be assumed that there is a loss of service if pregnancy follows, or sickness, or the communication of any disease.[8] So if the sense of shame and wrong-doing diminish the servant's ability to work.[9] Preg-

[1] Russell v. Chambers, 31 Minn. 52; Morgan v. Ross, 74 Mo. 318; Riddle v. McGinnis, 22 W. Va. 253; Barbour v. Stephenson, 32 Fed. Rep. 66; Herring v. Jester, 2 Houst. 66; Taylor v. Shelkett, 66 Ind. 297; Fox v. Stevens, 13 Minn. 272; Paterson v. Wilcox, 20 Up. Can. C. P. 385; Wilson v. Sproul. 3 Pen. & W. 49; Hornketh v. Barr, 8 S. & R. 36; Coon v. Moffitt, 3 N. J. L. 436; Pruitt v. Cox, 21 Ind. 15; Phillips v. Hoyle, 4 Gray, 568; Hatch v. Fuller, 131 Mass. 574; Felkner v. Scarlet, 29 Ind. 154; White v. Murtland, 71 Ill. 250; Kendrick v. McCrary, 11 Ga. 603; Blagge v. Ilsley, 127 Mass. 198.

[2] Magninay v. Saudek, 5 Sneed 146.

[3] Lunt v. Philbrick, 59 N. H. 59.

[4] Comer v. Taylor, 82 Mo. 341.

[5] Simons v. Busby, 119 Ind. 13.

[6] Comer v. Taylor, 82 Mo. 341; Kinney v. Laughenour, 89 N. C. 365; Delvee v Boardman, 20 Iowa, 446; Hill v. Wilson, 8 Blackf. 123.

[7] White v. Nellis, 31 N. Y. 405.

[8] Anderson v. Ryan, 8 Ill. 583; Leucker v. Steileu, 89 id. 545; Hewit v. Prime, 21 Wend. 79; Hogan v. Cregan, 6 Robt. 138.

[9] In Blagge v. Ilsley, 127 Mass. 191, Colt, J., said: "There was evidence from several witnesses, including the plaintiff and the daughter, that the latter appeared strong and well before the alleged seduction, and that afterwards she became nervous and excitable, and did not appear to be herself. Upon this part of the case the jury were told that the plaintiff

nancy or the birth of a child are not essential. It is sufficient if there be illness of the daughter, resulting from the seduction, and a consequent inability or reduced ability to labor; [741] or if there be expenses necessitated by the same cause.[1] It is not important to the right of action that the loss should result from the seduction in any particular way. It will be enough if a loss has been occasioned which is a legal, natural and direct consequence of the wrong.[2] Where the illness of the daughter, following seduction, is not the consequence thereof, but of the publication of her shame, it will not be deemed a proximate result of the wrong.[3]

It is competent to show the circumstances under which the female was seduced, and the means used for corrupting her mind,—the promises, flattery or deception employed.[4] An exception has been made of promises of marriage by some courts because the damages for the breach of it belong to the daughter seduced.[5] When such evidence is admitted the jury

might recover if they were satisfied that, as the immediate result of the criminal act, the health of the daughter failed, and there was a consequent loss of ability to render service; and it must have been found by the jury that the proximate effect of the seduction was an incapacity to work. In the opinion of a majority of the court, it cannot be declared, as matter of law, that this instruction was erroneous, or that the evidence did not justify the finding. The decline in the daughter's health and spirits directly followed the wrong charged. The daughter was herself a witness, and there was opportunity for the jury to judge of her physical strength and temperament, her natural delicacy and sensibility to the injury alleged. It cannot be laid down as a matter of law that loss of health would not be the natural, probable and direct consequence of the defendant's act, although that act was followed by no sexual disease and no pregnancy. Shame, humiliation and mental distress, affecting the sensibilities of the victim and her capacity for faithful service, may well be a probable and natural consequence of the wrong, wholly without regard to the fear of abandonment or exposure."

[1] Night v. Wilcox, 18 Barb. 212; White v. Nellis, 31 id. 279; Abraham v. Kidney, 104 Mass. 222; Stiles v. Tilford, 10 Wend. 339; Blagge v. Ilsley, *supra*.

[2] Night v. Wilcox, 15 Barb. 279.

[3] Night v. Wilcox, 14 N. Y. 413.

[4] Watson v. Watson, 53 Mich. 168; Bracey v. Kibbe, 31 Barb. 273; Phelin v. Kenderdine, 20 Pa. St. 354; White v. Campbell, 13 Gratt. 573; Fox v. Stevens, 13 Minn. 272; Kahn v. Freytag, 2 Robt. 678; Parker v. Monteith, 7 Ore. 277.

[5] Comer v. Taylor, 82 Mo. 341; Foster v. Schofield, 1 Johns. 297; Clark v. Fitch, 2 Wend. 459; Gillett v. Mead, 7 id. 193; Whitney v. Elmer, 60 Barb. 250; Brownell v. McEwen, 5 Denio, 367; Kip v. Berdan, 20 N. J. L. 239.

should be cautioned to give no damages for breach of the marriage promise.[1] It may be proved in what manner and on what terms the defendant visited her, the family and her relations.[2] Evidence in a father's action of a promise of marriage is not admissible as a ground of damage.[3] Nor can he recover compensation for the support and maintenance of the illegitimate child.[4] But where the seduced may sue in her own name, she may allege and prove both the promise of marriage and seduction, with a view to damages for the double wrong,[5] and may prove many acts on the part of the defendant though they extend over a considerable period of time, as well as all the consequences of the seduction.[6] The plaintiff may show his relationship to the seduced and the [742] situation of the family,[7] and that the defendant aggravated his wrong-doing by producing an abortion.[8] There is some conflict of decision on the question of proving the character and social standing of the plaintiff: but it is believed that where he sustains such relation to the seduced as to suffer injury to his feelings through her dishonor, it is, according to the weight of authority, competent for him to show to affect damages the character and social standing of his own family and the defendant's pecuniary circumstances.[9] It is held in Indiana that in an action by the seduced female the defend-

[1] Phelin v. Kenderdine, 20 Pa. St. 354.

[2] Herring v. Jester, 2 Houst. 66; Parker v. Monteith, 7 Ore. 277; Davidson v. Goodall, 18 N. H. 423; Brownell v. McEwen, 5 Denio, 367.

If the defendant held out expectations to the plaintiff and induced the reasonable belief that he intended to marry his daughter, the insult done in the abuse of his hospitality and the betrayal of his confidence may be considered in awarding compensation for his injured feelings. Lunt v. Philbrick, 59 N. H. 59.

[3] Robinson v. Burton, 5 Harr. 335; Gillett v. Mead, 7 Wend. 193; Whitney v. Elmer, 60 Barb. 250; Odell v. Stephens, 12 Ind. 384; Herring v. Jester, 2 Houst. 66; Kip v. Berdan, 20 N. J. L. 239; Hines v. Sinclair, 23 Vt. 108.

[4] Hitchman v. Whitney, 9 Harr. 512; Sargent v. ———, 5 Cow. 106.

[5] *Ante*, §§ 983, 984; Lee v. Hefley, 21 Ind. 98.

[6] McCoy v. Trucks, 121 Ind. 292; Shewalter v. Bergman, 123 id. 155; Russell v. Chambers, 31 Minn. 54.

[7] Wilson v. Sproul, 3 Pen. & W. 49.

[8] White v. Murtland, 71 Ill. 250; Klopfer v. Bromme, 26 Wis. 372.

[9] McAuley v. Birkhead, 13 Ired. 28; Grable v. Margrave, 4 Ill. 372; Herring v. Jester, 2 Houst. 66; White v. Murtland, 71 Ill. 250; Clem v. Holmes, 33 Gratt. 722; 36 Am. R. 793; Parker v. Monteith, 7 Ore. 277; Applegate v. Ruble, 2 A. K. Marsh. 128; Lavery v. Crooke, 52 Wis. 612; Rid-

ant's financial standing may be shown;[1] but in Iowa neither the plaintiff's financial circumstances nor that of her family is a proper subject of proof if the defendant did not avail himself of it to effect the seduction.[2] The measure of damages in this action is peculiarly within the province of the jury.[3] It was long ago remarked by Wilmot, C. J., that "actions of this sort are brought for example's sake, and although plaintiff's loss in this case may not really amount to the value of twenty shillings, yet the jury have done right in giving liberal damages."[4] "It is believed," said Sherwood, C. J., "that no case can be found in the books where the verdict in an action such as this has been set aside upon the sole ground of awarding excessive damages."[5]

§ 1284. Evidence for defendant in mitigation. The bad moral character of the plaintiff and his character for chastity, it is held in New York, cannot be proved in reduction of damages. Comstock, J., speaking for the court, said: "It is true that in actions of this kind compensation is given for injured sensibilities of the parent, and that a pecuniary value is placed upon the society and attentions of a virtuous daughter. But to justify evidence of bad reputation in general, or in a particular respect, it must first be shown that the sensibilities of such a parent are less acute, and that the society and affections of a virtuous daughter are to him less valuable than to other men. This cannot be affirmed in fact, and there is no such presumption in law."[6] The defendant will not be permitted to show that the plaintiff is devoid of natural sensibilities.[7] In Delaware it has been held that he may show the plaintiff's dissolute habits, though not his general reputation in respect to virtue;[8] and in Tennessee that it may be shown by general reputation that the plaintiff is a person of profligate principles and dissolute habits, but evidence of particular

dle v. McGinnis, 22 W. Va. 253. *Contra*, Hodsall v. Taylor, L. R. 9 Q. B. 79; Dain v. Wycoff, 7 N. Y. 191; Watson v. Watson, 53 Mich. 168. See Haynes v. Sinclair, 23 Vt. 108.

[1] Shewalter v. Bergman, 123 Ind. 155; Wilson v. Shepler, 86 id. 275.

[2] West v. Druff, 55 Iowa, 335.

[3] Riddle v. McGinnis, 22 W. Va. 253, 280.

[4] Tullidge v. Wade, 3 Wils. 18.

[5] Morgan v. Ross, 74 Mo. 318.

[6] Dain v. Wyckoff, 18 N. Y. 47.

[7] Grider v. Dent, 22 Mo. 490.

[8] Robinson v. Burton, 5 Harr. 335.

acts should not be received.[1] It is no defense to the [743] parent's action that the daughter consented willingly to the seduction; for her consent will not deprive such plaintiff of his action;[2] neither is the defendant's responsibility lessened because he accomplished his purpose by force.[3]

It is presumed, in the absence of evidence to the contrary, that the person seduced was a virtuous girl at the time of the seduction, and was a comfort and help to her parents if she lived at home.[4] But her general character is in issue on the question of damages. It may be impeached by general evidence.[5] And specific acts of lewdness and immorality may in some states be shown.[6] But in others the evidence to impeach her character for chastity must be confined to general reputation.[7] Previous chastity is not essential to the cause of action, but antecedent misconduct may have much influence on the question of damages for the parent's pain and disgrace.[8] The consent or connivance of the parent, or one suing in the

[1] Reed v. Williams, 5 Sneed, 580; Thompson v. Clendening, 1 Head, 287.

[2] Bartlett v. Kochel, 88 Ind. 425; Barbour v. Stephenson, 32 Fed. Rep. 66; McAuley v. Birkhead, 13 Ired. 28.

[3] Dalman v. Koning, 54 Mich. 320.

[4] People v. Brewer, 27 Mich. 137.

[5] Reed v. Williams, 5 Sneed, 580; Robinson v. Burton, 5 Harr. 335; Smith v. Milburn, 17 Iowa, 30; Lea v. Henderson, 1 Cold. 146; Bamfield v. Massey, 1 Camp. 461; Dodd v. Norris, 3 id. 519; West v. Druff, 55 Iowa, 335; Dalman v. Koning, 54 Mich. 320; Parker v. Coture, 63 Vt. 155. See Wallace v. Clark, 2 Overt. 93.

[6] White v. Murtland, 71 Ill. 250; Love v. Masoner, 6 Baxter, 24; Verry v. Watkins, 7 C. & P. 308; Hogan v Crogan, Robt. 138; Kahn v. Freytag, 2 id. 678. See Ford v. Jones, 62 Barb. 484.

[7] Shattuck v. Myers, 13 Ind. 46; Hoffman v. Kermerer, 44 Pa. St. 452; Smith v. Yaryan, 69 Ind. 445; Doyle v. Jessup, 29 Ill. 460.

[8] Hill v. Wilson, 8 Blackf. 123; Comer v. Taylor, 82 Mo. 341; Simpson v. Grayson, 54 Ark. 404; Smith v. Milburn, 17 Iowa, 30. See Lea v. Henderson, 1 Cold. 146, where it was held that the fact that another person had had intercourse with the person seduced before her alleged seduction by the defendant, this being unknown to the defendant or to the public at the time of the seduction, is not to be considered by the jury in mitigation.

The unchaste conduct of the female is provable in mitigation of actual damages under a general denial without being otherwise pleaded. Wandell v. Edwards, 25 Hun, 498. One who injures the reputation of another cannot reap a benefit from his wrong; hence the defendant cannot show that after the seduction the plaintiff's character was bad. Shewalter v. Bergman, 123 Ind. 155. Nor that the female was guilty of specific unchaste acts. McKern v. Calvert, 59 Mo. 243; Morgan v. Ross, 74 id. 318.

character of master, to the seduction, will be a bar to the action. And conduct, not amounting thereto, but only to negligence or want of ordinary prudence, may be shown as tending to mitigate damages.[1] In such action it has been ruled that a marriage between the seducer and the seduced and his acquittal on an indictment for the seduction may be proved [744] for the same purpose.[2] In Illinois and elsewhere it has been held that an offer of marriage made by the defendant after the seduction cannot be considered in mitigation.[3] Evidence of the defendant's general reputation for chastity and purity of life is not admissible.[4] If money furnished by the defendant to the plaintiff's daughter is not shown to have been applied to plaintiff's benefit or in reduction of his damages, such payments cannot be proven.[5]

§ **1285. Criminal conversation.** The husband's injury by this wrong consists in his mental suffering from the dishonor of the marriage bed, and the loss of the affections of his wife and the comfort of her society, as well as the pecuniary injury from loss of her services. The extent of the actual injury will of course depend on their prior relations, and the practical consequences between them of her defection. In this class of cases an actual marriage must be proved,[6] and the *gravamen* of the action is that the defendant has committed adultery with the wife.[7] The right of action is not affected if the wrong was committed by force;[8] nor by the fact that the plaintiff obtained a divorce from his wife a short time before suit was brought,[9] or condoned her wrong.[10] The amount of damages is left to the discretion of the jury, and the same considerations prevail in their assessment as when they are awarded in

[1] Travis v. Barger, 24 Barb. 614; Richards v. Fouts, 11 Ired. 466; Graham v. Smith, 1 Edm. Sel. Cas. (N. Y.) 267; Sherwood v. Tetman, 55 Pa. St. 77; Parker v. Elliott, 6 Munf. 587; Smith v. Masten, 15 Wend. 270.

[2] Eichar v. Kistler, 14 Pa. St. 282.

[3] White v. Murtland, 71 Ill. 250; Ingersoll v. Jones, 5 Barb. 661.

[4] Watson v. Watson, 53 Mich. 168.

[5] Russell v. Chambers, 31 Minn. 54; Sellars v. Kinder, 1 Head, 133; Pruitt v. Cox, 21 Ind. 15.

[6] Hutchins v. Kimmell, 31 Mich. 126.

[7] Wood v. Mathews, 47 Iowa, 409.

[8] Egbert v. Greenwalt, 44 Mich. 245.

[9] Wales v. Miner, 89 Ind. 118.

[10] Macdonald v. Macdonald, 12 Rettie (Scotch), 1327; Verholf v. Van Houwenlengen, 21 Iowa, 429; Sikes v. Tippins, 85 Ga. 231; Stumm v. Hummell, 39 Iowa, 483.

favor of a plaintiff who can feel the dishonor of other seductions. And courts will seldom set aside the verdict for excess.[1] There are also other and peculiar considerations which will enter into the account.[2] Evidence in mitigation will [745] be received which tends to show that the plaintiff has in fact suffered less injury than would otherwise be a probable inference from the act proved. It is proper to show unhappy relations between him and his wife, or that he was wanting in affection for her,[3] or that there was but slight intercourse between them;[4] that he was unkind in his treatment of her, or

[1] Johnson v. Allen, 100 N. C. 131; Wales v. Miner, 89 Ind. 118; Sikes v. Tippins, 85 Ga. 231; Torre v. Summers, 2 Nott & McC. 367; Johnston v. Disbrow, 47 Mich. 59; Wilford v. Berkeley, 1 Burr. 609; Duberly v. Gunning, 4 T. R. 657.

[2] The action lies in this case for the injury done to the husband in alienating his wife's affections, destroying the comfort had from her company, and raising children for him to support and provide for; and as the injury is great, so the damages given are commonly very considerable. But they are properly increased or diminished by the particular circumstances of each case. The rank and quality of the plaintiff; the condition of the defendant, his being a friend, relative or dependent of the plaintiff; or being a man of substance; proof of the plaintiff and his wife having lived comfortably together before her acquaintance with the defendant, and her having always borne a good character till then; and proof of a settlement or provision for the children of the marriage, are all proper circumstances of aggravation. Buller's N. P. 27; Mayne on Dam. (Wood's ed.) 664.

The extent of the injury in any case must depend in a great measure upon the previous relations of the parties. If these were cordial and affectionate, and such as are expected to exist when a suitable marriage has been formed, under a proper sense of the obligations and responsibilities that belong to it, the wrong of the seducer who succeeds in withdrawing the wife's affections from her husband, and induces her to live with him a life of shame, it is impossible adequately to measure. If, on the other hand, the husband was a libertine, and has brought shame upon his family by his own notorious misconduct, and if the wife, after the destruction of her affection, by his own abuse and misconduct, has finally surrendered her own honor, it is difficult to understand what claim he can have to legal consideration. And between these extreme cases there may be numerous others differing so widely in their facts, that, while it may be wise to give a right of action in all, yet the measure of redress must be left largely to the discretion of the proper legal tribunal, which shall be at liberty to award much or little according as they find that much or little has been lost by the complaining party. Cooley on Torts, 224.

[3] Hadley v. Heywood, 121 Mass. 236; Coleman v. White, 43 Ind. 429; Rudd v. Rounds, 25 Atl. Rep. 438 (Vt.); Bromley v. Wallace, 4 Esp. 237.

[4] Calcraft v. Harborough, 4 C. & P. 499.

guilty of infidelities,[1] or negligently suffered her to encounter temptation.[2] The loss to the plaintiff may be greatly mitigated by showing that the wife was of bad character at the time of the alleged wrong. It may be shown that there had been improper familiarities between her and other men;[3] that she was wanting in chastity before her marriage,[4] or had committed adultery afterwards;[5] and the fact that the defendant was solicited by her will also go in mitigation.[6] Where the basis of the action is the alienation of the wife's affections, without the aggravation of criminal conversation, the relations which existed between her and her husband may be proven for the purpose of showing his damage. This is measured by the value of her services and marital consent, less the value of the performance of the husband's duty to support, clothe and care for her.[7]

[1] Norton v. Warner, 9 Conn. 172; Bromley v. Wallace, 4 Esp. 237.

[2] Calcraft v. Harborough, *supra;* Duberley v. Gunning, 4 T. R. 657; Van Vacter v. McKillip, 7 Blackf. 598; Bunnell v. Greathead, 49 Barb. 106; Pierce v. Pierce, 3 Pick. 299.

[3] Norton v. Warner, 9 Conn. 172.

[4] Conway v. Nicol, 34 Iowa, 533.

[5] Winter v. Henn, 4 C. & P. 494.

[6] Elsam v. Faucett, 2 Esp. 562.

[7] Rudd v. Rounds, 25 Atl. Rep. 438 (Vt.).

CHAPTER XXXIX.

DAMAGES FOR TORTS IN ADMIRALTY.

§ 1286. Fundamental difference between liability in admiralty and at common law.
1287. Division of loss in collision cases.
1288. Rule applicable to other torts.
1289. Liability confined to proximate loss.
1290. Total loss; elements of damage.
1291. Total loss, what is.
1292. Partial loss; elements of damage.
1293. Same subject.
1294. Interest.
1295. Mitigation of liability.
1296. Recovery by owner of cargo.

§ 1286. Fundamental difference between liability in admiralty and at common law. At common law a party injured by the act or neglect of another is entitled to recover such a sum as will place him in as good condition as though the wrong had not occurred. If his own conduct contributed to produce the result of which he complains he cannot obtain redress. The civil law is in harmony with the common law on this proposition. The reason for the rule is said to be based upon grounds of public policy, which requires, in the interest of the whole community, that every one shall take such care of himself as can reasonably be expected. There is another and more commonly assigned reason for regarding contributory negligence as a defense instead of as a mitigation of damages — the law has no scales to determine whose wrongdoing was the most potent factor in causing the mischief. In courts of admiralty the rule is different. As between the parties to the wrong complained of the loss resulting from a collision will be divided in three classes of cases: first, when there is no fault on either side; second, when the fault is inscrutable; and third, when both parties are in fault.[1] This rule of apportionment emanated from the ancient maritime codes.

[1] Cohen's Admiralty, 229.

§ 1287. Division of loss in collision cases. "The rule of admiralty in collision cases, as we understand it," said Justice Bradley, "is that where both vessels are in fault they must bear the damage in equal parts — the one suffering least being decreed to pay to the other the amount necessary to make them equal, which amount, of course, is one-half of the difference between the respective losses sustained."[1] The judge further said: "But when claims are prosecuted judicially, the courts regard the pleadings, and the English courts are very strict in holding the parties to their allegations, and in refusing relief unless it is sought in a direct mode. If only one party sues, and the other merely defends the suit, and upon the proofs it appears that both parties are in fault, the court declares this fact in the decree, and decrees to the libelant one-half of the damage sustained by him — the damage sustained by the respondent not being regarded as the subject of investigation determinable in that suit. This technical result of the form of proceedings and pleadings, in which the respondent suffers himself to be placed in a position of disadvantage, has led to the erroneous notion that each party is entitled by the law to be paid one-half of his damage by the other party; and that each claim is independent of the other. But where both parties file libels, as they are entitled to do, although to conform to the pleadings, a decree may be rendered in each suit in favor of the libelant for one-half of his damage, even the English courts will not allow two executions, but will grant a monition in favor of that party who has sustained most damage for the balance necessary to make the division of damages equal."[2] In this country if both parties file libels the suits will be consolidated and the decree will pronounce for one-half of the difference of the damage sustained by the two vessels.[3] Where the injury results from the combined negligence of two vessels the damages should be apportioned equally between them, the right being reserved to the libelant to collect the entire amount from

[1] The North Star, 106 U. S. 17, 20, citing The Catharine v. Dickinson, 17 How. 170 (which case first established the rule for the supreme court of the United States), and other cases confirmatory of it.

[2] The North Star, 106 U. S. 17, 22.

[3] Id.

either of them to the extent of her stipulated value, in case of the inability of the other to respond for her portion.[1]

§ 1288. Rule applicable to other torts. If a person injured by a tort which is cognizable in the common-law courts brings his suit to recover therefor in a court of admiralty which has jurisdiction he elects to be compensated according to the rule there prevailing; and if his fault contributed to the wrong of which he complains he must be content with the recovery of a moiety of the damages resulting from it.[2] Where seamen are injured by the fault of the vessel on which they are serving and the co-operating fault of another vessel their recovery against the latter cannot exceed one-half their loss; the other half must be borne by themselves, inasmuch as they cannot claim compensation against their employer for an injury resulting from their own neglect.[3] As to passengers, shippers or consignees the measure of compensation for any wrong or breach of contract is damages to the amount of the whole loss sustained; being innocent of all wrong, they bear no proportion of the loss resulting from a collision.[4]

§ 1289. Liability confined to proximate loss. The liability in admiralty for the consequences of a collision is not more extended than in the common-law courts in cases of other torts. The wrong-doer must respond for all the direct injury which follows his wrongful act or culpable neglect; but he is not liable for anything beyond the direct consequences. Where a boat which was engaged in transporting ice was so aged as to be too weak to stand the wear and tear, it was ruled that for an injury to her which caused the loss of her cargo the party in fault was liable only to the extent that damage would have resulted from his act if the boat affected by it had been ordinarily fit for the business in which it was engaged.[5] If a collision deprives the master of a ship of his compass, chart and log-line, thereby rendering it difficult if

[1] The Sterling and The Equator, 106 U. S. 647.

[2] Atlee v. Northwestern Union Packet Co., 21 Wall. 389; McCord v. The Tiber, 6 Biss. 409; The Queen, 40 Fed. Rep. 694, applying the rule to a case of personal injuries.

[3] The Queen, 40 Fed. Rep. 694.

[4] The Atlas, 93 U. S. 302. See § 1296.

[5] Mould v. The New York, 40 Fed. Rep. 900. See Gilkey v. The Beta, 44 id. 389.

not impossible for him to know his exact whereabouts, and he judiciously undertakes to reach a place of safety, and is not chargeable with negligence in his attempt to do so, the wrong-doer is liable for the consequences, as the abandonment of the vessel made necessary by her becoming grounded. Depriving the vessel's officers of the means of averting such an accident is the proximate cause of the resulting loss.[1] If personal injuries result from a collision they may be recovered for,[2] and so may the damage resulting from the loss of life.[3] The latter cause of action may be recovered for in a proceeding *in rem* against the vessel responsible for it.[4]

§ 1290. Total loss; elements of damage. If a vessel is completely lost the libelant is entitled to have restored to him such an one as he has been deprived of. It was said where there was a loss of a French fishing brig of the kind French fisherman are willing to use for their business, and such as are constantly built in France for that purpose, that the fact that vessels of the same tonnage which English and American fishermen consider superior to the French vessels could be built or purchased for a considerably less sum in England or in the United States was immaterial, in view of the fact that there was a regular market price in France for vessels like the one lost.[5] It has been held that the value of the property lost at the time of its destruction affords full indemnity to the owners of it, and that there cannot be a recovery for lost freights or the contingent profits which the master of a vessel might realize from the allowances made to him upon the voyage.[6] All the adjudications have not held to this great strictness. Where a smack was negligently run down while performing salvage service her value was recovered and also damages for the loss of the anticipated salvage reward.[7] In a later English case than that referred to in note six the principle is said to be well established to allow the gross freight, less

[1] The City of Lincoln, 15 Prob. Div. 15.

[2] The George and Richard, L. R. 3 Adm. 466.

[3] Id.; The Sea Gull, Chase's Dec. 145.

[4] The Sea Gull, Chase's Dec. 145.

[5] Guibert v. British Ship George Bell, 3 Fed. Rep. 581. See The Colorado, Brown, 411.

[6] The Columbus, 3 W. Rob. 164 (1849).

[7] The Betsey Carnes, 2 Hagg. 28.

the expense which would have been incurred in earning it.[1] In this country the admiralty courts do not recognize any distinction between cases of partial and total loss in determining the damages which may be recovered for a collision. In both classes of cases they allow as part of the damages the net freight which the vessel was in process of earning at the time of her loss.[2] The rule has been applied where a vessel was chartered for a fixed time and was wholly lost while engaged in the performance of the contract.[3] In the case last cited compensation was allowed for the loss of a verbal charter for the season which embraced many trips subsequent to the one on which the collision occurred. Judge Lowell stated that his ruling was "an advance upon the decisions," and Judge Brown has observed of it that "no other similar case in this country or in England is found."[4] The rule which permits the recovery of the net value of an existing charter rests upon the ground that the loss of the vessel is necessarily followed by a loss of the profits it would have made, because the charterer could not be obliged to accept performance of his contract by the employment of any other than the stipulated vessel. Hence the rule stated does not apply where the contract provides for the accomplishment of results and leaves the contractor at liberty to use any instrumentalities he sees fit.[5] There may be a recovery of net freights which would have been earned under a charter-party though nothing has been done in pursuance of it. Benedict, J., held in a recent case in which a vessel chartered for a voyage from New York to Cadiz was lost while en route to the former port to enter upon the voyage that there was nothing uncertain, speculative or remote in the claim for the net freight which she would

[1] The Canada, Lush. 584 (1860).

[2] The Rebecca, 1 Blatch. & H. 356; The Baltimore, 8 Wall. 386; The Hope, 5 Fed. Rep. 822; The Minnie, 26 id. 860.

[3] The Hope, 5 Fed. Rep. 822; The Freddie L. Porter, 8 id. 170. Compare The Amiable Nancy, 3 Wheat. 546.

[4] The City of Alexandria, 40 Fed. Rep. 697.

[5] Id.; The North Star, 44 Fed. Rep. 492. In the last case a steamer was sunk after she had entered upon the performance of her charter. Her owner was paid a considerable sum for a re-assignment and release of his interest in the charter on the theory that he had the right to substitute another vessel. On that consideration it was held that he could not recover the profits which would have accrued to him from a complete performance of the charter.

have earned. "The voyage had been determined on, the charter-party had been executed, and the cargo had been engaged, and it is certain that, but for the collision in question, the Iberia would have earned for her owners, under the charter to Cadiz, a sum that is capable of computation. If at the time of her loss the ship had been engaged in performing a charter from Aden to New York and back to Cadiz, the loss of freight on the voyage to Cadiz would have been recoverable; and it is not seen how any difference arises from the fact that at the time of the loss she was chartered for the same voyage by two charter-parties instead of one."[1] There cannot be a recovery for lost freight when the vessel is wholly laden with her owner's goods at the time of the collision because of the rule which confines the recovery of the shipper to the value of the cargo at the place of shipment. Brown, J., said: "The compensation for which the ship-owners look in the employment of their vessel to carry their own goods is solely in the expectation of the enhanced value of the goods at the place of discharge; and if that expectation of enhanced value cannot be considered in determining the owner's loss on the goods, I do not see how it can be any more considered as regards the loss of the ship, either directly or indirectly. Nor is that necessary; nor is the supposition of a fictitious charter necessary in order to satisfy the rule of *restitutio in integrum*. That rule will be fully satisfied by allowing to the libelants, as in the case of goods wholly lost at sea, the market value of their vessel at the port of sailing at the time she was devoted to the voyage, with interest from that date; and, in addition thereto, whatever stores or special equipment of any kind may have been provided for the voyage, including the wages of officers and men from the time they were engaged, as well as any other items of expense, if any, reasonably incurred for the prosecution of the voyage up to the time of loss, with interest on such sums from the time they were supplied or paid."[2]

[1] The Iberia, 46 Fed. Rep. 301. The judge cited The Freddie L. Porter, 5 id. 822; The Canada, Lush. 586; The Consett, 5 Prob. Div. 229; The Star of India, 1 id. 466; The Mary Steele, 2 Low. 370; The Belgenland, 36 Fed. Rep. 504. The Argentino, 13 Prob. Div. 61, applies the rule to a case of partial loss.

[2] The Beatrice Havener, 50 Fed. Rep. 232.

§ 1291. Total loss, what is. The fact that a vessel sinks after a collision does not of itself warrant the conclusion, as a matter of legal judgment, that either she or her cargo is a total loss.[1] If it appears probable that they may be raised without much expense, and the vessel repaired, her owners cannot insist upon compensation as for a total loss if they have neglected to employ reasonable measures to mitigate the damage. In some cases allowance has been made for the cost of raising a sunken vessel though she was not repaired. This course has been taken when it was necessary to raise her in order to ascertain whether she should be abandoned as a total loss or not, and also when her removal was required because she was an obstruction to navigation.[2] In all these cases the vessels were sunk in rivers or harbors or in comparatively shallow water elsewhere. If the sunken vessel lies in deep water and was of comparatively little value before the collision, her owner cannot incur large expense in raising her and charge the vessel in fault with it, and also with the cost of repairs, freight, demurrage and value of the cargo. In such a case the recovery will be limited to the value of the vessel, cargo, freight and personal effects before the collision occurred.[3] It is said in The Granite State[4] that there cannot be an established market value for barges, boats and other articles of that description as in cases of grain, cotton or stock. The value of such a boat depends upon the accidents of its form, age and materials; and as these differ in each individual, there could be no such value. A person may make considerable profits by the use of an old hulk of little value in the market for vessels. His loss cannot be measured by the ratio of her profits, as he might supply himself with another at a much cheaper rate. But when the injured vessel is not a total loss, and is capable of being repaired and restored to her original situation, the cost necessary to such repair cannot be said to be an incorrect rule of damages.

[1] The Baltimore, 8 Wall. 377; The Bristol, 10 Blatch. 537; The Thomas P. Way, 28 Fed. Rep. 526; The Havilah, 50 id. 331; The Granite State, 3 Wall. 310.

[2] The Empress Eugenie, Lush. 139; The Venus, 17 Fed. Rep. 925; The America, 11 Blatch. 485; The Mary Eveline, 14 id. 497; The Nebraska, 3 Bene. 261.

[3] The Havilah, 50 Fed. Rep. 331 (court of appeals, second circuit).

[4] 3 Wall. 410.

§ 1292. Partial loss; elements of damage. "In order to make full compensation and indemnity for what has been lost by the collision, *restitutio in integrum*, the owners of the injured vessel are entitled to recover for the loss of her use while laid up for repairs. When there is a market price for such use that price is the test of the sum to be recovered. When there is no market price, evidence of the profits that she would have earned if not disabled is competent; but from the gross freight must be deducted so much as would in ordinary cases be disbursed on account of her expenses in earning it; in no event can more than the net profits be recovered by way of damages; and the burden is udon the libelant to prove the extent of the damages actually sustained by him."[1] The expenses of the vessel from the port of departure to the place of collision and return from thence to a port of repair have been disallowed on the theory that the voyage might not have been a profitable one.[2] There are cases which ignore some of the contingencies which may have influenced the court in ruling the proposition last stated. In an English case[3] the injured vessel was in ballast on a voyage from Antwerp to Montreal to load a cargo of grain. She collided with

[1] Mr. Justice Gray in The Potomac, 105 U. S. 630, 632, citing Williamson v. Barrett, 13 How. 101; Sturgis v. Clough, 1 Wall. 269; The Cayuga, 2 Bene. 125; 7 Blatch. 385; 14 Wall. 270; The Gazelle, 2 W. Rob. 279; The Clarence, 3 id. 283. In the case before the court demurrage was allowed for the loss of three trips in the established trade of the vessel on the basis of the profits which according to the average of her whole business for the season she would have realized on that number of trips. This allowance was made, instead of the charter value of the vessel, because she was engaged in a regular established line for which she was peculiarly fitted, and her charter value could not be satisfactorily ascertained; neither could her place be supplied by a vessel equally fitted for the service. No deduction was made for insurance or for wear and tear or for necessary repairs at the end of the season. It did not appear that there was any need of repairs at the time of the collision, nor that there was any decrease in the cost of insurance while the repairs were being made. On these considerations a majority of the court were unable to say as matter of law that the damages were excessive. See The Margaret J. Sanford, 37 Fed. Rep. 148. The rule stated in the text is not applied in the courts of Ontario. Brown v. Beatty, 35 Up. Can. Q. B. 328.

[2] Memphis, etc. Packet Co. v. The H. C. Yaeger, 4 Fed. Rep. 927.

[3] The Consett, 5 Prob. Div. 229 (1880); The Argentino, 13 id. 61 (1888).

another vessel October 10, and was compelled to put into Queenstown for repairs. She was under a profitable charter, which her owners did not abandon until it became apparent to them that she could not be repaired in time to resume her voyage and enter upon the performance of her charter until after the time the St. Lawrence is usually closed for navigation. The abandonment of the charter being justifiable, it was ruled that the loss of the profit which would have accrued from its performance was a ground of damage in favor of the vessel owners. It has been pointed out[1] that there were several contingencies which made it uncertain whether, had no collision occurred, the charter would have been performed. There was the contingency in the first place of the vessel's ever reaching Montreal; and second, of her charterers being ready to furnish her with the stipulated cargo, and also whether she would accomplish the homeward voyage and earn her freight. It is essential to the right to recover dead freight as an item of damage that the vessel which has lost freight in consequence of a collision shall make reasonable efforts to secure a fresh cargo.[2] If an existing charter is lost in consequence of a collision and a charter at lower rates is necessarily taken for the residue of the charter period the vessel owner is entitled to compensation for the loss resulting up to the expiration of the original charter.[3] It is not a valid reason for refusing demurrage that its allowance, added to the cost of the repairs, will make a sum in excess of the value of the vessel before the collision, if the owners acted with care, skill, diligence and fidelity and in good faith in the course pursued, and the excess of the cost of repairs over the estimates could not have been foreseen.[4]

It is not a sufficient reason for disallowing demurrage while a boat is detained for repairs that the work she would have been put to but for the accident was done by another boat owned by the libelants, and which was at the time not otherwise employed.[5] This ruling is said to be maintainable

[1] Per Fox, J., in The Hope, 5 Fed. Rep. 822.

[2] The C. P. Raymond, 28 Fed. Rep. 765.

[3] The Belgenland, 36 Fed. Rep. 504; The Star of India, 1 Prob. Div. 466; The Consett, 5 id. 229.

[4] The Glaucus, 1 Low. 366, 372.

[5] Coffin v. The Osceola, 34 Fed. Rep. 921.

on the ground that the owners of the disabled boat were entitled to procure another boat to take her place. It is immaterial to the wrong-doer whether the boat substituted was hired from other persons at market rates or supplied by the libelants themselves. If the latter course is pursued they are entitled to charge for the use of their own boat at the market value of its use, for the time being, as though they had hired her from other persons.[1] Such value is not always determinable by the net value of the charters of the disabled vessel for the days her place was taken by other vessels owned by the same person. The better rule is, where substituted service can be obtained, to measure the recovery by its cost. In The Emma Kate Ross, before the circuit court of appeals for the fourth circuit,[2] it appeared that the vessel was twenty-one days undergoing repairs, and that she was chartered for all but one of them. During eight of these days her owner hired another boat to fill her engagements at a cost of $110 per day. During the remaining days he substituted other boats of which he was the owner. It was ruled that the amount which the disabled boat would have earned under her charters was not to be taken as the measure of the wrong-doer's liability, but that the rate which was paid for the substituted vessel was the proper standard, it not appearing that she was incompetent for the service. It was not improper to apply this rule because the other vessels owned by the libelant were larger than the disabled one, and therefore presumably competent to earn more compensation. The principle we have been considering and which is sustained by an unbroken current of American adjudications is not recognized in England to the same extent it is here. It is there held by the privy council that indemnity for consequential loss from the detention of a vessel can only be recovered where an actual loss resulting therefrom is shown, and reasonable proof of its amount is made. This well-established principle is applied to the question under consideration by holding that a claim for demurrage during the detention of a vessel injured in a collision while a substituted vessel, the property of the same

[1] New Haven Steamboat Co. v. Mayor, 36 Fed. Rep. 716; The Emma Kate Ross, 46 id. 872; The Favorita, 18 Wall. 598; The Cayuga, 14 id. 278; 7 Blatch. 385.

[2] 50 Fed. Rep. 845.

owners, was doing at the defendant's expense and indemnity for loss occasioned by the substitution, the work which the disabled vessel ought to have done, is not recoverable. In other words, only such sum can be recovered as will reimburse the owners for the actual outlay they have incurred, such as for the lodging, maintenance and wages of the crew; loss of profits which might have been earned by the particular vessel are not an element of the damages.[1] The recovery of such profits is not allowable in Ontario, nor is the expense of hiring another vessel to take the place of the one injured.[2]

The allowance in favor of a vessel damaged while she is being repaired is measured by the value of her use. The rate of demurrage stipulated for in the charter is not evidence of such value in favor of her owner against a third person.[3] If the rate so stipulated is adopted as the value of the use of a vessel there cannot be also a recovery for wharfage and fees for watchmen, because the term "demurrage" includes these.[4] The damages recoverable include a charge for wharfage and necessary commissions when there is not an acceptance of the rate of demurrage thus fixed.[5] If expenses have been judiciously incurred in saving property and thus reducing the amount of the loss they are recoverable,[6] although the loss may have been increased by the efforts made.[7] In awarding compensation for the time a vessel was obliged to lay by in order to have necessary repairs made the allowance will not be extended beyond the time actually incurred for that purpose. Time consumed in consultation between her owner and an attorney and in deciding on the former's course will not be regarded.[8] If expenses have been incurred in retaining the crew during the time repairs were being made there may be a recovery of the amount.[9] A recovery for demurrage must

[1] The City of Peking, 15 App. Cas. 438 (1890).

[2] Brown v. Beatty, 35 Up. Can. Q. B. 328.

[3] The Jas. A. Dumont, 34 Fed. Rep. 428; The Margaret J. Sanford, 37 id. 148.

[4] The C. P. Raymond, 28 Fed. Rep. 765.

[5] The Jas. A. Dumont, 34 Fed. Rep. 428; The Fannie Tuthill, 17 id. 87.

[6] Seabrook v. Raft of Railroad Cross-Ties, 40 Fed. Rep. 596; Hoffman v. Union Ferry Co., 68 N. Y. 385.

[7] The Narragansett, Olcott, 246, 257.

[8] Seabrook v. Raft of Railroad Cross-Ties, 40 Fed. Rep. 596.

[9] Hoffman v. Union Ferry Co., 68 N. Y. 385.

not exceed the sum which the boat as such, and without men or supplies, could have been chartered for.[1]

§ 1293. Same subject. As a general rule a vessel which has been damaged may be repaired at the place where the damage was done if that is practicable; but unnecessary expense must not be incurred. If the cost of making repairs there is exceptionally great, and the owner voluntarily takes his vessel to another place where they are made at much less cost, his recovery must not exceed the amount he actually pays for them, including the time and expense of moving his vessel from one place to the other. The fact that an estimate of the expense of repairs was made by surveyors at the port where the damage was done does not suspend the application of this rule.[2] If a vessel sunk by a collision is raised and found to be in such a condition that it is prudent and practicable to repair, if her owners act with promptness they may recover the cost of raising her and her cargo and of making such temporary repairs as she may need,[3] and also the sum it costs to put the vessel, her furniture and fittings into as serviceable a condition as she and they were in before the collision occurred, as well as a reasonable amount for demurrage and compensation for damage sustained by the cargo.[4] If the crew joint with the vessel-owners in a libel against the vessel in fault, they may recover for the loss of their personal effects; but their value should not be put at what it would cost to replace them.[5] If the injured vessel is free from fault the expense of towing her to her home port for permanent repairs instead of stopping at an intermediate port for temporary repairs may be recovered if the damage is serious and the navigation was dangerous, in the absence of proof of ignorance or dishonesty on the part of her master.[6] If making repairs results in other expenses they may be recovered; as for surveying the injuries done a vessel and the superintend-

[1] The Emilie, 4 Bene. 235.

[2] The City of Chester, 34 Fed. Rep. 429.

[3] The Catharine v. Dickinson, 17 How. 170.

[4] The Minnie, 26 Fed. Rep. 860; Comerford v. The Melvina, 43 id. 77.

[5] Id.; Leonard v. Whitwill, 19 Fed. Rep. 547.

[6] The Benjamin F. Hunt, Jr., 34 Fed. Rep. 816; The Fannie Tuthill, 17 id. 87; Comerford v. The Melvina, 43 id. 77.

ence of repairs, the re-adjustment of the ship's compass, her re-rating at Lloyd's, the cost of the master's protest made in a foreign port, which is required by general usage, and the wages of the crew under contract during her detention.[1] It is otherwise as to the expense of the master's protest made in a foreign port as a means of collecting insurance, because that grows out of a contract wholly between the insurer and the insured, and is not made necessary by the act of the wrong-doer.[2] The expense of saving the lives of the crew of the wrecked vessel and returning them to the nearest port is an item which may be recovered for. Such services are regarded as being rendered in the performance of a maritime duty; and not as a voluntary charity merely.[3] Salvage money paid by the owner of a damaged vessel and interest thereon is a proper charge against the wrong-doer;[4] but it is otherwise as to the costs and counsel fees incurred in defending a suit to recover for salvage services.[5] There cannot be a recovery of the expenses of a convoy to an injured vessel unless the necessity therefor is made clear.[6]

§ 1294. Interest. Where the loss is only partial the probable earnings have been allowed the libelant if there was no more certain mode of arriving at his loss by the detention of his vessel while repairs were being made. In such cases, and also where the charter value of the vessel is recovered, there cannot also be a recovery of interest. Where there is a total loss interest on the value of the vessel or cargo is recoverable from the date of the casualty,[7] unless there is a recovery on some other basis than that of the value of the lost property. It is said, however, that the recovery of interest is a matter of discretion, even in a case of total loss.[8] Where the loss is partial only and the vessel proceeded against has been bonded

[1] The Belgenland, 36 Fed. Rep. 504; New Haven Steamboat Co. v. Mayor, id. 716; The Alaska, 44 id. 498. It is otherwise as to the expense of re-rating if the vessel has been repaired in a different manner from that in which she was originally constructed. Gilkey v. The Beta, 44 Fed. Rep. 389.

[2] The Belgenland, *supra;* The City of Norwich, 118 U. S. 468.

[3] Leonard v. Whitwill, 19 Fed. Rep. 547.

[4] The Alaska, 44 Fed. Rep. 498.

[5] Greenwood v. The Fletcher, 42 Fed. Rep. 504; The Favorita, 4 Bene. 132.

[6] The Alaska, 44 Fed. Rep. 498.

[7] Guibert v. British Ship George Bell, 3 Fed. Rep. 581.

[8] The North Star, 44 Fed. Rep. 492.

in limited liability proceedings under the federal statutes in a fixed sum to "abide and answer the decree," interest is not to be computed until the date of the decree of the district court.[1] The allowance of interest upon the cost of repairs and sums expended for salvage services is a matter of discretion. If the repairs make the vessel more valuable than she was before the collision interest will not be allowed.[2]

§ **1295. Mitigation of liability.** The common-law doctrine that a wrong-doer's liability is not mitigated by a benefit accruing to the injured party from his contract with another applies in admiralty. Hence the payment of insurance upon a lost vessel does not lessen the liability of the party responsible for a collision.[3]

§ **1296. Recovery by owner of cargo.** Where a cargo is lost at sea as the result of a collision its owner is entitled to recover the prime cost or market value of it at the place of shipment, with all charges of lading and transportation, including insurance and interest, but without any allowance for anticipated profits. When the goods have no ascertainable market value at the place of shipment indirect means must be resorted to for the purpose of ascertaining their real value there. In a case where the loss was of a cargo of guano owned by the Peruvian government, the loss having occurred while the cargo was in transit to New York, it was held that evidence of value based upon an estimate of the price at which sales of it were usually made in New York, with a fair deduction for profits and expenses of every kind, afforded a just basis for fixing the measure of recovery.[4] It is said that it is immaterial to the application of this rule how near the lost vessel may have been to her port of destination at the time the collision occurred.[5] In several cases, however, as where whales captured at sea have been tortiously converted in regions where there was no market for them or their prod-

[1] The Manitoba, 122 U. S. 97; The José E. Moré, 37 Fed. Rep. 122.

[2] The Alaska, 44 Fed. Rep. 498.

[3] The Monticello v. Mollison, 17 How. 152.

[4] The Scotland, 105 U. S. 24. In The Joshua Barker, Abb. Adm. 215, there was a loss of cargo through the sole fault of the vessel which had it on board. The damages were measured by its value at the place of delivery.

[5] Guibert v. British Ship George Bell, 3 Fed. Rep. 581; The Amiable Nancy, 3 Wheat. 546; The Vaughan and The Telegraph, 14 Wall. 258, 267.

ucts, in order to do justice the courts have been obliged to adjust the value of the whales by the price at the controlling market of the country in which the suit has been brought at the time the vessel which sustained the loss could have reached there without unreasonable delay, less the expense of carrying the product to that market.[1] The same rule has been adopted where there have been collisions between whaling and fishing vessels.[2] In the case last referred to the court allowed the price at the nearest port, which was not remote from the place where the injury occurred, such port being a market for fish, and refused to allow the price at the port for which the vessel was destined. It was contended that inasmuch as in collision cases where freight has actually been contracted for, the freight then pending, less the expense of completing the voyage, is allowed as part of the damages, and that in the case of a fishing vessel, the fish on board not having cost anything, that the difference between the price at the port nearest which the loss occurred and the price at the port of destination should not be regarded as profit but as the freight earned by the vessel and wages earned by the crew according to the several and respective shares of the former and the latter in the proceeds of the "catch." The court thought the application of the rule contended for would open the door to the very dangers and uncertainties sought to be excluded by the decisions directed against the recovery of profits in any shape; but allowed the value of the fish at the nearest port without deducting the small expense which would have been incurred in reaching there, and also interest on such value from the time of the collision, but refused to make an allowance for the fish which the master reported might have been taken with reasonable certainty during the portion of the fishing season which the collision deprived the appellants of the benefit of.[3] Where a cargo of dates gathered on the river Euphrates was lost it was held that the shipper might recover as part of his damages the expense of sending an agent there to superintend the picking and the rent of

[1] Bourne v. Ashley, 1 Low. 27; Bartlett v. Budd, id. 223; Taber v. Jenny, 1 Sprague, 315.

[2] Swift v. Brownell, 1 Holmes, 467; Guibert v. British Ship George Bell, 3 Fed. Rep. 581.

[3] Guibert v. British Ship George Bell, *supra*.

a house for one year for the shelter of the men employed, though the use of the house continued but for six weeks. It appeared that houses are usually rented for that term by those engaged in the business of gathering the fruit.[1]

A shipper or consignee who has freight on either of two vessels which come into collision with each other, or on a third vessel which is injured by others, may proceed in a common-law court or in admiralty, by a proceeding *in rem* or by a libel *in personam* against the owner of either or both of the offending vessels, and recover the entire amount of his damages.[2] If the proceeding is in admiralty against both the offending vessels the decree should be against each of them for one moiety of the entire damages to the extent of the value of the vessels respectively. Any balance of the moiety in excess of the value of either vessel which may not be collected is a charge against the other to the extent of its value beyond its own moiety.[3]

[1] The Umbria, 46 Fed. Rep. 927.

[2] The Atlas, 93 U. S. 302; The Juniata, id. 337; The Britannic, 39 Fed. Rep. 395.

[3] The Alabama and The Gamecock, 92 U. S. 695.

GENERAL INDEX.

References are to sections: Vol. 1, secs. 1–469; Vol. 2, secs. 470–767; Vol. 3, secs. 768–1296.

ABATEMENT —
on determination of issue, judgment peremptory, and same jury should assess the damages; if omitted, another jury may, 432.
duty of party liable to abate nuisance, 1035, 1038, 1040.
judicial, generally provided for, 1036.

ABDUCTION —
of child, damages for, 1252.

ACCEPTOR —
primary liability of; his contract governed by law of place of payment, 358.
primarily liable to the holder of a bill, 540.
what liability arises from acceptance, 540.
his agreement by acceptance, 549, 561.
damages recoverable on agreements to accept, 540.
how amount of principal sum ascertained in action against, 540.
fraud on him not available as a defense where transaction not repudiated, 549.
may show in action against the drawer acceptance for his accommodation, 555.
is liable on his acceptance as though he had given his note for same sum, 561.
is not liable for re-exchange, 561.
but this has been questioned on principle, 561.
is liable to reimburse the drawer who has been compelled to pay re-exchange, 561.
by what law his undertaking is governed, 563.

ACCIDENT —
towns held liable when injury results from defect in highway, 26.

ACCOMMODATION PAPER —
it cannot be collected by the accommodated party, 542.
parol evidence admissible to show a note or bill to be such, 551.
on what consideration it is made, 551.
liability of accommodation party, 551.
how and to whom accommodation drawer liable, 555.
measure of recovery on, when purchased for less than its face, 555.

ACCORD AND SATISFACTION —
definition, 246.
consideration of, 247.
payment of part of debt not sufficient, 248.
any other act or promise will suffice, 249.
as payment at different place or before maturity, 249.
or giving note or security, 249.
value of substituted thing not material, 249.
composition with creditor, 250.
compromise, 251.
agreement must be executed, 252.
rescission or exoneration before breach, 252*a*.
differs from release, 254.

References are to sections: Vol. 1, secs. 1–469; Vol. 2, secs. 470–767; Vol. 3, secs. 768–1296.

ACCOUNT —
when entire, constituting but one cause of action, 111.
what a running, imports, 111.
debits and credits reciprocal payments when brought into, 215.
items proper for may be put into to show net balance, 215.
interest on, allowed by custom or tacit agreement, 322.
loss of, as consequence of destroying account books, must be specially alleged, 420.
agent's duty to render, 784.

ACTION —
when prosecution of groundless, *damnum absque injuria*, 3.
where injury gist of, 3.
when costs and expenses of, items of damage, 25, 55, 58.
difference in matter of proof between, for tort or breach of contract, 100, 104.
a cause of, has value and is of the nature of property, 7.
successive, when will lie, 112–118, 125.
necessity of, 127.
parties to, given by statute, 129.
must be brought in name of person in whom the legal interest vested, 130.
wrongs and breaches of contract concerning, actionable when it survives, 7.
what must concur to give, 3.

ACT OF GOD —
no damages for breach of condition or agreement caused by, 476, 655, 709.

ACTUAL LOSS OR INJURY —
directly arising from breach of contract recoverable without special allegation, 66.
elementary limitation and measure of damages, 75.
necessary to give a right of action for more than nominal damages, 9.
is the measure of damages for compensation, 12, 471, 525, 596, 599, 610, 627, 670, 675, 693.

AD DAMNUM, 414, 417.

ADMINISTRATOR —
charged with his debt, 222.
may retain for debt owing him out of assets, 222.
not liable beyond assets, 494.
his duty is to apply assets to debts, 494.
when liable, and to what extent, to beneficiaries of his trust, 494.

ADMIRALTY —
rule of damages for torts in, 1286–1293.

ADVICE OF COUNSEL —
may avail to mitigate exemplary damages, 155, 405.
in mitigation of damages for malicious prosecution, 1240.

AGENT —
will forfeit his right to compensation by misconduct, 683.
damages for assuming to act as without authority, 25, 84–87, 787.
when he may sue in his own name, 130.
liability for failing to disburse money to pay incumbrance, 77.
how amount of indemnity against principal ascertained, 82.
may receive payment, 231.
may make tender, 264.
when interest allowed against, 353.
undisclosed principal may sue on contract made in name of agent, 130.
liability of principal, 77, 79.

References are to sections: Vol. 1, secs. 1–469; Vol. 2, secs. 470–767; Vol. 3, secs. 768–1296.

AGENT — continued.
liability of principal for breach of contract to employ, 81.
master or principal liable for exemplary damages for malicious tort of servant or agent, 407, 408.
reciprocal obligations of principal and agent, 768, 769.
particular duties and liabilities of agents, 770, 774.
liable to at least nominal damages for any breach of his agreement or duty, 770.
principal entitled to full indemnity, 770, 771.
where a loss happens in case of deviation from instructions, 770, 771.
agent is liable for loss arising from his neglect to give due information, 771.
agent's neglect of duty or agreement concerning insurance, 772.
disregard of order for the purchase and shipment of goods, 773.
defaults in regard to commercial paper, 775, 776.
same principles applied to factors, 777.
sales at unauthorized price, 778, 779.
duty to sell at a certain time, 780, 781.
duty to pursue directions as to terms of sale, 782.
guaranty commission, 783.
duty of rendering accounts, 784.
liability of brokers, 776.
agents' rights, 788–795.
reimbursement of expenditures, 789.
factor's right to reimburse himself by sales, 790.
how right to reimbursement affected by mode of doing business, 792.
agent may charge for exchange, 791.
agent's right to indemnity, 793.
no indemnity for unlawful act, 794.
measure of agent's recovery, 795.
when agent liable to third person, 796.
liable on implied warranty of authority, 797.
measure of damages, 798.
rule in California, 798.
recovery of money from him, 799.
liable for his torts, 800.

AGGRAVATION —
what is done after illegal entry is, of damages, 1030.
facts in, may be shown to enhance damages, 1031, 1032.
in trespass *quare clausum*, taking and carrying away personal property matter of, 1030.
may be alleged as substantive cause of action, 1030.
difference in pleading for, 1030.
in the claim of damages for, 1030.
facts connected with an entry and taking for public use considered only for compensation, 1070.
not necessary to allege matter of, 422.
allegation of, not traversable, 423.
proof of, to enhance damages, 394.
social standing of parties and defendant's wealth, when provable, 404, 405.

AGREEMENT —
not to sue, operates to relinquish debt, 144.
alternative, 282, 283.

AMENDMENT —
of *ad damnum*, 417.
of verdict, 457, 458.

References are to sections: Vol. 1, secs. 1-469; Vol. 2, secs. 470-767; Vol. 3, secs. 768-1296.

ANIMALS —
owner not liable for acts of his animals done according to their natural dispositions or habits of which he had no notice, 31.
liability for suffering diseased sheep to trespass and communicate disease, 18.
damages for breach of warranty of soundness, in being diseased and communicating disease to other animals, 675.
damages from breach of warranty resulting in personal injury from, 675.

ANNOYANCE —
as an element of damage, 48.

ANNUITY —
stipulated damages for non-payment of, 288.
damages for negligence by which security for lost, 113.
interest on, recoverable, 344.
tables of, admissible in evidence, 455.

APPEAL —
not waived by acceptance of payment, 271.
interest pending, 389.

APPEAL AND SUPERSEDEAS BONDS —
their usual conditions, 531.
of *supersedeas* bonds in the federal supreme court, 532.
liability on when the judgment or decree below is only in part for money or *in rem*, 533-535.
damages on, 532-535.
liability on specific conditions, 536, 537.
two sets of sureties in, not co-sureties, 536.
undertaking on appeal under the code, 536, 537.
interest and damages awarded on, 538.

APPLICATION OF PAYMENTS —
general rule, 234.
the debtor has absolute right to direct, 235, 236.
confined to voluntary payment, 235.
evidence of, 236, 237.
trustee has not the right to direct, 235.
by creditor, 238-240.
by court, 241.
when *pro rata*, 242.
when to oldest debt, 243.
when to debt bearing interest, 244.
general payment applied to debt least secured, 245.

APPORTIONABLE CONTRACTS —
for services, 468.
whether a contract is such depends on the intention of the parties, 468.
contracts for service are, when wages are intended to be paid as the work progresses, 468.
contrariety of decision on contracts for particular work as to their being severable, 708, 709.

APPORTIONMENT —
of compensation for work done under special contracts not fully performed or deviated from, 507, 509.
none of rent for part of rent period, 849.
none for use of part of demised premises where there has been partial eviction by landlord, 848.
otherwise when partial eviction by stranger, 848.

References are to sections: Vol. 1, secs. 1–469; Vol. 2, secs. 470–767; Vol. 3, secs. 768–1296.

APPORTIONMENT — continued.
after partition between tenants, if lessor releases one tenant such release will sever rent, 850.
ratio of values governs in apportionment between several tenants, 850.
of damages between landlord and tenant on a part of the demised premises being taken for public use, 853.

APPRENTICE —
damages for enticing away, 122.

ARBITRATION —
damages for revocation of submission to, 53.

ARREST —
mitigations for wrongful arrest, 150, 165.

ASSAULT AND BATTERY —
damages given for mental as well as physical pain, 29, 93–96.
matters provable in mitigation, 151.
recent provocative words and acts, 151.
extent of mitigation, 151.
exemplary damages permitted, 151, 393, 402.
effect of plaintiff's malice in provoking, 151.
effect of criminal punishment, 151.
peaceable character of defendant, 151.
defendant in mitigation may show *res gestæ*, 159.
damages against passenger carriers for, 942.

ASSESSMENT OF DAMAGES —
how made, 427–434.
writ of inquiry, 427.
when without a jury, 428.
what a default or demurrer admits, 429.
jury may assess damages conditionally on demurrer to evidence, 429.
defendant may offer evidence in reduction of damages, 430.
jury *tam quam*, 432.
when new jury may be called, 433.
correction of error in, 434.

ASSIGNEE —
of lessee liable by privity of estate, 850.
his liability determined by a new assignment, 850.
his liability does not depend on possession, 850.
if he continues in possession his liability will continue though he has assigned, 850.
of lease bound by covenant to repair, 859.
presumption as to time when dilapidations took place, 859.

ASSIGNOR —
liability of, for breach of implied warranty on sales of notes and choses in action, 668.

ATTACHMENT BOND —
injury to credit and business as item of damage in action on, 55.
conditions of, 510.
breaches of, 510.
who may sue on, 511.
damages recoverable on, 512–514.
costs, etc., recoverable, 516.
when exemplary damages recoverable on, 514.
what may be shown in defense, 515.

References are to sections: Vol. 1, secs. 1-469; Vol. 2, secs. 470-767; Vol. 3, secs. 768-1296.

ATTORNEY —
how lien of, affected by set-off of judgment, 204.
liability of, for officer's act done by his direction, 140.
fees of, as items of damage, 55, 83, 86.
value of his services, how proved, 446.
tender may be made to, 265.
his lien, 204.
advice of, may be shown in mitigation of exemplary damages, 405.
See ADVICE OF COUNSEL.

ATTORNEY'S FEES —
effect of stipulations for, in notes, 564.
such stipulations do not affect indorsers, 564.
when an item of damages on breach of covenants for title, 610, 617, 619.
allowance of for service in case of breach of warranty of title to personal property, 669.

ATTORNEY'S SERVICES —
an action for, will lie, 682.
may contract for a stated sum, or recover on a *quantum meruit*, 682.
what may be shown to enhance or diminish the merit and value of such service, 682.
in England actions cannot be maintained for advocacy in litigation, 682.
when the expense incurred for such service an item of damage, 762.

BAGGAGE —
liability of carrier for loss of, 954.
what is baggage, 954.
measure of damages, money value and interest, 955.

BAILEE —
value of property lost by negligence or converted and interest, the measure of damages, 105.

BANKER —
liability of for refusal to pay check, 77.
when tender may be made to, 265.
liability of as collecting agent, 775, 776.

BARGAIN —
when loss of, not an item of damages for breach of contract for sale of land, 578–581.
when item of damage in such case without regard to cause of vendor's breach, 580.

BILLS OF EXCHANGE AND NOTES —
when receipt of them by creditor, payment, 225–227.
one in possession of may receive payment, 231.
interest on, 350.
place of contract, law of, 360.

BONA FIDE HOLDER —
who is such, of commercial paper, and his rights, 541, 542, 555.

BONDS AND PENAL OBLIGATIONS —
definition of a bond, 470.
what is a single bond, 470.
nature and effect of a condition, 470.
at law, the penalty became an actual debt on failure to perform the condition, 470.
but relief was granted in equity; that court would not allow the obligee to take more than in conscience he ought, 470.
penalties in affirmative agreements, 471.
statute of 8 and 9 Wm. III., and its effect, 472.
statute of 3 and 4 Anne, and its effect, 473.

References are to sections: Vol. 1, secs. 1-469; Vol. 2, secs. 470-767; Vol. 3, secs. 768-1296.

BONDS AND PENAL OBLIGATIONS — continued.
American statutes and practice, 474.
by these statutes, courts of law give the obligee what is due by the condition, and save resort to equity, 474.
in practice, judgment is given for the penalty, but the breach of the condition is treated as the gist of the action, 474.
if such judgment be sued, the damages assessed for breaches of the condition under it are the measure of the new recovery, 474.
if the condition be to do an illegal act, the bond is void, 474.
and void *pro tanto* when illegal as to a severable part, 474.
statutory bonds — their requisites, 475.
if the condition be impossible, the bond cannot be enforced, 476.
though in equity a compensation allowed, 476.
the penalty is the limit of recovery, 477.
and it is a maximum limit of the obligor's liability on private bonds, 477, 478.
interest may be allowed to amount of penalty, 478.
how duty to do equity treated with regard to limit of penalty, 477.
bonds of official depositaries of money, 479.
obligor's liability absolute for the money received, 479.
the difference between the operation of such bonds under different laws, 479.
by some, the officers merely bailees; others strictly debtors; though both classes under the same absolute responsibility, 479.
adjustment between different sets of sureties for same principal holding for successive terms, 480.
when the liability of sureties for such officer begins and ends, 480.
the sureties in last bond *prima facie* liable for defalcation, 480.
how they may relieve themselves, 480.
when the officer owns the funds officially received and is charged as debtor for them, his sureties at the time of the receipt are bound until the debt is paid, 481.
the difference in the manner in which such officers hold the funds illustrated by the decisions relative to the application of payments made by them, 481.
effect of omission of supervising officers to make periodical examinations or settlements, 482.
such regulations not intended for the benefit of sureties, but as a further protection to the public, 482.
the neglect of one public servant cannot be set up to relieve another from responsibility, 482.
effect on the liability of a surety for a tax collector of adding, after the execution of the bond, to the tax district, 725.

BONDS OF OFFICERS NOT FISCAL —
liability on, 484, 486, 487.
construction of as against sureties, 485.
measure of damages on against sureties, 488.

BONDS AND UNDERTAKINGS —
given in legal proceedings, 85.
alternative conditions in bonds, 282.
See APPEAL AND SUPERSEDEAS BONDS.

BREACH OF MARRIAGE PROMISE —
suits for, involve other than pecuniary elements, 92.
matters of mitigation, 159, 163.
what not a mitigation, 73.
that plaintiff is unchaste, 989, 990.
what may be proved in mitigation, 990.
nature of action for, 983.

References are to sections: Vol. 1, secs. 1-469; Vol. 2, secs. 470-767; Vol. 3, secs. 768-1296.

BREACH OF MARRIAGE PROMISE — continued.
seduction an aggravation, 984, 985.
consequences of seduction, 985.
elements of damage, 984–989.
injury to feelings, 986.
effect of defendant's conduct calculated to injure plaintiff's reputation, 986, 987.
loss of marriage, 988.
pecuniary and social standing of defendant may be considered, 988.
exemplary damages recoverable, 987.
what will excuse a breach of the promise, 989.

BROKERS —
entitled to commission on performance of service pursuant to employment, 683.
and whether they prove beneficial or not, if well performed, 683.
may recover customary brokerage in absence of special agreement, 683.
custom may require the business to be completed as a condition, 683.
must perform their duties with skill and fidelity, 683.
will forfeit their right to compensation by misconduct, 683.
liabilities to their principals, 786.

BURDEN OF PROOF —
importance of, in introduction of evidence, 438.

BURNING FLUID —
damage for selling explosive, without giving information, 19.

BUSINESS —
damages for tortious interference with, 54, 59, 70, 153, 154.
when damages for injury to credit and business refused, 55.
injury to by breach of contract, 60, 61.
damages for diverting business, 55.
damages to from non-payment of money, 77.
obligee in bond not to engage in, may sue for benefit of his vendee, 130.
damages may be stipulated in agreement not to engage in particular business, 291.
notes given for, subject to reduction or recoupment for vendor's resumption of it, 547.
damages for injury to by attachment secured by attachment bond, 512.
injury to, from torts, recoverable, 54, 57, 867–871.
damage to, in case of personal injury, 944, 945.
evidence in such case, 945–947.
injury to, by trespass to real property, 1029.
injury to, from nuisance, 1054.
duty of plaintiff to exert himself to prevent injury to, 871.
when injury to, an item of damage, 867.

CABLE —
damages for breach of warranty of fitness, 672.

CANAL —
consequential damages from failure to notify lessee to repair, 30.

CAPACITY TO EARN MONEY —
loss of, a ground of damage, 942.

CARRIER —
liability of, for losses happening during delay of transportation, 37.
for delay of transportation in case of deviation, 37.
for personal injury to passenger jumping from stage in view of apparent danger, 39.
injury to, from dangerous article furnished for transportation, 25.

References are to sections: Vol. 1, secs. 1–469; Vol. 2, secs. 470–767; Vol. 3, secs. 768–1296.

CARRIERS — continued.
difference in scope of damages between actions of tort and contract, 48, 49.
the Hobbs Case, 48, 49.
damages for preventing shipper from competing for prize, 71.
liability for damages for putting passenger off at wrong station, 48, 49, 57, 58, 938, 939.
, compensation to passenger for inconvenience when put off short of destination, 92.
character of passenger affecting damages against, 94.
damages for mental suffering recoverable against, 94, 99, 942, 943.
damages for failure of, to carry passenger to destination, 57, 58, 938, 939.
damages against, may be aggravated in action on contract, 92.
may be liable for substituted conveyance, 91.
recoupment in action for freight, 180.
damages for his failure to deliver or delay in delivering ascertained by same rule as against a vendor, 666.
liability for loss when he unnecessarily deviates from usual course, 770.
for delivering goods consigned C. O. D. without collecting, 774.
may recover damages for breach of contract to furnish goods for shipment, 877.
for breach of general contract to furnish goods for transportation, the profits the measure of damages, 877.
contracts to furnish cargo for particular vessel like a contract of service, 877.
recovery for partial breach, 879.
must mitigate his loss, 880.
shipper's rights in profits of, 881.
measure of damages on charter-parties, 878.
damages on a passenger-carrying contract under particular circumstances, 878.
earnings of chartered vessel to be deducted from stipulated freight, and for what time, 878.
description in charter of tonnage of vessel not a warranty, 878.
shipper must load according to the vessel's capacity, 878.
controlling principle is to compensate actual loss from total or partial breach, 879.
adaptation of the principle to such cases, 879–888.
duty of carrier to exert himself to prevent damages by obtaining other freight, 880.
not bound to anticipate shipper's default, 880.
after shipper's breach, carrier's duty to accept other or the same goods even at reduced freight, 880.
burden of proof, 882.
judicial exposition of two English charters, 881.
adjustment of damages for breach of agreement to load with enumerated articles, 883.
same, of freight under such charter, 873.
action for freight and other charges, 884.
how freight charges affected by value of property, 885.
service may be performed without agreement; carrier then entitled to reasonable freight, 884.
promise to pay freight implied, 916.
discriminations unlawful when conditions the same, 886.
carrier bound to serve for the equal benefit of all, 886.
what special agreements violate this principle, and are void as against public policy, 886.
carrier may make contracts for less than usual rate, 886.
in absence of regulations requiring it, shipper not bound to state quality or value of goods accepted for transportation, 885.

References are to sections: Vol. 1, secs. 1-469; Vol. 2, secs. 470-767; Vol. 3, secs. 768-1296.

CARRIERS — continued.
in absence of regulations, it is the duty of the carrier to inquire, if he wishes to know, 885.
on inquiry being made, shipper must answer truly, at his peril, 885.
carrier liable for the value, whatever it may be, 885.
he cannot afterwards exact larger sum on discovery of value, 885.
when freight is due and earned, 887.
if shipper retakes his goods, 887.
may require prepayment of freight, 887.
if he does not, he can maintain no action until delivery at the destination, 887.
if delivery becomes impossible without fault of shipper or carrier, no freight can be demanded, 887.
may recover freight for the part of perishable goods delivered, 887.
no freight recoverable for the part not carried, 887.
for articles that waste in bulk or animals that die, 887.
if voyage be broken up by interdiction of commerce, 887.
lump freight, 887.
definition of freight, 887.
increase of bulk, as by birth of infants or swelling of grain, 887.
freight is earned if property delivered in specie, though damaged, 887.
in this country recoupment of damage allowed, 887.
no freight payable if no substantial part of cargo delivered, 887.
what will be a total loss, 887.
if shipper prevents delivery at destination after transportation commences, 888.
when the right to full freight attaches, 888.
temporary interruption of the voyage does not affect carrier's right, 888.
he loses the right to freight if he does not take the necessary measures to resume the voyage, 888.
what delay admissible on inland waters, 888.
what circumstances will entitle shipper to delivery at intermediate port without paying freight, 889.
when *pro rata* freight may be demanded, 890.
there must be voluntary acceptance at an intermediate place in such a way as dispenses with further carriage of the goods, 890.
the basis of right to *pro rata* freight, 890.
a mere agreement to accept the goods at an intermediate port not equal to acceptance to create a right to *pro rata* freight, 890.
duty of master when the vessel under charter is lost after commencement of the voyage, 891.
carrier cannot recover freight on lost goods merely because the owner had insured them and collected the insurance, 892.
otherwise where the carrier's labor in saving the goods interrupted by shipper's settlement as for total loss with insurer, 892.
rule for adjusting *pro rata* freight, 893.
may land and warehouse goods if merchant not ready to receive them at port of destination, 894.
disposition of goods if they cannot be landed, 894.
master to exercise a prudent judgment for convenience of the owner, 894.
expenses chargeable to him, 894.
if under such circumstances he carries the freight back to place of shipment, he is entitled to freight both ways and expenses, 894.
no demurrage for ineffectual attempt to land at neighboring ports, 894.
freight under charter to load with enumerated articles, 895.
recoupment against freight, 896.

References are to sections: Vol. 1, secs. 1–469; Vol. 2, secs. 470–767; Vol. 3, secs. 768–1296.

CARRIERS — continued.
demurrage, 897.
damage in the nature of demurrage, 897.
detention beyond demurrage days provided for in charter, 897.
deduction for ship's expenses, 897.
obligation of carriers to receive goods for transportation, 898, 904, 916.
damages for refusal, 898–903.
when measured by increase of freight, or cost to transport by other means, 899.
when substituted conveyance can be resorted to and the measure of damages in lieu of, 899.
damages for breach of contract to carry at specified rates, 899.
for fall in market and loss of profits, 899, 902.
for deviating from the route required, thereby subjecting the goods to increased freight, 902.
liability of for other loss while deviating from usual route, 42.
damages against, for negligent delay of transportation, 903, 916.
bound to carry within reasonable time, 903, 904.
contracts changing liability of, 904.
he cannot be relieved by contract from consequences of his negligence or misconduct, 904.
doctrine in New York, West Virginia and Illinois, 904.
special damages in case of negligent delay, 905.
liable for fall in the market, or decrease of quantity or quality of the goods, 906–910.
the ground of such liability, 37, 906, 907.
delay after notice of arrival, 910.
where the transportation is by a long sea voyage, 909.
liable for increased expenses of obtaining delivery by reason of negligent delay, 911.
expense of searching for goods, 911.
not liable for exposure of goods to seizure because they were intended for illegal traffic, 911.
liable for duties to which goods are subjected by the delay, 911.
not relieved from this damage though price increased by imposition of duties, 911.
when expense of further transportation for sale an item of damage, 912.
liability for delay when facts are known, 913, 914.
mental anguish as an element of damage, 915.
responsibility of, in caring for property, 916.
burden of proof as to injury or loss, 917.
damages where goods have a market value, 918.
liable for damages with reference to known special use, 52.
liability for injury to or loss of goods, 918–920.
the common-law liability of, 916.
interest on damages against, generally allowed, 920.
shipper or consignee entitled to compensation for his proper acts to prevent damages, 921.
circumstances which will modify their liability to pay value at the place of destination, 922–925.
have the right to call for information as to the nature and value of the property offered for transportation, 925.
qualification of their responsibility by notice, 926.
liability for partial loss when value limited, 927.
when loss occurs by their negligence or misconduct such regulations have no effect, 925.
liable for goods lost by wrong delivery, 931.
or when carried by different conveyance or route from that specified in shipper's instructions, 931.
apportionment of damages in case of mutual fault, 928.
damage not mitigated by insurance, 929.

References are to sections: Vol. 1, secs. 1–469; Vol. 2, secs. 470–767; Vol. 3, secs. 768–1296.

CARRIERS — continued.
liability for injury to or loss of goods, exemplary damages, 930.
for what losses responsible, 931.
damages where there are successive carriers, 932.
what is the destination for purpose of damages, 932.
proof of value, 933.
measure of recovery in admiralty, 1296.
liability of, as to passengers, 934–956.
See PASSENGER CARRIERS.

CART —
leaving cart with horse in a place dangerous to children, 19.

CAUSE OF ACTION —
two things necessary to, 3.
nature and protection of, 7.
assignability of, 7.
nature and qualities of, 7.
has value and is of nature of property, 7.
cannot be affected by legislation, 7.
wrongs and breaches of contract relating to a, actionable, 7.
when it survives, 7.
what must concur to give, 3.
violation of right and possibility of damage, 10.
not divisible, 106, 110, 111.
present and future damages, 107.
what is an entire demand, 108.
splitting, effect of, 110.
examples of, 110.
on breach of contract for life support, 112, 113.
when future damages included in, 120.
for enticing away servant, etc., 122.
for continuous wrong, 125.

CAVEAT EMPTOR —
admonition to purchaser, 544, 667.
has full application to sales by executors and other trustees, 668.
in other cases applies where there is no fraud or warranty, 676.

CERTAINTY —
damages must be, as to nature and cause, 53.
liability for principal loss shown with certainty includes details and incidents, 54.
only items which are certain recoverable, 55.
as to anticipated profits, 59, 60, 61.
of a whaling or other voyage, 60.
of advance in price of real estate because of improvements, 60.
on breach of warranty of seeds, 61.
of damages depending on prospective growth of orchard, 62.
from breach of special contracts, 61, 64.
of commercial ventures, 67.
on dissolution of partnership, 68.
of commercial agencies, 69.
of tortious interference with business, 70.
of depriving of chances for prizes and promotion, 71.
for depriving of contingent advantages, 72.
for failure to provide a sinking fund, 74.

CERTIFICATE OF ARCHITECT, ENGINEER, ETC.—
necessity of, when provided for by contract, 712.
effect of, 712.
what necessary to render it conclusive, 712.
where he acts contrary to contract, 712.
may be impeached for fraud or mistake, 712.
necessity of notice to parties of measurements, 712.

References are to sections: Vol. 1, secs. 1-469; Vol. 2, secs. 470-767; Vol. 3, secs. 768-1296.

CHARACTER —
when bad, provable in mitigation, 94, 163.

CHARTER-PARTY —
measure of damages against charterer, 878.
on charter to load with enumerated articles, 883, 895.
measure of damages on, against carrier, 900, 901.

CHILD OR SERVANT —
parent or master's action for injuries to, 952.
no allowance for wounded feelings, 952.

CHILDREN —
liability for injury to, by negligently leaving dangerous property in public place where children resort, 19, 40.
by putting loaded gun in hands of, 19.
in *ventre sa mere*, how regarded, 8.

CHOSES IN ACTION —
warranty implied on sale of, 555.
implied warranty on assignment of a judgment and damages for breach, 668.

CIRCUITY OF ACTION —
defense in avoidance of, when available, 143.
damages must be equal, 146.
may be unliquidated, 146.
agreement not to sue, 144.
principle may operate in favor of plaintiff, 145.
reciprocal obligations, 147.
recoupment allowed to prevent, 170.

CLERK —
when tender may be made to, 265.

CLOTHING —
as part of baggage, how value of estimated against carrier, 955.

COAL DUST —
damages for breach of warranty of, 673.

COLLATERALS —
duties and rights of debtor and creditor in respect of, 228, 229.
how losses on policies of insurance so held adjusted, 829, 834.

COLLECTING AGENT —
liabilities of, 775, 776.
on contract to take proper means to collect, 776.

COLLISION —
damages at common law for, 18.
damages for injury resulting from, 54.
division of loss resulting from, in admiralty, 1287.
elements of damage where a total loss is claimed, 1290.
same, where loss is partial, 1292, 1293.
recovery of interest, 1294.
mitigation of liability by insurance, 1295.

COMMENCEMENT OF SUIT —
date of, a period in the estimate of damages, 112, 120, 123, 127.

COMMERCIAL AGENCIES —
uncertainty of profits of, 69.
damages for wrongful discharge from, 69.

COMMERCIAL PAPER —
liability of collecting agents relative to, 775, 776.
when principal liable to agent for damages and costs on bills, 789.

References are to sections: Vol. 1, secs. 1-469; Vol. 2, secs. 470-767; Vol. 3, secs. 768-1296.

COMMERCIAL VENTURES—
damages for loss of profits of, 67.

COMMISSIONS—
the right of brokers to them, 683.

COMPENSATION—
the remedy mostly given for violation of right, 1.
the redress given for violation of right, 12.
the cardinal principles of, 12.
by it all rules of damage tested, 12.
actual loss is the measure, 12, 75.
some exceptions based on public policy, 12.
limited to natural and proximate consequences, 12, 13.
distinction between cases of contract and tort in respect of consequential damages, 15, 16.
for injuries from flood by removing barrier, 19.
for consequential damages from dangerous drug by mislabeling, 25.
for consequential damages from slander, 41.
for enticing or taking away slaves or servants, 18.
for breach of contract, damages contemplated by parties, 45.
direct damages, 14.
recovery mostly confined to direct damages, 50.
is the logical and legal boundary in respect to details, 75.
adapted to the nature of the rights violated, 75.
interest for non-payment of money, 76, 77.
for total breach of contract, 78.
the general measure of, 78.
exceptions, 78.
proportionate for partial breach, 78.
how restricted when injured party may prevent or limit damages, 88.
for mental suffering, when recoverable, 95, 97, 941–943, 975–980.
right to, exists independent of motive, 98.
how bad motive may increase, 98, 103.
rule of, how departed from in action against officer for neglect to collect execution from solvent debtor, 160.
for actual loss or injury the principle which measures and limits recovery, 488, 697.
for physical pain and mental suffering from personal injury, 58, 941–944.
elements of damage for personal torts, 93, 1241–1250.
for breach of marriage promise, 92, 983–988.
the measure of, for loss of *mesne* profits, 994.
must be paid for property taken for public use, 1061.
what it must be, 1061.
scope of, where property taken or injured, 1061–1083.
measure of, and facts which may be taken into consideration when property taken for public use, 1061–1083.
whole value to be given when owner's entire land taken, 1084.
if part only taken, the difference in value of the whole before the taking and its value affected by it, 1064.
when property of which a part taken for a railroad is permanently diminished in value, 1065.
if diminution has occurred from such cause, the particular exposures and injuries which operated to produce it immaterial, 1065, 1066.
where the depreciation must be considered in advance, what facts may be regarded, 1066.

COMPROMISE—
is a good consideration, 251.
composition with creditors is a good consideration, 250.
a surety is only entitled to the amount he pays on the compromise of a liability for which he is bound, 748.

References are to sections: Vol. 1, secs. 1-469; Vol. 2, secs. 470-767; Vol. 3, secs. 768-1296.

CONCERT SINGER —
refusal of, to sing as consequential damage, 29.
damages for procuring to break engagement, 29.
or disabling by battery, 29.

CONFUSION OF GOODS —
rights of respective owners, 101.

CONSENT OF PLAINTIFF —
when may be shown in mitigation, 162.

CONSEQUENTIAL DAMAGES —
definition of, 15.
distinction relative to, between torts and breaches of contract, 15, 45, 48.
rule of, for torts, 16.
those which happen in the usual course of things, 16.
all persons required to foresee such consequences of their acts, 16.
required of the insane, 16.
illustrations, 17, 19.
under fence statutes, 20.
for mental suffering, 21.
whether recoverable when caused by nervous shock, 21.
or fright caused by defendant's negligence or other wrong, 21, 24.
not necessary that the wrong-doer be able to anticipate who the sufferer will be, 25.
particular injury need not be foreseen, 26, 28.
act complained of must be efficient cause, 29-42, 56.
illustrations of remote consequential damages, 29, 33, 1289.
liability of carriers for, 36, 37.
an act may be primary cause though it operates through successive instruments, 38, 42.
and successive causes, 56.
immediate cause may be act of the injured person, 39.
or of third person, 40, 42.
in cases of fraud, 25, 42, 44.
from using or dealing with dangerous forces, elements or substances, 19, 25.
machines or animals, 18, 19, 25, 31.
from aggressive acts, 17, 18, 25, 38, 40, 44, 55.
for breach of contract, limited to those contemplated by parties, 45.
to those which are natural and approximate consequences, 45.
not necessary that they should have been actually contemplated, 45.
from incendiary fire in absence of guard, 45.
for goods lost by fire when not stored according to agreement, 45.
in extra insurance when delay in transportation, 45.
for loss of grain resulting from breach of contract to harvest, 46.
for loss of rice occasioned by delay at mill, 46.
for exceptional losses by reason of special circumstances, 46, 50, 53.
liability not affected by collateral ventures, 47.
what incidents of performance or non-performance contemplated, 47.
doctrine of Hadley v. Baxendale, 50.
to extend liability on account of special circumstances they should be made known, 50, 52.
liability for principal loss includes details and incidents, 54.
expenses incurred to stay and prevent, 54.
for non-payment of money, 77.
recovery for successive consequences, 56, 57.
from breach of contract to deliver threshing-machine for standing crop, 56.
from injury to horse followed by expense for treatment, etc., 57.
from interrupted transportation by carrier of passengers, 57, 58.

References are to sections: Vol. 1, secs. 1-469; Vol. 2, secs. 470-767; Vol. 3, secs. 768-1296.

CONSEQUENTIAL DAMAGES — continued.
expense of measures to limit or prevent damage, 58.
for loss of profits, 59, 60-69.
for outlays in anticipation of special contracts, 61-64.
in performance, 60.
for loss of wages of men kept idle on account of breach of contract, 60.
resulting from interference with business, 61.
for loss on commercial ventures, 67, 69.
chance for prize or promotion, 71.
on breach of special contract, 61, 64.
from breach of warranty of seeds, 61.
for wrongful dissolution of partnership, 68.
for wrongful discharge from commercial agency, 69.
what may be recovered as such for breach of a contract for the sale and delivery of chattels, 662.
purchaser is entitled to recover such damages as were in the contemplation of the parties, 662.
where the goods were bargained for for a special use or purpose, 662-664.
what recoverable on breach of contract for particular works, 699.
carrier's liability for, 52, 86, 915-919.
against carrier of passengers, 935-939.
telegraph companies, 961-971.
for withholding real property, 994.
for injury to unfinished house delaying completion, 1015.
to sluiceway to mill causing mill to stop, 1015.
removing fence inclosing dairy ranch, 1024.
trespassing sheep communicating disease, 1028.
injury to business, 1029.

CONSIDERATION —
want of failure of, a defense, 159.
compromise is a, 251.
composition with creditors, 250.
implied *assumpsit* follows, 132.
partial want or failure of, may be shown in mitigation, 155.
received by the principal, supports the undertaking of the surety, 723.
presumed in action upon commercial paper, 541.
defenses connected with, to commercial paper, 542-554.
inadequacy of, distinguishable from failure of, 544.
want or failure of, a defense to notes and bills between immediate parties, 542.
fraud in relation to, as a defense to such paper, 542.
as to whom accommodation paper is without consideration, 542.
a note made for a gift is without consideration, 542.
other instances, 542.
effect of partial want of, 543.
may be shown, though unliquidated, 543.
when a partial failure of consideration a defense to a note, 544.
generally some remedy for, 546.
instances of partial failure, 547.
where part of consideration of note is fraudulent, 549.
where part of the consideration is illegal, 549.
parol evidence admissible to show want or failure of, 551-554.
admissible to affect the holder with a trust, 552.
that it was contingent, conditional or defeasible, 551, 552.
where consideration executory, it may be shown to have failed, 552-554.
measure of damages including interest for breach of covenants for title, 593.
when not so, 595.
actual, in deed may be proved, 594.

References are to sections: Vol. 1, secs. 1–469; Vol. 2, secs. 470–767; Vol. 3, secs. 768–1296.

CONSIGNEE —
makes himself party to carrier's contract by accepting goods and thereby incurs liability for freight and demurrage, 897.

CONTINUING OBLIGATIONS AND WRONGS, 112–127.
nuisance is a continuing wrong, 1036–1038.
when it is not, 1042–1047.
what recoverable in first and subsequent actions, 1039, 1040.
maintenance of a dam flooding another's land is such, 1039.
not uniformly so held, 1043.
what distinguishes, 1042.
the election of injured party to consider nuisance continuous or permanent, 1046.

CONTRACT —
elements of damages for breach of, 63, 79, 80.
for particular works, elements of damages for breach of, 80.
damages for breach of special, 61, 63, 68, 78.
damages for taking negro hired to make a crop, 55.
damages for preparation to perform, 80, 82.
incurred by acts in reliance upon performance, 81.
damages for total breach, 78.
proportionate amount for partial breach, 78.
how far compensation may be given for other pecuniary items, 92, 95.
damages for breach of, how affected by motive, 99.
what a total breach of, 108.
actions for continuous breach of, 125.
recoupment between contractor and employer, 181.
each party has a legal right to violate, on the terms of paying damages, 569.
to pay in or deliver specific articles, 659–661.
with carriers, cannot exempt them from liability for negligence or misconduct, 904, 934.
exempting master from liability to servant for consequences of negligence, 6.

CONTRACTOR —
employer may perform contract after default of, 90.
entitled to contract price, or reasonable value of his work, 684, 706.
demands for extra work, 707.
considerations on which allowance of depends, 707.
effect of provision that deviations and extra work be ordered in writing, 707.
rate of compensation for extra work, 707.
recovery may be had for part performance of a severable contract, 707, 708.
contrariety of construction as to severable quality of contracts, 708.
not answerable for defects in plans furnished him, 701.
when entitled to payment though work destroyed without his fault before completion, 700.
damages for delay, 703, 704.
consequential, for defective work, 705.
demands for part performance of an entire contract, on *quantum meruit*, 709–711.
certificate of architect, engineer, etc., 712.
may recover contract price by action on the contract when it has been substantially performed, 709.
what is a substantial performance, 709.
what a waiver of objection to work so as to entitle him to recover on *quantum meruit*, 709.
at what rate he is entitled to be compensated, 709, 710.
what proof no answer to employer's evidence showing extent of his loss from contractor's non-performance, 710.

References are to sections: Vol. 1, secs. 1–469; Vol. 2, secs. 470–767; Vol. 3, secs. 768–1296.

CONTRACTOR — continued.
his right to recover for work done in part performance where he has in good faith endeavored to fulfill and employer is benefited, 709–711.
his right of recovery when employer stops the work, 713, 714.

CONTRACTS FOR PARTICULAR WORKS —
nature of such contracts, 696.
rights and remedies of employees, 696–705.
compensation for the actual loss the measure of damages, 697, 698.
on contractor's breach of contract, the other party entitled to damages equal to the benefit he would have derived from performance, 697, 698.
measure of damages against defaulting contractor, 697, 699.
consequential damages recoverable, 699, 702.
works contracted for a particular purpose, 702.
damages for delay, 703.
consequential damages for defective work, 705.
contractor not excused by accidental destruction of the work, 700.
when he is excused and entitled to payment for part performance notwithstanding destruction, 700, 708.
contractor not answerable for failure of plans furnished him, 701.
contractor's rights and remedies, 706–714.
contract price, 706.
demands for extra work, 707.
recovery for part performance of a severable contract, 708.
what will be a waiver of objections to the contractor's performance, so as to entitle him to recover on *quantum meruit*, 709–711.
when recovery may be had for part performance, 710, 711.
contractor's right of recovery when employer violates the contract by stopping the work, 713, 714.

CONTRACTS FOR THE SALE OF PERSONAL PROPERTY —
damages for breach of, 46, 52.
damages where articles sold for special purposes, or with special warranty, 45, 46, 47, 50, 52, 56, 60.
contract to deliver threshing machine for a standing crop, 56.
recovery may be had of the price or value on executed sales, 642.
where price not fixed there is an implied promise to pay the real value, 642.
an agreement as to price is not essential to a bargain and sale, 642.
when a higher price may be recovered, 642, 643.
parties may agree that the price be fixed by a third person, and they will be bound by the price he fixes, 643.
if property delivered and consumed by purchaser before price is so fixed, its value recoverable, 643.
such third person the agent of both parties, 643.
one of several sellers may be agreed on to decide a fact essential to fix the price, 643.
when the decision of a third person may be avoided or is not binding, 643, 644.
to entitle seller to recover full price or value the sale must be so far executed as to pass the title, 644.
sale of specific property complete without delivery, 644.
otherwise of a contract to sell and deliver before appropriation of the particular property, 644.
whether a tender of goods will complete a contract, 644.
as to goods made to order, 644.
rule of damages where goods made to order, 649.
where goods are sold to be paid for by bill or note on time and it is not given, 644.
where only part of the stipulated quantity delivered, 645, 646.
damages for not accepting goods, 647.
notice by vendee of refusal to accept, 648.
vendee's right to return goods, 650.

References are to sections: Vol. 1, secs. 1–469; Vol. 2, secs. 470–767; Vol. 3, secs. 768–1296.

CONTRACTS FOR THE SALE OF PERSONAL PROPERTY — continued.
foundation of the rule of damages against vendee for not accepting goods contracted for, 649.
how objection of a want of punctuality in delivery may be waived by vendee, 650.
the case of goods sold by sample, 650.
right of return when they differ, 650.
effect of failure to return or to give notice of rejection, 650.
in case of rejection of goods sent on order for particular kind, freights on to be refunded, 650.
amount recoverable where property appropriated by vendor before contract completed, 650.
measure of damages for non-delivery of contracted goods, 650–653.
rule in favor of vendor when delivery impossible, 655.
contracts for the delivery of stocks, 657.
sales of good-will, 658.
contracts to pay or to deliver specific articles, 659–661.
consequential damages which a purchaser may recover against a vendor for a breach of the contract to deliver, 662.
purchaser is entitled to recover such damages as were in the contemplation of the parties, 662.
where goods bargained for for a special use or purpose, 662, 663.
where such special purpose was to fulfill a contract for resale of such goods, the profits in that sale recoverable, 662, 663.
damages for failure to deliver specific engine sold for a particular use to drive machinery, 665.
damages for delay, 664–666.
classification of warranties in the English decisions, 667.
warranties of quantity and title, 667, 668.
recovery where goods contracted of particular kind and different goods delivered and received, 667.
caveat emptor as to goods delivered on contract, 667.
implied warranty of goods purchased for food, 667.
on sales by sample there is a warranty that the bulk is equal to it, 667.
damages for breach of warranty of title, 669.
damages for breach of warranty as to quantity or quality, 670–675.

CONTRACTS OF AFFREIGHTMENT —
sometimes general without reference to route or mode of conveyance, 877.
how such contracts differ from others more specific, 877.
See CARRIERS.

CONTRACTS TO PAY MONEY, 76, 77, 286, 287.
stipulated damages on, 285, 289.

CONTRIBUTION —
no contribution is allowed between wrong-doers, 755, 764.
this only applies against a wrong-doer who knew he was doing wrong, 755, 764.
between co-sureties, 754.
foundation of liability to contribute, 754.
basis of, 756.
what necessary to give sureties reciprocal right of contribution, 755.
where several principals become bound for the same debt they are co-sureties, 755.
co-sureties are supposed to assume the same risk and to stand in the same relation to the principal, 756.
effect of one secretly sharing in the benefits of the undertaking as a principal, 756.
a surety's right to, and the amount he is entitled to, based on the maxim that equality is equity, 756.

References are to sections: Vol. 1, secs. 1–469; Vol. 2, secs. 470–767; Vol. 3, secs. 768–1296.

CONTRIBUTION — continued.
between co-sureties; when all the sureties are solvent each is liable for his aliquot proportion of the amount paid, 756.
there is a like right of contribution for costs which a surety has been compelled to pay, 756.
where one paying a debt obtained part security he has been allowed a commission, 756.
an insolvent surety ignored in determining the amount of contribution, 757.
all sureties entitled to share in the benefits of any security either obtains, 758.
no contribution recoverable until a surety has paid more than his share, 759.
can be had only in respect to the amount actually paid, 759.
a surety not liable for, after he has been released by creditor, 759.
nor is he entitled to, for paying a void note, 759.
nor against one as to whom debt barred by statute, 759.
an estate liable to, though judgment obtained after it is barred for failure to present for allowance, 759.
the right to, accrues at the time of payment by surety, 759.
allowed on equitable grounds and may be defeated on such grounds, 759.
joint judgment against them conclusive between sureties, 760.
one not bound by judgment against another, 760.
of what it is evidence, 760.

CONTRIBUTORY NEGLIGENCE —
does not go to the cause of action upon contract, 873.
damages may be reduced for, 873.

CONVERSION —
value of property and interest, measure of damages for, 105.
special owner may recover according to his interest, 139, 1136, 1137.
mitigation by return of property, 156, 1139–1141.
interest recoverable, 105, 325, 1115.
damages in trover assessed on equitable principles, 156.
the action of trover, 1108.
general rule of damages, 1109, 1110.
other rules of damages, 1111.
time of conversion, 1112.
proof of value, 1113, 1114, 1117.
when the value for damages should be taken, 1112.
when special value, or value to the owner, recoverable, 1113, 1115.
what may be recovered as the value of fixtures, 1114.
in action under the code, 1114.
when the converted property had to be sold, 1116.
where the property has no market value, 1117.
or is of fluctuating value, 1118–1125.
discussion of highest value before trial, 1118–1125.
damages where wrong-doer has improved property, 1126–1129.
for conversion of money securities, stocks, deeds, etc., 1132–1135.
special or consequential damages, 1129.
attorney's fees, 1130.
exemplary damages, 1131.
conversion of insurance policies, 1133.
plaintiff's duty to mitigate damages, 1142.
how damages affected by nature of plaintiff's interest, 1136, 1137.
mitigation of damages in trover, 1138–1141.
circumstances admissible which show that actual loss is less than the value, 1138.
return and acceptance of property will be considered in mitigation, 1138.

References are to sections: Vol. 1, secs. 1–469; Vol. 2, secs. 470–767; Vol. 3, secs. 768–1296.

CONVERSION — continued.
mitigation of damages in trover; dispositions of the property amounting to return of it, 1138.
conflict of decisions on that subject, 1141.
when defendant entitled to return the property and thereupon to stay of proceedings in trover, 1139, 1140.
expense of procuring return or decrease in the value of the property returned reduces amount allowable for mitigation, 1139, 1140.
where several liable, part satisfaction by one, 1141.
measure of damages where property returned, 1139.
when agent guilty of, and liable accordingly, 774, 786.

COPYRIGHT (see INFRINGEMENT OF COPYRIGHT), 1198.

CORPORATION —
liability for exemplary damages, 408–411, 950.
liable like natural persons for tortious and malicious acts of agents, 408, 409.

COSTS AND EXPENSES —
when items of damage or otherwise, 55, 58, 82–87, 167.
of extinguishing adverse claim as items of damage for breach of covenant of warranty, 610.
whether attorney fees may be included, 610.
of suit in defense of, or to establish the granted title as an element of damages for breach of the covenant of warranty and of quiet enjoyment, 617–619.
must be incurred reasonably and in good faith, 617, 618.
not allowed in successful defense against an invalid adverse claim, 619.
separate suits may be brought at same time against the several parties to notes, and costs of all recovered, 564.
an indorser who has been compelled to pay costs cannot recover them in an action against prior parties to a note or bill, 564.
recovery for on replevin bonds, 499.
on attachment bonds, 516.
on injunction bonds, 524.
when incurred by purchaser of note or chose in action to enforce the subject of purchase may be recovered on breach of implied warranty, 668.
so when incurred in defending title to property bought with warranty, 668.
of raising crop from seed warranted, 674.
surety's right of recovery for, against his principal, 752.
what costs a surety may recover, 753.
what recoverable on contract of indemnity, 762.
when an item of damages for fraud, 1173.

COUNTER-CLAIM, 173.

COUNTS —
effect of general verdict when one of the, bad, 462.

COURT —
power over verdicts, 3.
may set aside excessive or insufficient verdicts, 459.
may amend informal verdicts, 458.

COVENANTS —
not to sublet or assign, 861.
to insure, 862.

References are to sections: Vol. 1, secs. 1-469; Vol. 2, secs. 470-767; Vol. 3, secs. 768-1296.

COVENANTS AGAINST INCUMBRANCES —
what are incumbrances, 620.
damages cease when incumbrance removed, and if removed by covenantee wrongfully, he cannot claim on the covenant indemnity for the damages recovered against him, 619.
generally held to be *in presenti*, 621.
rule of damages for breach of, 622, 623.
in England and Canada, 624.
criticism of the rule of damages, 626.
in some states covenant runs with the land, 625.
when they will pass to subsequent grantees by deed without covenants, 626.
where connected with covenant for quiet enjoyment, 630.
rule of damages when the incumbrance cannot be removed, 627, 628.
liability of remote covenantor, 629.

COVENANTS OF SEIZIN AND GOOD RIGHT TO CONVEY —
purport of these covenants, and when broken, 591.
acceptance of deed merges contract, 591.
how these covenants differ, 591.
they are similar in purpose and effect, 591.
they are generally regarded as covenants for title, and not merely for possession, 591.
uniform in effect when formal and show intention to assure highest title, 591.
diversity in the forms of these covenants in the United States, 591.
their construction in Massachusetts, Maine and Nebraska, 591.
they are covenants *in presenti*, 592.
if broken, they are broken when made, 592.
in England and in some of the states they are, however, held to be real, and run with the land, 592.
doctrine in Ohio, 592.
the general doctrine is that they are personal covenants and do not run with the land, 592.
that being broken at the date of the deed, they are turned into mere choses in action, and incapable of assignment or of being available to any but the covenantee, 592.
measure of recovery on, 593.
actual consideration may be proved, 594.
when consideration does not measure damages, 595.
effect of recovery on a total breach, 596.
it is a bar to any further recovery, 596.
only nominal damages recoverable in absence of actual loss, 597–599.
where covenant runs with land, 600.
how damages may be prevented or mitigated, 601, 602.
where title fails to part and reconveyance is tendered, 599.
want of reconveyance no bar, 599.
it will not affect the right to full damages when no title passed, 599.
nor will a resale, 599.

COVENANTS OF WARRANTY AND FOR QUIET ENJOYMENT —
scope of these covenants, 603.
the same facts constitute a breach of both, 603.
both run with the land, 603.
and the rule of damages on a breach is the same, 603.
what is a breach, 604.
there must be an eviction under a paramount title existing when the covenant was made, 604.
rule of damages for breach of them, 605, 606.
in England and Canada, 607.
same in some of the older states, 608.
rule in case of partial breach, 609.

References are to sections: Vol. 1, secs. 1–469; Vol. 2, secs. 470–767; Vol. 3, secs. 768–1296.

COVENANTS OF WARRANTY AND FOR QUIET ENJOYMENT—con.
rule of damages for breach of them, where the adverse claim and eviction are under a paramount incumbrance, 609.
matters provable in mitigation of damages, 611.
rule where adverse title extinguished by the covenantee, 610.
where the defect is an outstanding right of dower, 612.
or a term of years, 612.
by and against whom recovery may be had, 613.
not necessary a conveyance by covenantee be made with covenants to pass these covenants to grantee, 613.
they are divisible, and benefit of them will go to recipient of any part of the land, 613.
remote grantee evicted may bring suit against the first or intermediate covenantor, 613, 614.
he may bring suits against all at one time or successively, 613, 614.
entitled to only one satisfaction and costs, 613.
when intermediate grantee may maintain action on the eviction of his grantee, 614.
he must satisfy his covenant to his grantee, 614.
the grantee has a right to defend unless aware that no defense can succeed, 617.
notice of suit to covenantor, 615, 618.
interest as an item of damages, 618.
expenses and costs incurred may be recovered as part of the damages for breach of these covenants, 617, 619.
damages recoverable by tenant or lessee on covenant for quiet enjoyment, 863, 871.

COVENANTS NOT TO SUE—
effect of, 259.

COVENANTS TO PAY OFF INCUMBRANCES—
when an instrument will be construed to be such a covenant, 631.

COVENANTS TO REPAIR OR REBUILD—
damages for breach of, 855–860, 872–874.
diminution of rental value recoverable, 872.
lessee of hotel may recover for loss of certain rooms for failure of lessor to repair, 872.
contemplated use will fix standard of repairs, 872.
want of due care to prevent premises getting out of repair no defense for breach of covenant, 873.

CREDIT—
injury to, an item of damage, 55, 77, 965.
injury to by attachment remote and speculative, 512.
compensation for such injury has been allowed where there was malice, 512.

CREDITORS—
may extinguish debt by gift, 221.
liability of, in respect to collaterals, 228, 229.
application of payments by, 238.
tender to, 260–278.
when a devise to, a payment, 221.
composition with, 250.
value of debtor's custody to, 160, 161.
their duty to surety to realize on securities, 737.
how secured by and their remedies on probate bonds, 393–395.

References are to sections: Vol. 1, secs. 1–469; Vol. 2, secs. 470–767; Vol. 3, secs. 768–1296.

CRIMINAL CONVERSATION —
damages for, may include mental suffering, 95.
mitigation of damages in action for, 163.
what must be proved in action for, 1285.
damages recoverable for, 1285.
evidence in mitigation, 1285.

CRIMINAL PROSECUTION —
note given in part on agreement to discontinue, illegal and void, 550.

CROSS-ACTION —
necessity of, much diminished by practice and legislation increasing scope of defense, 544–548.

CROPS —
damages for preventing growth of, by removal of slaves, 18.
for not harvesting according to contract, 46.
for not threshing, 56.
owner must use diligence to protect, 88.
proof of value of, 120, 443, 1023.

CURRENCY —
its relation to money, 206, 207, 209.
contracts presumed to be made with reference to the currency of the place of contract, 211.

CUSTODY —
value of, of debtor to creditor, 160, 161.

DAM —
damages for raising water of stream so as to stop mill, 54.
indirect benefits from mill no mitigation of damages for injury by, 158.

DAMAGES —
nature and purpose of, 1.
when recovery of apparently a specific remedy, 1.
recovery of necessity to justice, 1.
some damages inferred from every injury, 2.
not recoverable if arising out of illegal act, 4.
contractual exemption from, 6.
modification of common-law liability, 6.
nature of right to; its survival, 7.
nominal damages, 9.
illustrations of, 10.
maxim *de minimis*, etc., has no application, 11.
actual loss necessary to sustain recovery for more, 9, 75.
for interrupted transportation by carrier of passengers, 57.
actual not necessary to right of action, 10.
absolute responsibility for direct, 14.
consequential (see CONSEQUENTIAL DAMAGES), 15.
when include compensation for mental suffering, 95, 97, 915, 942, 975–980.
how motive may affect, 98, 103.
where wrong-doer improves property, 102, 103.
entirety of, 106, 142.
present and future, 107.
entirety of, defined, 106, 108.
accruing subsequent to action, 113.
contract to do several things successively divisible, 110.
entire demand may be severed, 109.
demand growing out of same contract or resting in contract, an entirety, 110.
to real property, 114, 116.
prospective, 120, 124.

References are to sections: Vol. 1, secs. 1–469; Vol. 2, secs. 470–767; Vol. 3, secs. 768–1296.

DAMAGES — continued.
entirety of, when successive actions necessary, 127.
on contracts of indemnity, 117.
for total breach of contract, 120.
future, in case of personal torts, 123, 1251.
present worth of, 124.
measure of in action by special owners, 139.
in action against officer levying execution, 139.
all joint tort-feasors equally liable, 140.
mitigation of, 149.
for non-payment of money, 76, 77.
exemplary damages, 390–412.
accord and satisfaction, 246.
release of, 253.
stipulated damages, 279, 424.
pleading of, 413.
assessment of, 427, 434.
evidence of, 437.
double and treble, 464.
measure of on bonds is the sum due by the condition, 474.
they are allowed in equity where the condition is impossible, 476.
the penalty in a bond the limit of recovery, 477.
and of the liability of the obligors, 477.
this limitation is only applicable when the suit is founded on the bond, 477.
it does not apply when the suit is upon an affirmative agreement, or upon some security, 477.
nor when suit is upon a judgment rendered on a bond, 477.
equity may enforce a debt beyond a penalty against a complainant compelled to do equity, 477.
or against a litigious and dilatory debtor, 477.
so where advantage is made of the money, 477.
why equity will limit the obligee as complainant to the penalty, 477.
in a few cases the sum due by the condition exceeding the penalty has been recovered, 477, 478.
interest may be added to the amount of the penalty from the date of forfeiture when the actual debt or damages equal the penalty, 478.
the measure of, on official bonds, as against sureties, 488.
as against officers, 489–492.
on probate bonds, 493, 494.
on guardian's bonds, 496–498.
are limited by the penalty, 496.
measure of, on replevin bonds, 504–509.
on bonds given by defendants in replevin to retain the property, 509.
measure of, on attachment bonds, 512–514.
where a stock of goods attached, recovery may be had for interruption of business, 512.
but not to the reputation of the goods, 512.
may be enhanced by proof that attached property was intended for a particular use, 512.
depreciation of the property in the officer's hands may be shown, 512, 513.
but only when it is personalty of which the officer takes possession, 512.
what consequential damages in such cases excluded, 512, 513.
when exemplary damages allowable, 514.
what may be shown in defense, 515, 516.
measure of, on forthcoming bonds, 518.
and on condition to pay the judgment, 519.

References are to sections: Vol. 1, secs. 1-469; Vol. 2, secs. 470-767; Vol. 3, secs. 768-1296.

DAMAGES — continued.
measure of, on injunction bonds, 523–528.
recovery may be had of costs and expenses, including attorney fees to procure dissolution, 524.
damages recoverable for the injury sustained from the restraint of the injunction, 525–528.
on *supersedeas* bonds for review in the supreme court of the United States, 532.
liability where the judgment or decree below is only in part for money, or is *in rem*, 533–535.
liability on more specific conditions in use in state courts, 536, 537.
on undertakings under the code, 536.
interest and damages awarded on appeal, 538.
recoveries on notes and bills, 540–565.
damages in lieu of re-exchange, 562, 563.
statutes of the several states on that subject, 563.
measure of, in vendor's action on contract for sale of land before conveyance, 567–570.
effect of resale in determining amount, 570.
elements of, in vendor's action for purchase-money, 570.
right of recovery where notes given for purchase-money, 571.
recovery against purchaser of land where the price is not fixed by the contract, 574.
elements of, in the vendee's action against the vendor for breach of the contract for the sale of land, 581–584.
interest on purchase-money, 577.
measure of damages in England, 578.
seller must convey perfect title, 572.
recoupment for defect of title, 573.
when purchaser may not question title, 574.
damages against the vendor for dilapidations, when he retains possession as security for the purchase-money, 588.
for waste and dilapidations on rescission, 587.
damages in suits for specific performance, 590.
courts of equity have sometimes given damages solely in lieu of specific performance, 590.
they will give it in part where entire performance cannot be specifically decreed, 590.
the measure of damages thus allowed is the same as at law, 590.
it will entitle the purchaser to an abatement of the price or to the value of the part lost, according to circumstances, 590.
where the contract is in such terms as to imply no warranty of quantity there can be no abatement of compensation, 590.
presumption as to benefits which would have accrued from performance of a contract, 590.
may be given when specific performance would not be granted, 590.
measure of, on breach of covenants of seizin and good right to convey, 593.
not affected by fact that the land has been enhanced in value by improvements or otherwise, 593.
reasons of policy for this exceptional rule of damages, 593.
when value of improvements may be included, 593.
if the consideration was property, its value will be adopted as the basis of recovery, 594.
and agreed value will be adopted and may be proved, 594.
when consideration will not measure the damages, 595.
where it cannot be ascertained, 595.
when paid by a third person, 595.
any recovery beyond nominal damages for breach of the contract of seizin and good right to convey requires proof of actual loss, 597.

References are to sections: Vol. 1, secs. 1-469; Vol. 2, secs. 470 767; Vol. 3, secs. 768-1296.

DAMAGES — continued.
measure of, on breach of covenants of seizin, etc.: if the purchaser obtains anything by the deed its value will reduce recovery, 597-599.
where there is a total breach, consideration and interest are *prima facie* the loss, 597.
effect of grantee obtaining and enjoying possession, 597.
where these covenants do not run with the land possession will not generally prevent recovery measured by consideration and interest, 597.
possession may compensate for interest when there is no liability to the superior owner for rents and profits, 598.
where the defect of title is only technical, and there has been long possession under the conveyance, 598.
where outstanding title has been bought in, 598.
elective total breach and reconveyance when title to part fails, 599.
damages will be reduced if the title has been made good by the statute of limitations, 598.
damages are assessed with reference to the facts affecting the real loss at the time of the assessment, 599.
at least nominal damages recoverable for any breach, 599.
how damages for breach of these covenants may be prevented or mitigated, 601, 602.
by the defect of title being cured, 601.
by covenantor acquiring title and it inuring to covenantee by estoppel, 601.
how damages adjusted on a partial breach, 602.
when the defect is an outstanding life estate its value is measure of damage, 602.
for loss of things which would pass as appurtenant to the freehold, as fences, buildings and fixtures, 604.
measure of, for breach of the covenant of warranty, 605.
consideration and interest, together with costs and expenses of defending the title, 605.
it is an exceptional rule, 605.
increased or diminished value at time of eviction not regarded, 605, 606.
if property is the consideration its value is the basis of the measure of damages, 606.
the rule of damages in England and Canada, 607.
same in some of the older states, 608.
rule in the case of a partial breach, 609.
they will be assessed *pro tanto* according to the rule for total breach, 609.
where the conveyance contains parcels and the title fails to one, 609.
where it fails to an undivided part, 609.
where the eviction is by some paramount charge or incumbrance, 609.
if action not brought until after title absolute under the incumbrance, 609.
effect of covenantee owing purchase-money due to amount of the incumbrance, 609.
or of the covenantor leaving sufficient money in hands of covenantee to discharge it, 609.
rule of recovery where covenantee has extinguished the adverse title, 610.
what may be included in the cost of extinguishing adverse title, 610.
effect of covenantee repurchasing property after a legal eviction on the damages for breach of the covenant of warranty, 610.
the recovery will be adjusted to the actual loss, 610.
rule of, where remote grantee sues first covenantor, 614.

References are to sections: Vol. 1, secs. 1–469; Vol. 2, secs. 470–767; Vol. 3, secs. 768–1296.

DAMAGES — continued.
measure of: interest as an item of damages in action for breach of covenant of warranty, 616.
notice of suit to covenantor, 615.
costs and expenses, including attorney fees, of defending reasonably and in good faith against superior title, 617–619.
covenantee on covenants for title cannot recover for any damages resulting from his own wrongful acts, 619.
rule of, for breach of the covenant against incumbrances, 622, 623.
in England and Canada, 624, 625.
comments on the American rule of damages, 626.
rule of damages for breach of this covenant when the incumbrance permanent and cannot be removed, 627, 628.
any recovery beyond nominal damages will be limited to the actual injury, 627.
amount paid to extinguish incumbrance recoverable for breach of the covenant, 627, 628.
measure of, where the incumbrance is a right of way over the granted land, 627.
where incumbrance consists of a prior grant of timber growing on the land, 627.
where it is an existing contract running with the land to fence a railroad, 627.
where it is an outstanding lease, 627.
where it is a life estate, 627.
liability of remote covenantor, 629.
where covenant connects with that for quiet enjoyment, 630.
defenses and cross-claims against purchase-money, 632–641.
measure of, for breach of covenant to pay off and extinguish incumbrances, 631.
where the promisor is the purchaser of the incumbered property, and the promisee is not bound for the debt, 631.
for not accepting goods contracted for, 647.
value of the goods refused may be ascertained by an immediate resale, 647.
theory of such resale, 647.
if the net proceeds less than contract price the deficiency may be recovered as damages, 647.
resale not necessary to be made at the place of delivery fixed by the contract of sale, 647.
foundation of rule of damages against vendee for refusing to accept goods contracted for, 650.
measure of, for non-delivery of property contracted to be sold, 651–653.
on a contract for a cargo the vendee is not entitled to recover on the basis of what the goods are worth in broken parcels, 651.
nor will the general rule be departed from though one or both of the parties were mistaken as to the material facts, 651.
where there is a mistake as to quantity in close packages, 651.
rule of, where a purchaser agrees to sell to his vendor at a price below the market, and violates his agreement by selling to another for more than market price, 651.
the basis of the general rule of, 651.
where the property not found in market and can be obtained only at a price much above the contract price, 652.
or where the article is patented, 652.
where other goods are purchased in market by the purchaser, the price paid, and expense and trouble of doing so, included, 652.
where the market price fluctuates, and the refusal to deliver was with a view to profit, 652.
or raised and depressed by illegitimate combinations, 653.
where there is no market at the place of delivery, how the value there ascertained, 652.

References are to sections: Vol. 1, secs. 1–469; Vol. 2, secs. 470–767; Vol. 3, secs. 768–1296.

DAMAGES — continued.
measure of, for non-delivery of property: not admissible to inquire as to the probable effect of adding the goods in question to the quantity in market; nor of the plaintiff going into the market to buy the kind and quantity in question, 653.
profits on a contract for resale cannot be taken into account, 653.
nor can the vendor claim any mitigation because the vendee has contracted property for less than the contract price, 653.
if the vendor sells the contracted goods recovery may be had on the basis of the amount he sold for, 653.
there is no actual injury if the market price is less than the contract price, and the vendee then is only entitled to nominal damages, 653.
where the vendor sells to another a part of the goods, and then puts it out of his power to perform, the vendee may refuse the residue and recover as for total breach, 653.
rule of, in favor of vendee when delivery becomes impossible, 655.
measure of, against a vendor when the purchase price has been paid, 656.
in some states the highest market price to trial recoverable, 656.
on contracts for the delivery of stock, 657.
sales of good-will, 658.
on contracts to pay in or deliver specific articles, 659–661.
what consequential damages recoverable from vendor for not delivering or delaying delivery of goods sold, 662–666.
what profits may be taken into account, 664, 665.
what other losses, 662–666.
on vendor's warranties, 667–675.
measure of, for breach of warranty of title, 669.
no more than nominal damages can be recovered if the paramount title has not been asserted, 669.
costs incurred may be recovered if vendee dispossessed by suit, 669.
recovery is limited to the actual loss, 671.
may include interest, and special damages which are the proximate result of the breach, 671–675.
damages resulting from resale with like warranty, 671.
consequential damages on breach of fraudulent warranty, 671.
recovery by employee for services on a hiring at fixed wages, 678.
on *quantum meruit*, 679, 686, 688, 692.
recovery by attorneys for services, 682.
recovery by brokers, 683.
on sale of good-will, 658.
for part performance of contract which is not apportionable, 686.
same when performance prevented by sickness or death, 687–689.
or other disability, 687.
for part performance on apportionable contract for services, 691.
where employer gives employee cause to quit, or wrongfully dismisses him, 692–694.
other damages sometimes recoverable than the direct loss of salary or wages, 694.
liability of employee for violation of his contract of service, 695.
measure of, on contractor's breach of contract for particular works, 697–699.
of contract to build a house to be paid for by conveyance of a house and lot, 698.
on breach by contractor of contract for particular works, what profits recoverable, 697, 698.
damages recoverable may include amending and completing the contractor's work, 698, 699.
consequential damages recoverable, 699–705.
for breach of contract for work contracted for a particular purpose, 702.

References are to sections: Vol. 1, secs. 1–469; Vol. 2, secs. 470–767; Vol. 3, secs. 768–1296.

DAMAGES — continued.
measure of, on breach of contract for particular works; consequential damages, for delay in completing, 703.
interest on value, when paid for, 703.
loss of use during delay recoverable, 703.
rental value recoverable, 703.
must be such as were contemplated by the parties, 703.
what damages for delay or entire neglect to construct particular works may include, 704.
no liability for damages from extraordinary immediate cause for which contractor's delay merely gave opportunity, 704.
for defective work, 705.
recoveries of, by contractor, 706–714.
damages recoverable where employer stops performance under contract for particular works, 713.
what may be shown to enhance damages, 714.
where measurements provided for with a view to periodical payments, they are final for the work so measured, 713.
when employer violates the contract by stopping the work, money earned and retained as security recoverable, 713.
what may be shown to reduce damages, 714.
amount recoverable against a surety, 723.
when interest added, 723.
same rule of, applies to principal and surety, 723.
surety only liable for actual damages, 727.
what recoverable against surety in respect to interest, attorney fees, and stipulated damages, 728.
on a guaranty of the amount due, 728.
measure of, against guarantor of commercial paper, 729–734.
discharge or reduction of the amount otherwise recoverable from surety by creditor's conduct in respect to the parties liable, or sureties, 735.
defenses by surety alone or in suit in which he and the principal are defendants, 743.
extent of the surety's right of recovery against his principal for indemnity, 745–751.
surety's right to recover costs which he has been compelled to pay, 752.
consequential damages not recoverable by surety, 753.
what damages by way of contribution recoverable between co-sureties, 754.
who are such, 755.
what may be recovered on contracts of indemnity, 762.
under certain forms of indemnity, costs and expenses of defending groundless action recoverable, 762.
confined to those which immediately result from the act indemnified against, 762.
what costs and expenses recoverable when the indemnity is against the consequences of a levy of attachment or execution, 762.
on an indemnity against breaches of contract, 762.
on an indemnity against loss, damage and harm by reason of a suit for infringement of a patent, 762, 763.
recovery may be had on indemnity for payment of a judgment, or incumbrance, for service, trouble and expense within scope of agreement, 763.
also for property lost by act indemnified against, 763.
upon contracts to pay debts for purpose of indemnity, 765.
for pain, physical and mental, from personal injury and insult, 942, 985, 986, 1206, 1214, 1218, 1220, 1240–1245.
for breach of marriage promise, 92, 985–988.
for injury to business, 54, 59, 60, 61, 70, 153, 154, 512, 867, 871, 945, 1029.
as to necessity of successive actions for, 1016, 1036, 1038–1040.
rule of, against unfaithful or negligent agent, 767–787.

References are to sections: Vol. 1, secs. 1–469; Vol. 2, secs. 470–767; Vol. 3, secs. 768–1206.

DAMAGES — continued.
rule of, against agent; what damages proximate consequences of his acts and omissions, 770–774.
when principal liable to agent for, on his dishonored bills, 789.
measure of, against an agent acting without or beyond his authority, 787, 788.
rule of, on open policies of insurance, 813.
general rule of damage on policies of fire insurance, 821.
liability for loss extends only to immediate effects, 821.
damages for refusal of lessor to give possession, or on breach of covenant for quiet enjoyment, 863.
for injury to business between landlord and tenant, 868–870.
what uncertain and speculative, 874.
profits from future performance of vocalist not certain, 874.
damages on contract may be reduced for contributory negligence, 873.
consequential, for lessor's failure to repair, 874.
loss of custom to a mill kept idle by failure to repair dam, 874.
by fall of chimney, 874.
by goods getting wet, 874.
by failure to repair saw-mill stocked with logs, 874.
for fraud, may be recouped against rent, 876.
for other torts less than eviction, 876.
interest on, for use and occupation, 854.
measure of, for breach of covenant to repair, 855–860.
landlord cannot recover, against tenant for loss to which he contributed, 858.
measure of, for breach of covenant not to sublet or assign, 861.
for breach of covenant to insure, 862.
for quiet enjoyment, 863–871.
damages in the nature of demurrage, 897.
for carrier's refusal of goods to carry, 898, 899.
or breach of contract to carry at specified rates, 899–902.
for dispatching goods by different route for which higher freight charged, 902.
for negligent delay of transportation, 903.
not liable for remote consequences, 902.
consequential, against carrier for negligent delay, 911–914.
for failure seasonably to convey money to pay premium on life insurance policy, 914.
where statute of limitations runs on account during such delay, 914.
against carrier for injury to or loss of goods, 916–920.
owner's efforts to lessen loss, 921.
circumstances may reduce, below value at destination, 922.
not affected by the kind of motive power employed, 916.
do not depend upon contract, 916.
what evidence makes a *prima facie* case against carrier, 917.
when loss happens by one of the excepted causes, 917.
interest generally allowed on damages against carriers, 920.
shipper may estop himself from recovering full value by his conduct, 925.
proof of value against carriers, 933.
damages recoverable from passenger carriers, 934–956.
for refusal to carry, or delay, 935.
for detentions and exposures causing sickness, 936–939.
for personal injuries, 936–952.
consequential damages, 939–947.
exemplary damages, 937–951.
injury to wife, child or servant, 952.
excessive verdicts, 953.
damages recoverable from telegraph companies, 957–982.
measure of, against such companies, 982.

References are to sections: Vol. 1, secs. 1–469; Vol. 2, secs. 470–767; Vol. 3, secs. 768–1296.

DAMAGES — continued.
for breach of marriage promise, 983–990.
for withholding possession of real property as regulated by statutes, 992–1000.
mesne profits, action of trespass for, 992–999.
under the code, 1000.
for detention of dower, 1001–1007.
for trespass to real property, 1009–1032.
for injury to inheritance, 1033, 1034.
for trespass, are such as are appropriate to plaintiff's title, 1012.
possession alone will entitle plaintiff to recover, 1012.
but can recover only such, as affect his own right, 1012.
except against a stranger, 1012.
where the defendant derives a benefit from the trespass, 1014.
measure of, in such action by tenant against landlord who takes his minerals reserved, to which he has no access except with consent of tenant, 1014.
the principle is compensation in absence of right to punitory damages, 1015.
may be assessed on the value of a part of land severed, 1015.
valuation most favorable to owner to be adopted, 1017, 1018.
for cutting and carrying away trees, 1019.
rental value may be given when trespass suspends owner's enjoyment, 1015.
damages for removal of a fence, 1015, 1024.
for injury to unfinished house delaying completion, 1015.
for stopping a mill, 1015.
laying down and operating railroad, 1016.
question of successive actions, 1016.
when a permanent injury done by single act, damages assessed once for all, 1017.
depreciation of value of land an element of, 1017.
for deposit of sand bar, 1017.
for causing land to fall away by removing lateral support, 1017.
compensation to be made according to the value of the land or soil to owner, 1017.
for cutting trees, severance the essential fact, 1019.
value of the timber may be shown though not averred, 1019, 1020.
owner may adopt value of timber as measure of damages, 1019, 1020.
what owner entitled to recover for cutting and converting timber, 1019, 1020.
for mining and converting ores, 1019.
proper pleading in such a case, 1030.
diversity of decision as to the measure of damages, 1020.
the difference is between value in natural condition and value immediately after severance, 1020.
there may be recovery also for injury done to the land, 1019, 1020.
compensation allowed for labor and money to prevent damages, 1024.
for destroying or carrying away growing crops, 1023.
trouble of looking after trespassers not an item of damage, 1023.
consequential, for removing fence inclosing dairy ranch, or other fences, 1024.
for trespassing sheep communicating disease, 1028.
for stopping a mill, 1015, 1028.
depriving owner of pasture for his cattle by over feeding, 1028.
not necessary the damages from trespass be certain, 1028, 1029.
consequential damages for trespass — injury to business, 1029.
aggravations and special damages, 1028.

References are to sections: Vol. 1, secs. 1–469; Vol. 2, secs. 470–767; Vol. 3, secs. 768–1296.

DAMAGES — continued.
for trespass to real property, exemplary damages may be given, 1031, 1032.
not allowed in action against personal representatives, 1032.
pleading matters of aggravation, and effect of, on claim for damages, 1030.
to inheritance and reversion, 1033, 1034.
at least nominal damages recoverable for nuisance, 1037.
when the act complained of lawful, actual injury must be shown, 1037.
theoretical injury only will not support action for nuisance, 1037.
what recoverable in first action for continuous nuisance, 1039.
what recoverable in subsequent actions, 1038.
continuance of nuisance after one recovery, ground for exemplary damages, 1039.
damages for, may include expenditures necessary, not yet made, 1041.
the injury consists in exposing party to the necessity to expend money, 1041.
when such expenditures made not material, 1041.
damages for nuisance not always assessed as for a continuing wrong, 1042–1046.
measure of, for nuisance, 1047–1057.
permanent damages may be measured by depreciation, or by adding to amount of past damages cost of restoring premises, 1047.
how measured where injury is continuing, 1046.
special damages, 1048–1054.
loss of logs or destruction of crops, 1048, 1049.
for depriving a party of the use of land, 1049.
for loss of use of a ford, 1050.
flooding cellar with filth, 1050.
to be assessed with reference to the particular circumstances, 1050.
the general elements of, for nuisance, 1050.
liability of creator of a carrion or other nuisance causing sickness or putting in fear, 1051.
for wrongfully setting up rival ferry, 1051.
removing lateral support, 1051.
causing injury to business, 1054.
preventing the renting of tenements, 1054.
apportioning the injury, where there are several causes, 1054, 1059.
where several persons contribute without concert, 1059.
abatement of nuisance does not prevent recovery of damages, 1055.
mitigation of, for nuisance, 1055, 1056.
plaintiff's neglect to abate it, 1055.
private action for special injury from public nuisance, 1058.
parties jointly guilty of nuisance jointly and severally liable, 1059.
pleading in respect to, for nuisance, 1060.
damages for exercise of the power of eminent domain, 1061–1089.
for trespass to personal property, 1092–1107.
measure of, for conversion, 1108–1137.
where the wrong-doer has improved the property, 1126–1128.
for conversion of money, securities, stocks, deeds, etc., 1132, 1133, 1135.
how affected by the nature of plaintiff's interest, 1136.
mitigation of, in trover, 1138.
for slander and libel, 1203–1233.
measure of, in replevin, 1144–1154.
measure of, for fraud, 1171–1178.
exemplary, for fraud, 1178.
for infringement of patent-rights, 1183–1197.
of copyright, 1198, 1199.
of trade-marks, 1200–1202.

References are to sections: Vol. 1, secs. 1-469; Vol. 2, secs. 470-767; Vol. 3, secs. 768-1296.

DAMNUM ABSQUE INJURIA, 3.

DANGEROUS SUBSTANCE —
consequential damages from negligence in dealing with, 19, 25, 44.

DEALER —
implied warranty in sales by, 667-672.

DEATH —
only pecuniary loss from, recoverable, 96.
exceptions, 96.
statutory action for damages resulting from, 129.
survivorship in case of death of one of several entitled to sue on contract, 133.
personal representative cannot join, 133.
provision for support of wife as a matter in mitigation of damages from, 158.
pleading to recover for, 426.

DEATH, DAMAGES RESULTING FROM —
no action at common law, 1259.
nature of the statutory action, 1260.
diversities as to beneficiaries, 1261.
only pecuniary losses compensated in England and Canada, 1262.
rule in United States, 1263.
at least nominal damages recoverable, 1264.
recovery by widow, 1265.
by husband, 1266.
for loss of parents, 1267.
of child, 1272-1275.
facts and circumstances to be considered in estimate of damages, 1268-1271.
damages recoverable by collateral kindred, 1276.
to the estate of deceased, 1277.
special damages, 1278.
contracts exempting from liability, 1279.
where injury is done in another state, 1280.

DEBT —
interest on, 76.
has no *situs*, 200.
exchange when payable abroad, 212.
creditor not obliged to receive part of, 219.

DEBTOR —
collection of debt from, contrary to law, when not actionable injury, 3.
his right to apply payments, 235.
value of custody of, to creditor, 160, 161.
cannot pay debt without discharging it, 218.

DECEIT (see FRAUD), 1163.
remedy in case of, in sale of goods, 44.

DEED —
acceptance of, merges the contract of purchase, 591.
usual covenants in, 591.
promissory note given for a void deed is without consideration, 542.

DEFAMATION —
when injury from defamatory statements *damnum absque injuria*, 3.

DEFAULT —
effect of, as to proof in mitigation, 166.
what it admits, 429.

References are to sections: Vol. 1, secs. 1-469; Vol. 2, secs. 470-767; Vol. 3, secs. 768-1296.

DEFENDANTS —
joinder of, 135.
effect of non-joinder and misjoinder, 135.
survivorship when there are several, 135.

DEFENSES —
to actions for purchase-money, 632-641, 676.

DEL CREDERE COMMISSION —
liability of agent acting under, 783.

DEMURRAGE —
definition of, 897.
not allowed in case of ineffectual effort to land, 897.
consignee incurs liability for, by accepting goods, 897.
when damages in the nature of, may be demanded, 897.
detention by arrival of other vessels to unload first, 897.
for detention beyond days of demurrage allowed by charter, 897.

DEMURRER —
what it admits, 429.
jury may assess damages on, to evidence, 429.

DEPOSITS —
effect of deposit in court of a deed by vendor in action for purchase-money, 567-570.

DEPRECIATED CURRENCY —
on notes payable in, its value the measure of damages, 559.
surety paying a debt in, only entitled to indemnity or contribution on the basis of its value, 748, 759.

DILAPIDATIONS —
vendor retaining possession as security for purchase-money and suffering them, is liable for what it will cost to restore the premises, 588.

DIRECT DAMAGES —
absolute responsibility for, 14, 45.
not dependent on motive or previous contemplation of them, 14.

DISEASE —
suffering animals having, to go at large, 18.
damages for loss of animals by, on breach of warranty against, 675.

DISTRIBUTEES —
how secured by, and their remedies on, probate bonds, 488, 494.
when they may sue on such bonds, 494.

DISTRIBUTION, 302.

DOG —
damages for killing, 449, 450.

DOLLARS —
contracts payable in, 211.
contracts payable in, may require payment in other than legal currency, 267.
when this word expresses quantity rather than value, 659.

DOUBLE DAMAGES —
must be claimed in pleading, 464.
jury or court may award, 464.

DOWER —
damages recoverable on covenant against incumbrances for existence of an inchoate right of, or of an unassigned dower right consummate, 627.

References are to sections: Vol. 1, secs. 1-469; Vol. 2, secs. 470-767; Vol. 3, secs. 768-1296.

DOWER — continued.
damages recoverable on covenants for title for dower, set off out of premises, 612.
definition of, 1001.
facts essential to, 1001.
on death of the husband the right to, perfected as a chose in action, 1001.
it is set off to widow on valuation, 1002.
the value in case of alienation is taken exclusive of improvements made by purchaser, 1002.
the dowress entitled to an equivalent of one-third of the value at the date of alienation, 1002.
when value enhanced by other causes she is entitled to the benefit of it, 1002.
as to lands of which husband died seized she is entitled to, according to value at date of assignment, 1002.
she is entitled to such part as will give her an income equal to one-third of the income of the whole, 1002.
originally no damages were recoverable for detention of, 1003.
this modified as to lands of which the husband died seized by the statute of Merton, 1003.
in this country by statute or otherwise damages given against alienee from time of demand, 1003.
heir or devisee in possession liable from death of husband without demand unless he plead *tout temps prist*, 1003.
in South Carolina no damages recoverable in action for dower, 1003.
nor interest on sum assessed in lieu of dower, 1003.
but by statute interest may be collected from husband's alienee, 1003.
the usual equivalent of dower in that state, 1003.
in Maryland, damages against alienee recoverable only in equity, 1003.
effect of assigning dower, 1003.
damages before assignment includes net annual value, 1003.
rule in Canada, 1003.
residence on the premises after death of husband not a set-off to her damages, but may be considered in mitigation, 1003.
damages may include more than the value or *mesne* profits, 1003.
the original purpose of dower, and its protection in *Magna Charta*, 1003.
right to damages attaches after duty to assign, 1003.
effect of plea of *tout temps prist* sustained, 1003.
that plea not available where the heir has sold, 1003.
at law, the dowress' right to damages extinguished by her death, 1004.
otherwise in equity, where she may ask part of a fund in lieu of, where it has been produced by sale of lands of which she was dowable, 1004.
how the value of dower ascertained when payable out of proceeds of land sold free of it, 1004.
reprisals, 1005.
limited to husband's beneficial interest, 1006.
extent of, in lands subject to paramount charge or incumbrance, 1006, 1007.
widow has right of dower in the surplus, 1007.
how contingent dower right satisfied out of surplus when sold on paramount incumbrance, 1007.

DRAINAGE —
injuries from coal mine in natural basin, when *damnum absque injuria*, 3.

DRAWER —
liability of, 555.
warranty implied from drawing, 555.
measure of damages against, 555.
liability for re-exchange, 560.
by what law liability governed, 563.

References are to sections: Vol. 1, secs. 1-460; Vol. 2, secs. 470-767; Vol. 3, secs. 768-1296.

DRUGS —
damage resulting from selling mislabeled, 25, 44.

DUTY —
consequential damage from neglect of public, 25, 32, 42.
in dealing with dangerous substances, 19, 25.
machines or animals, 18, 19, 25.
action for breach of continuous, 127.
of plaintiff to prevent damage, 88, 90, 156.
application of, to surety, 90.
to employee in particular work, 91, 108.
in case of nuisance by flooding, 1048, 1049.
when failure to abate nuisance will go in mitigation, and to what extent, 1055.

EARNINGS —
of wrongfully dismissed servant go in mitigation of his damages for being so dismissed, 693.
application of rule to contractors for particular works, 713.

EJECTMENT —
damages in, at common law, nominal, 992.
for withholding possession of real property generally regulated by statute, 991.
where plaintiff's title expires after suit, 992.

ELEMENTS OF DAMAGE —
elementary limitation of damages, 75.
general classification of for breach of contract, 19, 82.
money, etc., taken by the breach of contract, 79.
preparation or part performance, 80.
expenditures and acts done in reliance on performance of contract by the other party, 81.
sums paid third persons in consequence of breach of contract, 82.
gains prevented and losses sustained, 78-91.
costs and expenses of suits, 82.
other than pecuniary items for breach of contract, 92.
for personal injury, 93, 98.
only pecuniary loss from death, 96, 1262, 1263-1275.
value of property, 105.
interest on, 105.

EMBEZZLEMENT —
of any part of property saved works a forfeiture of salvage, 721.

EMINENT DOMAIN (see PUBLIC USE) —
damages where one railroad crosses another, 60, 1078, 1079.
interest on assessment of damages, 336, 1091.

EMPLOYEE —
loss of benefits by wrongful discharge, 60, 69, 79.
duty to prevent damage, 88.
recovery by, where there has been a hiring at fixed wages, 678.
his right of recovery on *quantum meruit*, 679, 686, 688, 689, 692.
various modes of compensating for services, 684.
recovery for services on contract void by statute of frauds and repudiated by employee, 684.
necessity of full performance by, of entire contract, 686.
in what cases the rule relaxed, 687-690.
recovery on contract in which he has reserved the right to quit at pleasure on notice, 690.
when entitled to pay as work progresses, 691.
recovery by, when employer gives him cause to quit or wrongfully dismisses him, 692-694.
liability of, for violation of a contract of service, 695.

References are to sections: Vol. 1, secs. 1–469; Vol. 2, secs. 470–767; Vol. 3, secs. 768–1296.

EMPLOYER —
is entitled to pay for services in the very mode agreed on, 684.
rule applies though the contract void by the statute of frauds, if he is ready and willing to perform his part, 684.
but if he repudiates such void contract, services rendered under it may be recovered for on *quantum meruit*, 684.
liability of, where he gives servant cause to quit or wrongfully discharges him, 692–694.
payments made by, on contract for particular work, cannot be recovered, 708.
option of, when work not completed at agreed time, 709.
liable for work, though not done in time, if he afterwards permits it to be finished, 709.
may show cost of completing work, 709.
voluntary acceptance and appropriation of work raises a duty to pay for it, 710.
if work not in compliance with contract employer not bound to receive it, and if he does not he is not liable, 710, 711.
how he may avoid responsibility for work not done according to contract, 710.
when done on his land or materials, 710.
what not an acceptance or waiver of objections to work, 710.
damages recoverable when he stops work, 713.
under right to make alterations, not entitled to stop work, 714.

ENGINE —
damages on breach of warranty as to condition and capacity of, 429.
when value of use of recoverable in replevin, 544.

ENTICING —
a party to break his contract, 29.

ENTIRE CONTRACTS —
for services not apportionable and full performance required, 686.
dispensation of strict performance in case of disability, 687.
quantum meruit for part performance of, 688–690.
what hiring not entire contract, 691.
infant may recover for part performance, 690.
equitable recovery according to benefit for part performance in certain cases, 710, 711.

ENTIRETY OF DAMAGES —
damages for a cause of action not divisible, 106–142.
joinder of defendants, 106.
effect of non-joinder or misjoinder, 135.
joint liability, how severed or extinguished, 136.
effect of code on common law as to parties, 136.
principles on which joint right or liability for torts determined, 137.
common purpose necessary to render wrong-doers jointly liable, 137, 140, 142.
who may unite in suit for damages recoverable for injury to property, 137.
the rule as to at common law, 136.
distinction between real and personal property as to joinder of tenants in common, 137.
tortious act not an entirety as to parties injured, 138.
who may maintain trespass *quare clausum fregit*, 138.
general and special owners, 139.
measure of damages in such case, 139.
against officer levying under execution, 139.
persons having separate interests in chattel cannot unite in replevin, 139.
in one suit court will not take cognizance of separate claims of different persons, 139.

References are to sections: Vol. 1, secs. 1–469; Vol. 2, secs. 470–767; Vol. 3, secs. 768–1296.

ENTIRETY OF DAMAGES — continued.
joint and several liability for torts, 140.
no joint liability for slander, 140.
distinct demands growing out of same contract or resting in account, 110.
splitting entire demand, 110.
test of, 110.
items of account, 111.
continuing obligations, 112.
future damages, 113.
for injuries to real property, 114–116.
in case of permanent erection, 116.
from negligent construction of buildings, 116.
appropriation to public use, 116.
for breach of contract for indemnity, 117.
action for single tort to person and property, 118.
what not double remedy, 119.
when future damages included, 120, 121.
present worth only recoverable, 124.
continuance of wrong not presumed, 126.
action *ex contractu* must be brought by all having legal interest, 128, 133.
cannot be severed by partial assignments, 133.
release of one discharges all, 133.
when otherwise, 133.
principal and deputy, etc., jointly liable, 140.
officer and sureties for indemnity jointly liable, 140.
also attorney, 140.
distinct torts not entire, independent tort-feasors not jointly liable, 141.
several creditors jointly liable for wrongful arrest by officer, 141.
concert among wrong-doers necessary to joint liability, 141.
as to joint liability of liquor sellers for causing habitual drunkenness, 142.

ENUMERATED ARTICLES —
adjustment of damages for freight on, under charter, 883, 893.

ESCAPE —
measure of damages for, 160.
mitigation in action for, 160
recovery for, does not release debtor, 160.

EVICTION —
necessary to right of action for breach of the covenant of warranty and for quiet enjoyment, 604.
where it takes place by virtue of judgment, such judgment admissible to show that fact, 614.
but not sufficient to show that eviction was by paramount title in action against covenantor unless he was vouched in to defend, 614.
the consequence of, between landlord and tenant, 863–871.
how far available to plaintiff against whom rent claimed by way of recoupment, 876.
damages for, or refusal of possession, 865.
by landlord or a stranger, 848.
what will constitute, 848.
tenant must quit possession, 848.
no answer as to rent which has accrued, 848.
no bar to rent which accrues afterwards if tenant has possession, 848.
landlord's trespass or other tort on the premises not such, 876.

EVIDENCE —
must be adapted to damages claimed, 437.
burden of proof, 438.
intendments against defendant for holding back evidence, 439.
against plaintiff, 440.

References are to sections: Vol. 1, secs. 1-469; Vol. 2, secs. 470-767; Vol. 3, secs. 768-1296.

EVIDENCE — continued.
plaintiff must prove pecuniary items, 441.
of value, 445-448, 565, 654, 680, 1089, 1098, 1113.
of dogs, 449.
physical examination of plaintiff, 451, 452.
witnesses may be asked grounds of opinions, 450.
expressions of sufferer, 453.
photographs and stereoscopic views admissible in, 454.
and life and annuity tables, 455.
proof of the value of the property in an action on a replevin bond, 504.
when judgment evidence in action on covenant of warranty, and for what purpose, 614.
judgment conclusive against covenantor when he was vouched in to defend, 614.
life tables evidence of expectation of life, 601, 628.
proof of value, 654.
between vendor and purchaser, 669.
vendee may show cost of replacing machinery, 672.
of the value of services, 682.
opinions of witnesses admissible, 680.
of the value of attorney's services, 682.
circumstances which may be proved as tending to show a fixed sum tacitly agreed to, 682.
or how much the services were worth, 682.
evidence to support recoupment in action on contract for particular works, 709, 710.
what facts admissible to show loss where employer stops performance in violation of contract for, 714.
what will suffice to show a debt not collectible, 733.
effect of judgment recovered against a party having a right of recovery over, 669, 759, 760.
what is, in suit against sureties in a probate bond, 495.
when judgment or decree not conclusive against sureties upon official bonds, 495.
proof of value against carrier, 933.
possession is presumed to be in the owner in absence of other evidence, 1009.
and that his possession is co-extensive with his grant, 1009.
in cases of personal injury, of detriment to business, 945.

EXAMINATION —
physical, of plaintiff, 451, 452.

EXCHANGE —
par of, 212.
rate of, 213.
when rate of, recoverable, 562.

EXCHANGE OF LANDS —
damages recoverable on failure to convey pursuant to agreement for, 575.

EXECUTION LIEN —
will be discharged by tender, 277.

EXECUTOR —
de son tort, may mitigate damages by showing payment of debts of the deceased, 156, 157.
cannot retain for his own debt, 222.
when debtor made, a release, 222.
not a release in equity, 222.
may retain for his debt, 222, 793.

References are to sections: Vol. 1, secs. 1–469; Vol. 2, secs. 470–767; Vol. 3, secs. 768–1296.

EXEMPLARY DAMAGES —
compensation for wrongs done with bad motive, 390.
difference of views; when allowed, 391–393.
malice in law and in fact, 394.
restriction and denial of, 395–400.
as compensation and punishment, 401.
for penal offenses, 402.
as matter of right, 403.
enhancement and mitigation of, 404, 405.
based on actual damages, 406.
motive of one wrong-doer not imputable to others, 407.
parties liable; master for servant, 408–411.
liability of officers, municipalities and estates, 412.
liability of passenger carriers for, 937, 950, 951.
may be recovered against passenger carriers, though corporation, 950.
for breach of marriage promise, 987.
whether jury may consider claim of, in trespass, court to decide, 1092.
when submitted to jury, they to decide whether to allow them, and their amount, 1092–1095.
duties of court and jury in such cases, 1092–1095.
may be recovered in trover when conversion attended with aggravation, 1131.
may be allowed in replevin, 1145.
for slander and libel, 1215.
for personal injury, 1252, 1253.

EXEMPTIONS —
collection of debt by violation of exemption laws, when actionable, 3.

EXPECTATION OF LIFE —
life estates estimated on, 610.
life tables as evidence of, 601.

EXPENSES —
of litigation as items of damage, 55, 58, 82, 84.
in other cases, incident to wrong or breach of contract, 59.
liability for, paid or incurred to lessen damages, 88.
to prevent damages, recoverable, 88.
recoverable on bonds, etc., given in judicial proceedings, 85.
on warranty, 89.
in cases of personal injury, 93, 1250.
mitigation in favor of wrong-doer for return of property diminished by, 1139, 1141.
of a detained passenger recoverable from carrier, 937.
of other conveyance of passenger recoverable, 937.
of sickness, 937, 942, 944.
incurred by lessee who is refused possession, 869.
carrier must pay expenses of caring for goods during temporary obstruction of transportation, 903.
shipper or consignee entitled to recover of carrier proper expenses incurred to prevent damages, 921.
owner may recover from trespasser expenses to prevent damages, 1023.

EXPERTS —
testimony of, 441–443.

EXPRESS COMPANY —
liability of as collecting agent, 776.
See CARRIERS.

EXTRAORDINARY CIRCUMSTANCES —
no recovery when injury arises from, 34.

References are to sections: Vol. 1, secs. 1-469; Vol. 2, secs. 470-767; Vol. 3, secs. 768-1296.

EXTRA WORK —
what is, 707.
at what rate compensation should be made for, 707.
assent to deviation not alone sufficient to warrant a charge for work as extra, 707.

FACTOR —
his liabilities to his principal, 777–785.
his right to make sales to reimburse himself, 790.
valuation of his interest under policy of insurance, 828.

FAILURE OF CONSIDERATION —
a defense between immediate parties to commercial paper, 542.
as to defense of partial failure of, 544–548.
instances of, 547, 548.
admissibility of parol evidence to show, 551–554.

FAILURE OF TITLE —
measure of damages for, on covenants for title, 593, 605, 606.

FALSE IMPRISONMENT —
matters provable in mitigation, 149, 150, 154.
what not, mitigation, 154.
officer may arrest on suspicion, 165.
what special injury not implied and must be alleged, 421.
on default what defendant not allowed to show, 431.
damages recoverable for, 1257.
actual malice an aggravation, 1258.

FALSE REPRESENTATIONS —
person making, liable to make them good, 25.
of receipts from, from property negotiated for, 42.
See FRAUD, 1166.

FEELINGS —
no recovery on contract for injury to, 48, 49, 56, 104.
law implies injury to, in cases of personal injury and insult, 421, 1242–1245.
may be the principal element of injury, 95–97.
injury to, an item of damages against carriers of passengers, 942, 943.
in action for breach of marriage promise, 986.
injury to, subject of compensation in actions for slander and libel, 1206, 1214, 1220.
liability of telegraph companies for, 975–980.
may be recovered for in trespass by removing corpse from cemetery lot, 979.
and where dead body of husband mutilated, 979.
and for neglect to transport corpse, 979.

FENCES —
consequential damages for defects in, 18.
damages for leaving open, 18, 25.
duty of plaintiff to prevent damages by repairing or closing, 88.
damages for removal of, 1015, 1024.
expense of maintaining, when an item of damage in the taking of private property for use of railroad, 1072.
where materials of, replevied, their value, and not that of fence, recoverable, 1144.

FENCE STATUTES —
liability for consequential damages under, 20.

FERRY —
damages for breach of covenant to keep in good repair, 55.

References are to sections: Vol. 1, secs. 1–469; Vol. 2, secs. 470–767; Vol. 3, secs. 768–1296.

FINE —
no interest recoverable on, 330.

FIRE —
loss of houses pulled down to prevent spread of, *damnum absque injuria*, 3, 154.
consequential damages for negligently setting, 19.
for preventing extinguishment of, by cutting hose, 25.

FIRE INSURANCE (see INSURANCE) —
definition of, 802.

FISHERY —
law infers damage from unauthorized fishing in several fishery, 10.

FLOOD —
law implies some damage from flooding land, 10.
damage from, by removing bank which was a barrier, 19.
for loss of goods by, in case of delayed transportation, 27.
defendant may show in mitigation that injury would otherwise have come from same, 159.

FLUCTUATIONS —
in value of money, 208–211.

FLUCTUATIONS IN VALUE —
how values ascertained which are subject to fluctuation, 653.

FOOD —
implied warranty on sales of, 667.

FORBEARANCE —
a good consideration, 300.

FORCIBLE ENTRY AND DETAINER —
mental pain cannot be compensated in action for, 95.

FOREIGN CURRENCY —
how treated, 206.
how value of ascertained, 212.

FOREIGN DEBT —
how payable, 206.
amount recoverable on, 213.

FOREIGN JUDGMENT —
interest on, 333.

FORTHCOMING BONDS —
measure of recovery on, 518.
on condition to pay the judgment, 519.
what not a defense, 519.

FOULING WATER —
when injury to riparian owner *damnum absque injuria*, 3.
what damage recoverable for, 54.

FOUNDATION —
damages for negligently undermining building, 18.
when disturbance of lateral support not actionable, 3.

FRAUD —
consequential damages for, 25, 42, 44.
effect of to enhance damages, 44.
on contract to sell or convey land, 44.
in cases of confusion of goods, 44.
remedy in case of deceit in sale of goods, 44.
in falsely representing to be agent, 30.

References are to sections: Vol. 1, secs. 1-469; Vol. 2, secs. 470-767; Vol. 3, secs. 768-1206.

FRAUD — continued.
vitiates a contract at the election of the defrauded party, 542.
if not avoided defense on the ground of, 542.
where part of the consideration of a note or bill fraudulent, 549.
where execution of note procured by fraud, 549.
assurance by obligee to surety to get his signature that signing a mere matter of form and he should not be called on for payment, 554.
of landlord in making lease subject to recoupment against rent, 876.
scope of recovery for, 1163-1165.
liability for false representations, 1166.
they must relate to existing facts, 1167.
not future facts, nor to matter of law, 1167.
not to matters of belief or opinion, 1167.
must be relied on, 1167, 1168.
no defense that defendant believed his false representations to be true, 1169.
what is not negligence of the injured party, 1168.
false representations may be shown though contract in writing, 1168.
must be fraudulent, 1168.
need not be made to deceive the plaintiff in particular, 1170.
not necessary defendant should derive advantage from, 1166, 1170.
measure of damages for, 1171, 1172.
special damages for, 1173, 1174.
the value of property as represented to be, 1172.
costs of suits incurred on faith of false representations, 1173.
damages for fraudulently inducing one to incur liability, 1174.
or to buy diseased or vicious animals, 1173.
for falsely representing one worthy of credit, 1174.
expenses of litigation, 1177.
the certainty of the proof of damages for, 1175, 1176.
exemplary damages for, 1178.
pleadings relating to, 1180.

FREIGHT (see RECOUPMENT AND COUNTER-CLAIM), 180.
See CARRIER.

FRIGHT —
liability for negligently causing nervous shock and mental suffering, 21, 24.
of seaman from being thrown into water in case of collision, 96.

FRIVOLOUS SUIT, 11.

FRUIT ORCHARD —
damages depending on growth of, 62.

FUTURE ADVANCES —
parol evidence admissible to show that a note absolute in terms given for, 551, 552.

FUTURE DAMAGES. See ENTIRETY OF DAMAGES.

GAINS —
damages for, prevented recoverable, 78.
exceptional rule in land contracts and covenants for title, 78.

GARDEN SEEDS —
recovery on breach of warranty as to quality, 61.

GARNISHMENT —
when a wrong by violation of exemption laws, 3.

GAS —
damages for refusal to supply, 675.

References are to sections: Vol. 1, secs. 1-469; Vol. 2, secs. 470-767; Vol. 3, secs. 768-1296.

GAS PIPE —
damages for negligently laying, 18.

GATE —
damages for breach of agreement to maintain on a farm, 702.

GENERAL AVERAGE —
definition, 818.
conclusive though made in a foreign country, 818.
what property must contribute, 818.
what property exempt, 818.
on what contribution to, depends, 819.
importance of place where adjustment made, 819.
instance of, in fire insurance, 826.

GENERAL ISSUE —
payment may be proved under, in mitigation, 167.
not for complete defense, 232.
mitigation in slander under the, 152, 153.

GIFT —
a note transferred as a, without consideration, 542.

GOLD —
a legal tender in the United States, 210.

GOOD AND BAD FAITH —
distinctions made for bad motive, 98, 99, 100.
in plea of justification in slander, 153.
agent bound to act with, 768, 774.

GOOD RIGHT TO CONVEY, COVENANT OF —
damages for breach of, 593.

GOOD-WILL —
damages for injury to, 45.
on contract not to engage in same business, 45.
loss of, to a tavern stand, when an item of damages, 50.
stipulations fixing damages in contracts relating to, 291.
contract for sale of, 658.

GOODS —
proof of value, 444, 445.
evidence to classify, 445.
right of recovery for, when destroyed by mob, 90.

GOVERNMENT —
liability of, for interest, 332.

GRIFFIN *v.* COLVER —
the case stated, 53.

GROSS NEGLIGENCE —
as ground for exemplary damages, 43, 393.

GROUNDLESS SUIT —
no damages for, if not maliciously prosecuted, 3.

GUARANTIES —
construction of, 724, 725, 728.
instances of the, 725, 726, 728.
what a guaranty imports, 728.
when a continuing, may be determined by notice, 728.
on default made on guarantied contract, surety entitled to have his liability limited to the damages then recoverable, 728.
of a contract to furnish an engine, 729.

References are to sections: Vol. 1, secs. 1-469; Vol. 2, secs. 470-767; Vol. 3, secs. 768-1296.

GUARANTIES — continued.
conflict as to the effect of blank indorsement of commercial paper by third person, 730.
effect of a guaranty of collection, 733.
what essential to right of action, and the measure of liability, 733.
effect of there being collateral security not resorted to, 734.

GUARANTY COMMISSION —
liability of agent acting under, 783.

GUARDIAN'S BONDS —
when action will lie on, 496.
measure of recovery on, 497.

GUNPOWDER —
consequential damages for negligently keeping, 25.

HADLEY *v.* BAXENDALE —
consideration of, 50, 52.

HARBOR LIGHT —
damages for removing, 19.

HEIRS —
how secured by, and their remedies on, probate bonds, 393-395.

HIGHWAYS —
liability for consequential damages from defects in, 26.

HORSES —
liability for damage done by, when they run away, 17, 40.
according to their natural disposition, 31.
contrary to their ordinary habit, 31.
damages for injury to, 57.

HOUSE —
damages for injury to unfinished house delaying completion, 1015.
for destroying house in peril from fire, 1015.

HUSBAND AND WIFE —
his action for personal injury to her, 1252.
they must jointly sue for her pain and suffering, 1252.

ICE —
recovery for damages to unsecured, 1022.
duty of owner to mitigate damages arising from conversion of, 1242.

IDENTITY —
of property lost by wrong-doer's act, 102, 103.
proof of, by opinions, 443.

ILLEGALITY —
how it affects right to damages, 5[illegible]
consequential damages from illegal acts, 43.
how damages for illegal arrest mitigated, 150.
recovery for illegal seizure of goods, 156.
in part of consideration of note, 549, 550.

ILLNESS (see FEELINGS) —
damages for, when recoverable as result of breach of contract, 48, 49, 57, 58.
include compensation for pain when caused by wrong, 58.

IMPLIED CONTRACT —
as to parties, follows consideration, 132.

References are to sections: Vol. 1, secs. 1-469; Vol. 2, secs. 470-767; Vol. 3, secs. 768-1296.

IMPLIED PROMISE —
an express promise excludes an implied one, 686.
otherwise where performance prevented by certain causes, 687.
general remarks on the demand for part performance, 690.
what necessary to raise implied promise, 710, 711.
none of indemnity where there is an express promise, 745.

IMPROVEMENTS —
vendor's liability for, when contract by parol, and he refuses to fulfill, 583.
allowance made to purchaser for, in equity, on rescission for vendor's failure to make title, after deducting rents and profits, 589.
value of, not an element of damages for breach of covenant of seizin and good right to convey, 593.
may be deducted from *mesne* profits, 999.

INADEQUACY OF CONSIDERATION —
distinguishable from want or failure of consideration, 544.

INCONVENIENCE —
as a subject of compensation, 48, 49, 57, 92.
recovery for as an item of damage, 939, 942.

INCUMBRANCE —
what not an expense recoverable on covenant against, 53.
damages for failure to fulfill contract to discharge, 77.
on warranty against, 420.
what must be alleged in action for, 420.
what is such, 620, 627.
when a purchaser with a covenant against, not bound to see to payment of, 623.
damages for breach of covenant against, 622, 627, 629.

INDEMNITY —
to municipal corporation in respect of non-repair of streets, 83.
measure of damages, and how determined, 82–88.
effect of notice to defend action, 83, 84, 86, 88.
costs and expenses, when recoverable, 82.
what notice sufficient, 86, 87.
contracts of, damages on, 117.
damages due surety, party indemnified, 82.
may recover costs incurred judiciously, 82.
when wrong-doers must contribute to, 1007.
a note given as, against consequences of an unlawful act, illegal and void, 550.
parol evidence admissible to show that note given for indemnity though absolute in terms, 551.
express indemnities, 761–767.
damages the gist of the action for, 761.
there must be actual damages to support the action on an agreement for, 761.
agreements for may be so drawn as to admit of breach without actual injury, 761.
then, for such breach only nominal damages recoverable, 761.
a covenant against incumbrances an instance, 761.
to actions for indemnity non-damnification is the plea, and damages must be proved, 761.
diversity of decision as to such agreements, 761.
effect of a contract deviating from mere indemnity, 761.
but intended for indemnity, 765, 766.
in such cases damages may be given for probable injury, 761.
what recoverable as damages on agreements for indemnity, 762.
recovery may include costs and expenses of defending a groundless suit, 762, 763.

References are to sections: Vol. 1, secs. 1-469; Vol. 2, secs. 470-767; Vol. 3, secs. 768-1296.

INDEMNITY — continued.
contribution or indemnity between wrong-doers, 764.
effect of judgment, 767.
agent entitled to, from principal, 768, 793.
insurance a contract of, 820.

INDORSER —
his implied warranty, 555.
measure of damages against, 555.
liable for re-exchange on bills dishonored, 561.
what the liability includes, 561, 562.
by what law liability governed, 563.
not liable for commissions to holder's agent for collecting bill of acceptor, 564.
cannot recover of prior parties costs which he has been compelled to pay, 564.
stipulation for attorney fees and costs in notes does not affect his liability, 565.

INFANT —
who may make tender for, 264.

INFRINGEMENT OF COPYRIGHT —
copyright is statutory, 1198.
literary property is recognized at common law, 1198.
compensation and penalties for, 1199.

INFRINGEMENT OF PATENT-RIGHTS —
statutory remedies for, 1181, 1182.
damages for, recoverable at law, 1183-1188.
interest on damages for, 1187.
exemplary damages for, not generally allowed, 1188.
compensation for, obtainable in equity, 1189-1198.
compensation when invention is part of a thing and gives monopoly of a particular demand, 1193.

INFRINGEMENT OF TRADE-MARKS —
nature of right to trade-marks, 1200.
measure of damages for, at law, 1201, 1202.
compensation for, obtainable in equity, 1201, 1202.

INHERITANCE (see REVERSION) —
injury to, 1033.
when party injured has no estate in possession, 1033.
apportionment of damage between tenant and reversioner, 1033.
damage to, by destroying buildings, 1033.
injury to tenant in such case when he is bound to repair, 1033.
pleading to show injury to, 1033.
damages for waste, 1034.

INJUNCTION BONDS —
scope of their obligation, and when action on arises, 520, 522.
power of equity to award damages, 521.
mode of assessing damages, 523.
costs, expenses and attorney fees to obtain dissolution, as items of damage on, 524, 525.
damages from the restraint of the injunction, 526-528.
what facts no defense, 529.
what facts may be shown in defense, 530.
who entitled to benefit of, 529.

INJURIA SINE DAMNO, 3.

References are to sections: Vol. 1, secs. 1-469; Vol. 2, secs. 470-767; Vol. 3, secs. 768-1296.

INJURY —
every infraction of right is such, 1, 2.
some damages inferred from, 1, 2.
collection of debt by garnishment or execution in violation of exemption laws, 3.
compensation equal to, given as cardinal rule, 12.
duty of plaintiff to exert himself to prevent, 88.
increase of by plaintiff's voluntary act or negligence matter of mitigation, 155.

INQUIRY OF DAMAGES, 427.
when properly entered upon, 437.

INSANITY —
proof of, does not require experts, 443.
exempts from liability for exemplary damages, 394.

INSOLVENCY —
of execution debtor, as mitigation of damages for escape, 160.
when creditor may apply payment on debts for which he holds collaterals in case of insolvency of debtor, 228.

INSPECTION —
effect of, on acceptance of goods bought, 667.

INSTRUCTIONS —
agent bound to obey principal's, 768, 771, 774.
liable for losses resulting from disobeying them, 772-774, 778-782, 786.

INSUFFICIENT DAMAGES —
verdict for, may be set aside, 448, 1256.

INSURANCE —
money received from, not provable in mitigation, 158.
agent's liability for neglect of duty or agreement concerning, 772.
covenant by tenant to insure, 862.
growth and importance of insurance contracts, 801.
kinds of, 802.
definitions, 802.
cause of damage must be proximate, 803.
extent of injury; manner of ascertainment, 804.
damage to be ascertained according to the policy, 804, 813, 814.
contracts of, to be interpreted like others, 804, 805.
valued policy, 806.
stipulations as to ascertainment of damages, 806, 808.
those to prevent resort to the courts void, 808.
when proof of a loss a condition of payment, 809.
whether made within reasonable time, question of fact, 809.
waiver of such stipulations, 810.
preliminary proofs for information only, 811.
they do not bind in estimate of damages, 811.
they are admissions of the insured, 811.
proofs derivable from lost books excused, 811.
the cases relating to proofs of loss, 811.
pleadings, 812.
rule of damages on open policies, 813, 814.
how value to be proved, 813, 814.
damages on an agreement to insure, 814.
where the insurance limited to half the value, 814.
stipulations relating to other insurance, 814.
where interest in the property limited, 813.
evidence of value in ascertaining damage, 813, 814.
damages in case of abandonment, 814.
in case of insurance within limit of value, 814.
in case of partial loss, 816.

References are to sections: Vol. 1, secs. 1–469; Vol. 2, secs. 470–767; Vol. 3, secs. 768–1296.

INSURANCE — continued.
what is a total loss, 807.
in what cases the insured may elect to claim for a total loss, 815, 816.
loss in excess of sum fixed in policy, 815.
losses adjusted on the principle of indemnity, 817.
how damages on this principle arrived at, 817.
how cost of repairs reckoned, 817.
one-third new for old, 817–819.
when made on first voyage, 817.
general average, 818, 819.
damage for loss of ship, 818, 819.
where the ship has been sold, 818, 819.
difference between English and American rule, 818, 819.
fire insurance, 820.
a contract of indemnity, 820.
contract of, to be interpreted like other contracts, 820.
contracts for insurance, 821.
general rule of damages on, 821.
insurer only liable for immediate, not remote, consequences, 821.
when building destroyed, loss not estimated by cost of a new one, 821.
proof of value in estimating loss, 821, 825.
contribution where more than one policy, 822.
mitigation of liability, 823.
what jury may consider, 824.
no right of abandonment as in marine insurance, 824.
when parties have agreed on the manner of ascertaining value, 824.
general average in fire insurance, 826.
recoveries in special cases, 827.
construction of particular restrictions in policies, 827.
contracts to pay loss not exceeding certain sum, 827.
or a certain proportion of the value, 827.
insurance on commission goods, 828.
insurance on mortgages, 829.
insurer's contract to rebuild or replace, 816, 830.
rights of insured where similar structure not permitted by police regulations to be erected, 830.
adjustment among several insurers, 830.
life insurance, 831.
definition of, 831.
character of the contract, 832.
difference of judicial opinion as to its being a contract of indemnity, 832, 833.
criticism of the original case in England, 833.
if policy valid in its inception by being supported by requisite interest in the beneficiary, will be held good, 833.
when life insurance pledged for a debt, 834.
accident policy, 835.
secures actual loss or injury within amount of policy, 835.
remote consequences of injury not included, 835.
difference between English and American decisions as to scope of recovery, 836.
restatement of measure and elements of damage, 837.
insurer's liability for terminating the contract, 838.
refusal to issue paid-up policy, 839.
liability of re-insurer, 840.

INTEREST (see USURY) —
when and when not solely damages for non-payment of money, 76, 77.
on value of property in action for costs, 105.
does not stop at commencement of action, 113.
definition and general view, 300.
borrower by paying before money due cannot stop, 300.

References are to sections: Vol. 1, secs. 1–469; Vol. 2, secs. 470–767; Vol. 3, secs. 768–1296.

INTEREST — continued.
after accrued and due may be recovered whether principal due or paid, 300.
as damages, an inseparable incident to debt, 300.
how regarded in early common law, 301.
in England legalized by statute, 302.
how regarded at common law in America, 303.
agreements for, 304.
general promise to pay money with interest, 305.
liberally construed, 305.
law or custom fixes rate, 306.
"until paid," 310, 312.
legal or agreed rate applies from date, 307.
general payment applies to interest-bearing debt, 244.
and first to interest, 244.
measure of damages for delay in payment of money, 76.
due on recovered value of property, 105.
whether same rate will apply after debt due, 308, 309.
agreements for higher rate after debt due, 311, 312.
for more than legal rate before maturity, 313.
effect of usury found, 313, 319.
who may take advantage of, 314.
as compensation, 320.
right to not absolute, 321.
on accounts, 322.
where unreasonable and vexatious delay, 323.
on *quantum meruit*, 324, 328.
on money lent, 325.
on money paid, 326, 327.
as between vendor and purchaser, 328.
due from time money ought to be paid, 329.
none on penalties, 330.
when allowed on penalty of bonds, 331.
when due from government, 332.
and municipal corporations, 332, 333, 334.
judgments bear, incident to revival by *sci. fa.*, 335.
not collectible on executions except by statute, 333.
at what rate on, 333.
right to, as damages extinguished by payment of principal, 333.
allowed on liquidated damages, 330.
and all liquidated sums, 333.
in condemnation proceedings, 336, 1091.
on taxes, 337.
infants liable for, 338.
allowed on sums due for rent, 339.
on damages for infringing patent, 340, 1197.
right to, how affected by marital relation, 341.
between partners, 342.
on stockholders' statutory liability, 343.
allowed on delinquent annuities and legacies, 344.
on money due on policies of insurance, 346.
on advancements, 345.
not allowed on unliquidated demands, 347, 348.
what demands deemed unliquidated, 348.
on accounts, 349, 350.
when demand necessary, 351, 352.
on money had and received, 352.
when allowed against agents, trustees and officers, 353.
on money obtained by extortion or fraud, 354.
when allowed in actions for tort, 355.
the law of what place and time governs, 356, 370.
general rule as to contracts, 357.
bonds to United States, 359.

References are to sections: Vol. 1, secs. 1–469; Vol. 2, secs. 470–767; Vol. 3, secs. 768–1296.

INTEREST — continued.
the law of what place and time governs; between parties in different states, 360, 361.
where usury involved, 362, 365.
the law of what place governs the rate as damages, 366.
allegations and proof of foreign law, 367.
effect of change in law of place of contract, 368, 370.
as an incident to the principal, 371.
due by agreement, a debt, 371.
as damages, accessory to principal, 372.
compound, 373.
instances of interest on, 374, 375.
separate agreements for, 376.
periodical, after maturity, 277.
computation of, in case of partial payment, 278, 279.
for what causes suspended, 380, 386.
when payments prevented by legal process, 381.
by war, 382.
by tender, 383, 386.
how claimed in pleading, 387.
on verdict before judgment, 388.
on judgments pending review, 389.
agreement for interest on bills and notes which is repugnant to the laws of the country in which it is made and that in which it is payable is governed by the former, 556.
the foreign law governing interest must be proved. 556.
otherwise interest given according to the law of the forum, 556.
interest as damages to be paid by maker or acceptor, 557.
only given after demand on notes payable on demand, 557.
when not stipulated, given according to the law of the place of contract, 557.
when no place of payment mentioned, the place where a note made or a bill accepted is the place of contract, 557.
the place of contract may be fixed by circumstances, 557.
liability of drawer and indorser for interest, 557.
governed by the law of the place where their contract made, 558.
when recoverable against a purchaser of land, 575.
against vendor on rescission of land contract, 589.
recoverable on consideration in the damages for breach of covenants of seizin and good right to convey, 593.
allowed on the value of the property in action on replevin bond, 503.
allowed on the damages between vendor and vendee of personal property, 651, 656.
interest as an item of damages for breach of the covenants of warranty and of quiet enjoyment, 616.
how affected by receipt of rents and profits without responsibility to superior owner therefor, 616.
beyond penalty, when allowed on a bond, 477, 478.
allowed on the value of the property in action on a replevin bond, 505.
when recoverable on bills and notes, 556.
construction favorable to interest adopted, 556.
rate stipulated before maturity enforced afterwards, 556.
different in some jurisdictions, 556.
agreement for interest is generally for legal rate, 556.
validity of agreement as to rate determined by the law of the place of contract, 556.
by the law of the country where contract to be performed, 556.
when made in one country and payable in another, interest agreement is good if conformable to the laws of either, 556.
on *mesne* profits recoverable, 997.
on damages for trespass to real property allowable in discretion of jury, 1026.

References are to sections: Vol. 1, secs. 1–469; Vol. 2, secs. 470–767; Vol. 3, secs. 768–1296.

INTEREST — continued.
generally allowed on damages against carriers, 920.
when agent liable for, 771, 776, 785.
when principal liable for, 792.
is allowed on rent in arrear, 854.
allowance of, on damages for infringement of patent-rights, 1186, 1197.
on damages for public use of private property, 1091.
in trespass, 1096.
in trover, 1115.
allowance of, in admiralty in collision cases, 1294.

INTERMEDIATE DAMAGES —
between wrongful taking and return of property chargeable to the wrong-doer, 156.
between verdict and judgment, 388.

INTOXICATION —
who jointly liable for causing habitual, 142.

JOINT OBLIGATION OR LIABILITY, 127, 128.
principles on which determined, 136.
how extinguished or severed, 136.
joint and several liability for torts, 140.
owners of cattle joining to do damage, 141.
independent acts concurring in their effects, 141, 142.
for nuisance, 1059.
what parties not jointly liable, 1059.

JUDGMENT —
concludes parties as to whole cause of action, 110.
against plaintiff, evidence against one bound to indemnify him, 85–87.
effect of seasonable notice to defend, 86, 87.
may be paid to attorney who obtained it, 231.
judgment lien will not be discharged by tender, 277.
money must be paid into court and judgment discharged of record, 277.
interest on, 333, 334.
not included in when revived by *sci. fa.*, 335.
definition, 465.
requisites of, 466, 467.
restitution after reversal of, 468.
interest on, pending review, 389.
must follow verdict, 466.
must be certain, 467.
in suit against a party having right of recovery over, conclusive against indemnitor if he had notice of the action, 669.
effect of judgment between co-sureties, 759, 760.
how judgment or decree against principal on probate bond affects sureties, 495.
in replevin suit, when binding on sureties in the replevin bond, 506.
effect of, in condemnation for public use, 1090.

JURY —
damages, when there is no legal measure, referred to discretion of, 2.
when jury must be called to assess damages, 427.
when new jury may be sworn to assess damages, 433.
jury *tam quam*, 432.
deliberations of, 456.
not bound to yield their judgment and adopt opinions of witnesses, 456.
what affidavits may or may not be read to affect the verdict, 456.
when duties of jury ended, 457.
they must affirm their verdict in court, 457.
court may direct them to seal verdict, 457.
exemplary damages are in the discretion of, when the question of their allowance submitted, 403.

References are to sections: Vol. 1, secs. 1-469; Vol. 2, secs. 470-767; Vol. 3, secs. 768-1296.

JURY — continued.
cases of personal injury left to the discretion of, subject to power of court to set aside insufficient or excessive verdicts, 946.
same in actions for breach of marriage promise, 988.
trespass to real property, 1028, 1029.

LANDLORD AND TENANT —
mitigation of tortious entry upon demised premises, 154.
payment of paramount claims, like taxes, by tenant may be taken out of rent, 164.
recoupment between them, 164.
damages stipulated for failure of tenant to surrender possession, 291, 293.
value of use and occupation, 841.
when tenant holds after expiration of express agreement, 841, 842.
when tenant severs rent payable to two, 842.
action for use and occupation, 842, 843.
actions for rent, 844.
how different from action for use and occupation, 844.
amount of rent may depend on subsequent facts, 845.
recovery of rent payable in specific articles, 846.
surrender, determination of lease or eviction stops rent, 847, 848.
no apportionment when rent ceases during rent period, 847, 849.
apportionment may be provided for by agreement, 847.
will result from severance of reversion, 849.
how adjusted, 850.
what is an eviction, 848.
lessee's liability for interest, 854.
no warranty by landlord that premises tenantable, 848, 851.
failure of landlord to repair according to his covenant, no defense in action for rent except as a counter-claim, 848.
eviction no defense against accrued rent, 848.
note given for rent accruing during partial eviction, good, 848.
release by lessor to one of several tenants after partition will sever rent, 850.
liability of assignee for rent, 850.
no abatement of rent for bad condition of demised premises on account of a want of repair or partial destruction, 851.
when entire premises destroyed or taken for public use, or lessor's title ceases, 852.
covenant to repair, 853, 855.
measure of liability for not making repairs, 856-858, 860.
liability of assignee for repairs, 859.
a tenant holding over how impliedly bound for, 854.
damages recoverable from subtenant where his breach of covenant is a violation of the lessor's covenant to his lessor, 856, 857.
covenant not to sublet or assign, 861.
covenant to insure, 862.
when plaintiff has paid the premium and the covenant to insure has been broken, no loss occurring, 862.
measure of damages when landlord has not paid the premium, 862.
when covenant general to insure against fire, it will be intended that there should be full indemnity, 862.
measure of damages for breach of covenant for quiet enjoyment, 863-870.
effect on damages in case of eviction of tenant having made improvements, 866.
damages recoverable by lessee for eviction or being refused possession, 864, 871.
consequential damages to lessee for loss of business, 865, 867, 868.
expenses incurred to take possession, 869.
when value of lease includes damage to lessee's business, 869.
when loss of time an item of damage for refusing possession, 870.

References are to sections: Vol. 1, secs. 1-469; Vol. 2, secs. 470-767; Vol. 3, secs. 768-1296.

LANDLORD AND TENANT — continued.
lessor's covenant to rebuild or repair, 872.
not extended by construction, 872.
measure of damages on, 872.
tenant may make repairs and charge cost to defaulting lessor, 873.
tenant has two remedies for lessor's breach of covenant to repair, 873.
lessee's duty concerning repairs, 873.
what repairs tenant may charge for in such a case, 873.
may exercise his judgment as to kind, 873.
consequential damages for lessor's failure to repair, 874.
what damages uncertain and speculative, 874.
removal of fixtures, 875.
recoupment, 876.
apportionment of damages between, for taking demised property for public use, 1077.

LATERAL SUPPORT —
right to in natural state, 3.
not to, for buildings, 3.
damages for digging too near cellar wall and causing house to fall, 54, 1053.

LEASE —
damages for violation of by landlord, 65.

LEGAL TENDER. See TENDER.

LEGAL TITLE —
party holding legal title to note or bill may recover full amount, 541.
exception, when plaintiff entitled to less than the face, and no other person entitled to receive the residue, 541.

LEGATEE —
how secured by, and his remedies on, probate bonds, 493, 494.
when he may sue on probate bond, 494.

LESSEE —
liability of on covenant for rent, 849.
liability of for rent not apportionable to him and his assigns, 849.
measure of damages for eviction or refusal to give possession, 863-871.

LESSOR. See LANDLORD AND TENANT.

LIABILITY —
when an element of damage, 85, 121.
when an item of damages, 560, 565, 620, 762, 765, 766.

LIBEL AND SLANDER —
provocation as mitigation, 152.
mitigation under general issue, 152, 153, 166.
under plea of justification, 152, 153.
plaintiff's character in issue, 152.
See SLANDER AND LIBEL.

LIEN —
for convenience of commerce courts favor, 178.
in what cases existing, 148.
attorney's lien, 204.
damages for failure to perform contract to discharge, 77.

LIFE —
presumption that it continues, 123.
life tables admissible in evidence, 455, 601, 628.

LIFE ESTATE —
value of, may be computed by life tables, 455, 601, 628.

References are to sections: Vol. 1, secs. 1–469; Vol. 2, secs. 470–767; Vol. 3, secs. 768–1296.

LIFE TABLES —
evidence of expectation of life, 601, 628.

LIQUIDATED DAMAGES. See STIPULATED DAMAGES.

LIQUOR —
joint liability of parties contributing to produce habitual drunkenness, 142.

LORD CAIRNS' ACT, 590.

LORD CAMPBELL'S ACT, 1260.

LOSS —
actual measure of compensation, 12.

LOSS OF TIME —
a ground of damage, 942, 1246.

LOST DEBTS —
when an item of damages from restraint of an injunction, 527.
liability of telegraph company for, 1295.

MAINTENANCE —
contracts for, entire, 112.
as they impose continuous duties, there may be succession of actions, 112, 127.
entirety of wrong which destroys security for, 113.

MAKER OF NOTE —
his express agreement, 540.
amount recoverable against for principal sum, 541.
defense in behalf of, for fraud in consideration, 549.
by what law his contract governed, 563.
separate suits may be brought against, and indorser, 565.

MALICE —
not itself a tort, 406.
may make injurious acts actionable, 406.
plea of justification in slander not maintained, proof of, 152, 1224.
proof of acts done under advice of counsel to rebut, 154, 1240.

MALICIOUS INJURY (see EXEMPLARY DAMAGES) —
compensation for, given with liberal hand, 43, 99, 100.

MALICIOUS PROSECUTION —
damage for may include mental suffering, 75, 1237.
mitigation in actions for, 154.
what not a mitigation, 154.
effect of advice of counsel, 154, 1240.
instruction of employer, 154.
nature of the wrong, 1234, 1235.
unauthorized suit or appeal, 1236.
whether damages may be recovered for maliciously prosecuting a civil action, 1235.
elements of damage, 1237, 1238.
evidence in mitigation, 1239, 1240.

MARINE INSURANCE (see INSURANCE) —
definition of, 802.
cause of damage must be proximate, 803.
illustrations, 803.
damages must be ascertained according to the policy, 804.
construction of insurance contracts, 805.
contracts for marine insurance liberally construed in order to effect the real intention of the parties, 805.
valued policies, 806.
open policies, 813, 814.

References are to sections: Vol. 1, secs. 1-469; Vol. 2, secs. 470-767; Vol. 3, secs. 768-1296.

MARKET VALUE —
measure of damage on breach of contract of sale in absence of, 52.

MARRIAGE (see BREACH OF MARRIAGE PROMISE) —
damages for breach of promise of, may include other than pecuniary elements, 92.
absence of love as mitigation of damages for breach of promise of, 73, 163.
what is or is not a mitigation in action for breach of promise of, 154, 163.
may be proved in mitigation that defendant's family disapproved of the match, 159.

MARRIED WOMEN —
must join as plaintiffs in actions for injuries to, 128.

MARSHALING —
definition, 191.
on sales of incumbered property in parcels to different purchasers, 192.
effect of creditor releasing part, 194.
rights when one creditor may resort to two funds and another to only one, 195.
when the fund belongs to separate debtors, 196.
principle on which priority determined, 197.

MASTER AND SERVANT —
joint liability for act of servant, 140, 142.
in action for seduction of servant, offer of seducer to marry, not provable in mitigation, 158.
damages for enticing servant away, 30, 122.
liability for exemplary damages for employee's act, 408-411.
See SERVICE; EMPLOYEE; EMPLOYER; PRINCIPAL AND AGENT.

MECHANIC'S LIEN —
will be discharged by tender, 277.

MEDICINE —
consequential damages against ship-owner for not providing, 25.

MENTAL SUFFERING —
liability for as consequence of nervous shock, 21, 24.
for disappointment and inconvenience on breach of contract, 48, 49, 57, 58.
when damages for recoverable, 95, 98.
not regarded in case of negligent injury to property, 95, 96.
otherwise if injury wilful, 95.
of parent for injury to child, 96.
husband for suffering of and injury to wife, 96.
malpractice of surgeon, 96.
liability of telegraph companies for, caused by neglect to deliver messages, 975-980.
summary of the cases in which recovery for has been had, 979.

MESNE PROFITS —
mitigation in action for, 164, 199.
action of trespass for, 992.
consequent on recovery in ejectment, 992.
judgment in ejectment conclusive of title from date of demise laid in declaration, 992.
antecedent profits recoverable on proof of title, 992.
who may recover, 992.

References are to sections: Vol. 1, secs. 1–469; Vol. 2, secs. 470–767; Vol. 3, secs. 768–1296.

MESNE PROFITS — continued.
what may be allowed as damages, 993–1000.
they must be proved, 993.
not confined to rent, but costs of ejectment and all damages resulting from being kept out of possession, 993.
during what period, 993.
what included in costs of the ejectment, 993.
measure of damages, 993, 997.
recovery limited to compensation, 994.
consequential damages may be recovered, 994.
improvements may be deducted from, 994, 999.
interest on, recoverable, 994, 997.
statutory remedy in New York and other states on a footing of contract according to measure for use and occupation, 997.
statutes regulate the remedy and damages generally, 997, 999.
the common-law action for, an equitable one, 999.
proof of rental value, 995.
what property withheld, 996.
interest, 997.
compensation on recovery of a term, 998.
claims for improvements, taxes, etc., 999.
remedy for, under the code, 1000.
damages for withholding do not include rents and profits, 1000.
Oregon code and some others include waste, 1000.

MILL —
damages for stopping, 54.

MINE —
damages recoverable on injunction bond for being restrained from working, 527.

MINISTERIAL OFFICERS —
how liable for neglect, 160.

MISCONDUCT —
damages for, recoverable, though contract for waiver of, 904, 934.

MISJOINDER OF PARTIES —
effect of, 128–130, 141, 142.

MITIGATION OF DAMAGES —
equitable doctrine of, 149.
how far excluded when wrongful, 149.
matter of excuse, 149.
to disprove malice, 149.
not to reduce compensation, 147.
words as provocation for assault, 151.
effect of plaintiff's malice, 151.
in slander and libel, 152, 1206–1233.
matter in mitigation, how pleaded, 1230.
defendant may prove he was drunk or insane, 152.
what provable under plea of general issue in justification, 152, 153.
in trespass, 154.
in other actions, 154.
for plaintiff's act or negligence, 155.
expense of measures for prevention of damages, 156.
acts of plaintiff or defendant or third person reducing loss, 156, 158.
return of property, 156.
when taken on execution against plaintiff, 156, 157.
tender of part, 156.
application of property or proceeds to plaintiff's benefit, 156, 157.
none when benefit not derived from defendant, 158.
nor if benefit from collateral sources, 158.

References are to sections: Vol. 1, secs. 1–469; Vol. 2, secs. 470–767; Vol. 3, secs. 768–1206.

MITIGATION OF DAMAGES — continued.
in action for breach by employer of contract for services, wages for labor received from another, 158.
debtor not released by recovering for negligence against attorney or officer, 158.
nor is accidental or indirect benefit to the plaintiff from the wrong, 158.
wrong of delaying a ship not mitigated by plaintiff getting additional profit thereby from another boat, 158.
effect of benefit from insurance, 158, 159, 1055, 1056.
concurrence of other causes, 158, 159.
offer of marriage no mitigation of master's action for seduction of servant, 158.
mitigation by fuller proof of *res gestæ*, 159, 166.
by showing defendant less culpable, 159.
opposition of defendant's family in action for breach of marriage promise, 159.
that he was afflicted with incurable disease, 159.
not his want of love and affection, 159.
in trespass defendant may show title in himself to confine recovery to value of plaintiff's interest, 159.
officer may show he entered to make a levy in action for tortious entry, 159.
may show that some damage would arise from other cause, 159.
partial want or failure of consideration, 159.
in actions for official neglect, 160.
that the debtor was insolvent, 160.
not that debt still collectible, 160.
when otherwise, 160.
mitigation in action for escape, 160.
for omitting to assess tax, rule of damages, 160, 161.
plaintiff's consent, 162.
conduct of plaintiff impairing right to compensation, 163.
his bad character, when provable in, 163.
reduction of loss to injured party, 164.
or of benefit to wrong-doer, 164.
payment of ground rent of premises tortiously occupied, 164.
what may be proved in mitigation in mortgagee's action for waste, 164.
payment of taxes, etc., may be taken out of rent, 164.
pleading in, 165, 166.
when not pleadable may be proved under general issue, 166.
mitigation on assessment of damages, 165, 166.
proof of matters which if pleaded would be full defense, 166.
notice of in pleading, 166.
payments may be proved, 167.
by return of attached property in an action on attachment bond, 515.
by return of property of which the owner is deprived by the restraint of an injunction in an action upon injunction bond, 527.
what admissible as such in actions for breach of covenants for title, 601.
earnings of wrongfully dismissed servant in action against employer for such dismissal, 693, 694.
plaintiff's bad character, when a mitigation, 1226, 1255.
in trespass to personal property, 1104.
return of property, 1103.
when property taken is applied under legal process for owner's benefit, 1105.
in action for nuisance, 1055.
failure of plaintiff to abate nuisance by acts on the defendant's land cannot be considered in mitigation, 1055.
in other cases plaintiff's omission to abate will reduce his damages, 1055.
it is no defense that plaintiff rented premises with nuisance on them and at less rent, 1055.

References are to sections: Vol. 1, secs. 1-469; Vol. 2, secs. 470-767; Vol. 3, secs. 768-1206.

MITIGATION OF DAMAGES — continued.
in action for nuisance it is no defense that the nuisance is a useful business, 1055.
in what cases an incidental benefit from nuisance will go in mitigation, 1056.
mitigation of damages in replevin, 1159.
trover, 1138.
trespass, 1104.
in actions for personal injury, 1255.
in seduction, 1284.

MONEY —
damages for non-payment of, 76, 78.
legal tender act, 216.
effect of fluctuation in value of, 211.
contracts payable in dollars, 211, 267.
characteristics of, 203.
is cosmopolitan, 206.
money contract in one place, such everywhere, 206.
payable in legal money after maturity, 206.
bank bills and other conventional currency, 207.
effect of changes in the value of, 208.
the legal currency of the United States, 210, 211.
effect given to value of money at time of contracting, 209.
paying into court admits cause of action, 435.
agent's risk and liability when he mixes his money with his principal's, 774, 776.
duty on receipt of, 774, 776, 785.
liability for interest on, 771, 776, 785.
and for money lost in sub-agent's hands, 771.
what he may receive as money in collecting, 774, 776.
remittance of, 776, 785.
See INTEREST.

MORTGAGE —
mitigation in action for waste by mortgagee, 164.
discharged by tender, 277.

MORTGAGEE —
recovery by, on policy of insurance, 829.

MOTIVE —
how damages for breach of contract affected by, 99–104.
for torts, 100.
right to compensation independent of, 98.
effect of, in case of confusion of goods, 101.
where property sued for improved by wrong-doer, 102, 103.
how it affects *quantum meruit*, 99.
of one not imputable to another, 407.
how bad motive affects damages in case of breach of marriage promise, distinction made in matter of proof, 104, 985, 987.
See EXEMPLARY DAMAGES.

MUNICIPAL CORPORATIONS —
right of recovery over where made liable for negligence or tort of a person acting under contract or license, 83.
not liable for exemplary damages, 412.
liability of for interest, 332.

MUTUAL CREDIT —
mutual credits or debts must be pleaded, 148.
natural equity that they compensate each other, 148.
when demands reciprocal only net balance recoverable, 148.
courts favor liens, when, 148.

References are to sections: Vol. 1, secs. 1-469; Vol. 2, secs. 470-767; Vol. 3, secs. 768-1296.

NATURAL CONSEQUENCES —
right to damages confined to, 13.
See CONSEQUENTIAL DAMAGES.

NAVIGATION —
damages for obstructing, 54, 55.

NEGLIGENCE —
breaking Sunday laws, where contributory, 5.
at common law no right of action for causing death, 6.
consequential damages from, 17, 20, 25, 26.
liability for those likely to follow, 16.
from negligent collision of vehicles, 17, 18.
allowing diseased animals to go at large and communicate disease, 18.
from leaving bars of pasture down near railroad, 18.
from non-repair of fences, whereby animals enter and get hurt, 18.
or escape to do damage, 18, 28.
from negligently laying gas-pipe, 18.
setting fire, 18.
from leaving horse unattended in public street, 19.
or other dangerous property, 19, 25.
from bottling and mislabeling poison for market, 25, 44.
from non-repair of highways, 26.
from removing harbor light, 19.
from delay in transportation of goods, 36.
from breach of statutory duties, 32.
from retaining money in bank by trustee, 37.
from affording opportunity for injury to third person, 42.
of third person, 27.
actionable, alone causing mental suffering, will not sustain action, 95, 96.
of officer to levy tax, 160, 161.
liability of firm for negligence of member or servants, 142.
mitigation of damages in actions for, 158, 160.
not such, money derived from insurance or other collateral and independent source, 158.
liability of carrier for, cannot be contracted away, 904, 934.
telegraph companies liable for, 957, 958.
See PASSENGER CARRIERS; TELEGRAPH COMPANY.

NERVOUS SHOCK —
liability for mental suffering caused by fright, 21-24.

NEW TRIAL —
will be given for excessive or insufficient damages, 459.
where findings as to damages not sustained by evidence new trial may be granted, 459, 460.
objection for excessive damages may be obviated by remitting, 459.
where jury fail to find nominal damages, 11, 460.

NOMINAL DAMAGES —
nature and purpose of, 9.
allowed absolutely for infraction of legal right, 9.
cannot be controverted, 9.
where actual damages assessed nominal damages not added, 9, 406.
they will be allowed though the act sued for a benefit, 9, 10, 57.
recoverable for technical neglect of duty due plaintiff, 10.
so of technical violation of property right, 10.
given for failure to perform a duty or contract the neglect of which is a legal wrong to person entitled to performance, 11.
court will add to finding of jury when necessary, 11.
when judgment will be reversed because plaintiff entitled to, 11.
when erroneous omission to find, not cause for reversal, 11.

References are to sections: Vol. 1, secs. 1–469; Vol. 2, secs. 470–767: Vol. 3, secs. 768–1296.

NOMINAL DAMAGES — continued.
when verdict will be set aside for failure to find, 468.
court may add by amendment of finding for plaintiff, 465.
recoverable for any breach of covenants of seizin and of good right to convey, 599.
recovery confined to, until something paid or actual damage for breach of covenant against incumbrance, 609.
when only such damage recoverable on probate bonds, 494.

NON-DELIVERY OF GOODS —
damages for, value and interest, 105.

NON-PAYMENT OF MONEY —
damages for, 76, 77.

NOTARY —
mitigation of damages in suit for negligence, 90.

NOTICE —
adjoining owner required to give when he digs so as to endanger foundations, 54.
of special circumstances which may give a right to consequential damages, 50–52, 662–664, 968–971.
when necessary to principal to defend action against person having a remedy over, 82–88.
advantages of, to party bound to indemnify, 82–88.
effect of, upon indemnitor or warrantor, 82–86.
what is such, 86, 87.
by covenantee of suit by superior owner, 614, 615.
effect of judgment on covenantor when he is vouched in to defend, 614, 615.
effect of judgment when covenantee sues for the granted property, 614, 615.
how covenantor may be vouched in to defend action against his covenantee, 614, 615.
as to the necessity of, to subject covenantor to costs and expense in defense of title, 617–619.
after covenantor has come in on notice and assumed the defense, the covenantee may not also employ counsel at covenantor's expense, 618.
of resale of goods rejected by purchaser, 647.
effect of, by vendee of goods before time fixed for delivery, of his intention not to accept them, 647, 648.
also in case of order to manufacture goods, 648, 649.
effect of vendee failing to give notice of rejection of goods sold by sample, 650.
necessity of, to party bound by certificate of architect, engineer, etc., 717.
to party liable ultimately, or to contribute, 669, 760.
when necessary to party bound to repair, 873.
agent's duty to give to his principal, of matter occurring in agency important to his interest, 769, 771.

NUISANCE —
successive actions must be brought for, 127.
there is a legal obligation to discontinue, 125.
mitigation in action for, 159.
what not a mitigation, 158.
necessary particularity of allegation to recover special damages, 419, 420.
in case of public, special injuries must be alleged, 4, 421.
definition of, 1035.
may be anything wrongfully done or permitted which injures or annoys another, 1036, 1037.
in what the wrong of its continuance consists, 1036.

References are to sections: Vol. 1, secs. 1–469; Vol. 2, secs. 470–767; Vol. 3, secs. 768–1296.

NUISANCE — continued.
limitation on the right to use one's own property, 1036.
erector of a nuisance liable not only for the erection but the continuance of nuisance, 1036, 1040.
his grantee only for its continuance, 1035.
difference between nuisance and trespass, 1036.
remedy at law for nuisance imperfect, 1036.
injunction necessary, 1036.
judicial abatement generally provided for by statute, 1036.
nuisances generally of a continuing nature, 1036.
at least nominal damages recoverable for, 1037.
when the act complained of lawful, actual injury must be shown, 1037.
the action for, cannot be maintained on a mere theoretical injury, 1037.
successive actions for, generally necessary, 1038.
what decided and recoverable in first action, 1039.
what recoverable in subsequent actions, 1039.
continuance of nuisance after one recovery deemed wilful and contumacious, and is ground for exemplary damages, 1039.
the duty to abate, 1036, 1038, 1040.
when nuisance not a continuous wrong, 1042–1046.
when the construction of a railroad a permanent nuisance for which entire damages recoverable, 1042.
when other forms of nuisance permanent, 1042–1046.
depreciation in value as damages, 1047.
other elements of damages, 1048.
injury to crops, 1049.
liability for remote consequences, 1048–1051.
by blasting in quarry and throwing rocks upon buildings and putting in fear, 1051.
by removing lateral support to land, 1053.
for injury to business, 1054.
obstructing mill, and causing logs to deteriorate, 1054.
causing loss of rent by failing to keep privies and drains in repair, 1054.
by establishing brothel on property adjoining to tenements held for renting, 1055.
abatement of, does not preclude recovery of damages which have been suffered, 1053.
exemplary damages, 1052.
duty of plaintiff to abate, to prevent damage, 1055.
no defense that plaintiff rented the premises with the nuisance on them, and at less rent, 1055.
mitigation of damage, 1055.
not that nuisance is a useful business, 1055.
how far incidental benefits from, will go in mitigation of damages, 1056.
damages affected by interest in estate, 1057.
private remedy for public nuisance, 1058.
what parties jointly and severally liable, 1059.
successive tenants, 1059.
pleading in respect to, 1060.

OBLIGEE —
effect of his assurance to surety that he should not be called on for payment, 554.

ODIUM SPOLIATORIS —
intendments against defendant for holding back evidence, 439.
against plaintiff, 440.

OFFICE —
loss of, as result of assault and battery, remote, 29.

References are to sections: Vol. 1, secs. 1–469; Vol. 2, secs. 470–767; Vol. 3, secs. 768–1296.

OFFICER —
his liability for neglect of duty, 32, 160.
mitigations in favor of, for wrongful arrest, 150, 151, 154, 156.
for tortiously taking property, 154, 156, 157.
liability for escape, 160.
for neglect of duty to creditor, 160, 161.
may justify arrest on suspicion, 165.
liable for interest on money detained, 353.
may be liable for exemplary damages, 412.
loss from failure of, to perform public duty, not actionable, 32.
note given in part or in whole to induce neglect of his duty, void, 550.
right of action against, 484.
liability of, having custody of money, 479.
measure of damages against for neglect of duty, 489–492.

OFFICIAL BONDS OF OTHER THAN FISCAL OFFICERS —
general mode of redress for official dereliction, 486.
what private injuries covered by, 487.
measure of damages, 488.

OPEN POLICIES (see INSURANCE) —
rule of damages upon, 813.
adjusted to interest of the insured, 813.
how value to be established, 813.

OPINIONS —
of experts, admissible on questions of science and skill, 441.
on questions of value, 444–446.
of all persons on matters of common observation and experience, 442, 443.
not admissible on the amount of damages, 444.
witness may be asked grounds of, 451.
admissible as evidence on questions of value, 654, 680.

ORCHARD —
damages depending on subsequent growth of, 62.

OWNER —
general and special may recover according to interest, 137.

PAIN —
compensation for, recoverable when caused by wrong, 57, 58, 93, 95, 97.
the law infers from personal injury, 421.
expressions of sufferer are provable, 453.
a ground of damage, 942, 1242–1245.
in actions for false imprisonment, 1257, 1258.
mental suffering, when to be compensated, 1243.
in actions for seduction, 1283, 1284.
it is rather an aggravation than a ground of action, 1245.
wounded feelings of husband or parent for personal injury to wife or minor child not an item of damage, 1252.
liability of telegraph companies for, 975–980.

PAR OF EXCHANGE —
nominal and real par, 212.

PAROL EVIDENCE —
when admissible to show want or failure of consideration, 551–554.
admissible to affect holder of note with trust, 551, 552.
to show a deed to be a mortgage, 551.
to turn a sale into a mortgage, 551.
but not admissible thus to show a different promise, 552.
instances of its rejection, 552.
promise may be rendered nugatory by showing want or failure of consideration, 552.

References are to sections: Vol. 1, secs. 1–469; Vol. 2, secs. 470–767; Vol. 3, secs. 768–1296.

PARTICULAR WORKS —
elements of damages for employer's breach of contract, 80.
mitigation in action against contractor, 164.
damages for delay in completing, 60, 703, 704.
liquidation of damages on contracts for, 291, 293.
consequential damage for defective work, 705.

PARTIES —
who should join as plaintiffs, 128–134.
for injuries to married women, 128, 1252.
in actions given by statute, 129.
principal may sue on agent's contract, 130.
when contract not joint, 131.
effect of discharging one of several jointly liable, 133.
implied *assumpsit* follows consideration, 132.
when action *ex contractu* accrues to several jointly all must sue, 133.
no others can sue except in case of death or marriage, 133.
cause of action cannot be severed by partial assignments, 133.
who should join for tort connected with contract, 139.
persons having separate interests or separately injured cannot join, 139.
in action for act of servant or agent, 140, 142.

PARTIAL FAILURE OF CONSIDERATION —
discussion of, as a defense, 544–548.

PARTITION WALL —
damages for injury to, 54.
action for contribution and interest, 327.

PARTNERSHIP —
damages for breach of agreement or wrongful dissolution, 68.
in suit by, name of silent partner not to be used, 130.
liable for negligence or fraud of each member acting in its business, 142.

PART PERFORMANCE. See QUANTUM MERUIT.

PASSENGER —
breach of contract to convey, 48.
may recover for inconvenience and aggravations, for expenses of sickness caused by failure to carry to destination, 48, 57, 58, 936, 937.
may be salvor, 717.

PASSENGER CARRIERS —
their obligations mostly imposed by law, 934.
total refusal to carry, when actionable, a violation of duty, 934.
their duty to carry with care cannot be contracted away, 934.
damages substantially the same whether action on contract or for breach of duty, 934.
liable for damages for refusal to carry, or negligent delay, 935.
loss of time to be compensated, 936.
failure to furnish suitable accommodations, 936.
unnecessary exposure by detention in unhealthy climate, causing sickness, 936, 937.
liability for exposure in consequence of carrier by water failing to stop at advertised station, 936, 937.
passage money may be recovered back where carrier fails to carry, and personal expenses, 936.
liable for consequences of putting passenger down at the wrong place, or causing personal injury, 938, 942.
scope of such consequences taken into account, 938, 939.
where object of passenger's journey known to carrier, he is liable for consequences touching that object, 939.

References are to sections: Vol. 1, secs. 1–469; Vol. 2, secs. 470–767; Vol. 3, secs. 768–1296.

PASSENGER CARRIERS — continued.
their liability for failing to leave and arrive on advertised time, 939.
mere inconvenience a ground of damage, 939.
sickness is a ground of damage, 939.
elements of damage in case of personal injury, 942–946.
passenger's indiscreet acts not ground of damages, 940.
protection of passengers, 941.
damages for mental suffering, 942.
mental suffering independently of other pain, 943.
past and prospective damages, 944.
proof of damages, 945, 946.
recovery for special loss, 947.
wrongfully placing passenger in second-class car, 948.
what facts not provable in mitigation, 949.
what may be shown in mitigation, 949.
exemplary damages, 937, 950, 951.
injury to wife, child or servant, 952.
excessive verdicts, 953.
liability of, for loss of baggage, 954.
measure of damages, 955.
liability of sleeping-car companies, 956.

PATENT-RIGHT (see INFRINGEMENT OF PATENT-RIGHTS) —
note given for one which is void or worthless, without consideration, 542.
what not admissible as defense in action on such a note, 552.

PAYING MONEY INTO COURT —
admits cause of action to amount paid, 435.

PAYMENT —
may be proved in mitigation, 167.
what is; modes of making, 214.
what it includes, 214.
creditor may consent to a mode of which will be binding, 214–216.
what is not, 217.
effect of, 218.
creditor not obliged to receive part, 219.
effect of, made before maturity, 219.
by legacy, 220.
by gift *inter vivos*, 221.
by retainer, 222.
effect of creditor making his debtor executor, 222.
of debtor being appointed administrator, 222.
in counterfeit money, bills of broken banks or forged notes, 223, 224.
by note, bill or check, 225–227.
renewal of a note not payment, 226.
collaterals collected or lost by negligence of creditor, 228, 229.
who may make a, 230.
to whom may be made, 231.
pleading, 232.
evidence of, 233.
application of, 234–244.
effect of paying money into court, 278.
when amount paid is not sufficient, 278.
after suit, may be proved under general issue, 436.
effect of an erroneous judgment, 469.
cannot be appropriated by creditor to note part of the consideration of which is illegal, 550.

PENALTY —
effect of, on contract, 283.
as distinguished from stipulated damages, 280.

References are to sections: Vol. 1, secs. 1-469; Vol. 2, secs. 470-767; Vol. 3, secs. 768-1296.

PENALTY — continued.
extrinsic facts may be proved to show that the sum named is a, 288.
effect of larger sum being promised for default in paying a smaller, 288.
when sum fixed in contract is, 280–296.

PERFORMANCE —
what is, for the purpose of recovery on a contract, 709.

PERSONAL INJURY —
plaintiff's character as affecting damage for, 94.
damages for, resulting from vice or disease of animals warranted against, 671, 675.
from effects of selling a wrong drug, 675.
from explosive illuminating fluids, 675.
liability of carrier for, 936–947.
loss and injury may consist of inconvenience, sickness, loss of time, bodily and mental suffering, expenses and loss of capacity, 93–96, 936–944.
prospective damages included, 944.
recovery for injury to wife, child or servant, 952.
damages for, how assessed under accident policy of insurance, 935.
elements of damage for, 93, 1241.
physical pain and mental suffering, 93, 95, 96, 1242–1245.
insult, vexation, disgrace, 1243.
impaired health, disfigurement, 93, 1243.
loss or decrease of capacity to work, 1244–1249.
aggravation of existing disease, 1244.
expenses of nursing and medical treatment, 93, 1250.
the law presumes pain from, 1241, 1242.
and injury to feelings from insult, 1242.
pleading where the injury affects working capacity in a special employment, 1247.
entire damages to be recovered in one action, 1251.
a husband's action for, 1252.
a parent's action for, to minor child, 1252, 1255.
what may be included in damages for abduction, 1252.
exemplary damages for, 1253.
pecuniary circumstances of parties, 1254.
evidence in mitigation in actions for, 1255.
provocation to assault and battery, 1255.
bad character of plaintiff, 1255.
province of court and jury in actions for, 1256.
damages for false imprisonment, 1257, 1258.

PHOTOGRAPHS —
admissible in evidence, 454.

PILOT —
may claim for salvage service, 717.

PLACE OF CONTRACT —
law of, 357.
bonds of officers of United States, 359.
between persons residing in different states, 360.
effect of change of the law, 368.

PLAINTIFFS —
who should be, 128–133.
misjoinder of, when fatal, 134.
non-joinder, 134.
action to be maintained as to all, 463.
duty of lessee to prevent damages and otherwise, 88–91.

References are to sections: Vol. 1, secs. 1-469; Vol. 2, secs. 470-767; Vol. 3, secs. 768-1296.

PLEADING —
direct damages recoverable under general allegations, 66.
not necessary to itemize damages, 424.
to recover for death, 426.
plaintiff must state a case which entitles him to damages, 413.
ad damnum, 414, 417.
demand of damages in code complaint, 415.
effect of not answering, 416.
what provable under general allegation of damages, 418.
special damages must be alleged, 419, 421.
not necessary to allege matter of aggravation, 422.

POISON —
consequential damages resulting from mislabeling and sending to market, 25, 44.

POLICY OF INSURANCE, 802.
See INSURANCE.

POSSESSION —
effect of purchaser's taking and retaining, in action for purchase-money, 572.
purchaser in possession cannot object that contract is invalid, 574.
when vendor retains possession pending a question incidental to specific performance, he will be charged like a mortgagee, 588.
effect of, by purchaser, to subject him to interest, 575.
damages against vendor for withholding, 588.
in absence of other evidence owner presumed to have, 1009.
the gist of the action of trespass is injury to, 1009.
possession alone will entitle one to recover in trespass, 1012.
damages confined to injury to, unless plaintiff shows title, 1012.
one in, under color of title to fee may recover against stranger as owner, 1012.

PREVENTING LOSS —
plaintiff's duty to exert himself, 88.

PRIMARY CAUSE —
may be proximate cause though it operates through successive instruments, 38–42.
immediate cause may be the act of injured person, 39.
so of third person, 40–42.

PRINCIPAL —
liability of, to indemnify surety, 745.

PRINCIPAL AND AGENT (see AGENT) —
joint liability for acts of agent, 140.
principal not liable for unauthorized deceit of agent, 140.
each partner is agent of firm, 142.
principal not liable for malice of agent unless he was the cause or participates, 514.

PRIZE —
damages for preventing chance to compete for, 71.

PROBABLE INJURY —
when damages for, may be given, 762, 1251.

PROBATE BONDS —
bonds for faithful administration of decedent estates, 493.
what the principal's duties include, 493.
the assets a trust fund for creditors, legatees and distributees, 493.
a summary of their conditions, 493.
their history, 493.

References are to sections: Vol. 1, secs. 1-469; Vol. 2, secs. 470-767; Vol. 3, secs. 768-1296.

PROBATE BONDS — continued.
what recoveries may be had thereon, 494.
effect of recovery on, 494.
when only nominal damages recoverable, 494.
action on, as to sureties, 495.

PROFITS —
when not recoverable, 55.
certainty of, required, 59, 60, 61.
of labor, 66.
of commercial ventures, 67.
from prospective partnership or wrongful dissolution, 68.
from commercial agencies, 69.
when recoverable upon resale of land contracted for, 570, 581, 584, 703.
what profits recoverable as damages against defaulting vendor, 665, 672.
on breach of contracts for particular works, 697.
when an element of damages against an agent, 773, 778–782.
when loss of, an element of damages to evicted lessee, 867–870.
allowance of, as damages, 867, 868.
what profits remote and speculative, 867, 868, 870.
injury to business involves loss of, 869.
may be an item of damage when reasonably certain, 867–874.
of business injured by nuisance, an element of damage, 1054.
of infringer of a patent-right, how ascertained, 1190–1197.
of copyright, 1199.
of trade-marks, 1200, 1201.

PROMISE —
parol evidence not admissible to show a different promise from that stated in written agreement, 652.

PROMISE OF MARRIAGE —
action for breach of, 92.
See Breach of Marriage Promise.

PROMISSORY NOTES AND BILLS OF EXCHANGE —
the practice in respect to purchase and sale of foreign bills in England, 561.
when re-exchange or damages not recoverable, 562.
only allowed in favor of parties at whose risk remittance is made, 562.
by what law the liabilities of the parties governed, 563.
stipulation for attorney fees and costs in notes, 564.
value of notes and bills, 565.
their value the measure of damages against parties by whose fault they are lost, 565.
damages recoverable for conversion of a paid note, 565.
vendor's action on notes given for purchase-money of lands, 571.
effect of a partial want of consideration, 543.
may be shown though unliquidated, 543.
partial failure of consideration good when the part which fails is certain, 544.
part failure of consideration different from inadequacy, 544.
not a defense in England when the part failure is unliquidated, 544.
unliquidated partial failure of consideration is held to be no defense in some states, 545.
in others it is allowed, and in several by statute, 545.
for partial failure of consideration there is generally some remedy, 546.
remedy where the partial failure is a default in the performance of some other stipulation in the same contract, 546.
instances of defenses of that nature, 546–548.

References are to sections: Vol. 1, secs. 1–469; Vol. 2, secs. 470–767; Vol. 3, secs. 768–1296.

PROMISSORY NOTES AND BILLS OF EXCHANGE — continued.
remedy where part of consideration fraudulent or illegal, 549.
where execution of note procured by fraud, 550.
holder cannot appropriate general payment to, if part of consideration illegal, 550.
parol evidence to show want or failure of consideration, 551.
instances of same, 551–554.
limitation of the right to affect note by such evidence, 552.
liability on premium note given for open policy, 551.
liability on accommodation paper, 551.
it may be shown that note was delivered on conditions, 552.
amount recoverable as principal sum against drawer and indorser, 555.
in acceptor's action against drawer the bill is only an item of evidence, 555.
drawer's contract is conditional, 555.
what the drawing and negotiating of a bill implies, 555.
the indorsement of bill or note is like the drawing of a bill, 555.
the warranty of the indorser, 555.
warranty on transfers without indorsement, 555.
measure of damages against drawer or indorser, 555.
interest on, 556.
only allowable before maturity when expressly provided for, 556.
general promise sufficient, 556.
collectible on debt for which a note or bill was promised, 557.
if payable on demand, interest does not commence until demand, 557.
when not stipulated, allowed as damages at rate given by the law of the place of contract, 557.
liability of drawers and indorsers for interest, 558.
what notes are deemed payable in money, 559.
opinion of Campbell in Black v. Ward, 559.
measure of recovery when note given payable in a special currency, not legal tender, 559.
exchange and damages on bills dishonored, 560.
liability of the maker of a note and that of the acceptor similar, 540.
their agreements, 540.
what the recovery against the several parties may include, 540.
such paper is given for a sum certain, 540.
and payable only in money, 559.
the party having the legal title may recover the full amount, 541.
he will be trustee of any other beneficially interested in the amount recovered, 541.
when a holder having a right to a part only of the amount due will be limited to the amount of his interest, 541.
a defense between the original parties, when unavailable, 541.
how the payment of less than the full value of a note in its purchase will affect the amount recoverable by an indorser without notice of an existing defense, 541.
defense of want of consideration in whole or in part, 542.
consideration presumed, 542.
it has been held otherwise, 542.
the presumption not conclusive, 542.
if there is a total want or failure of consideration there can be no recovery, 542.
defense of fraud relating to consideration, 542.
when accommodation paper without consideration, 542.
a note made for a gift, without consideration, 542.
note given for property having no existence, void for want of consideration, 542.
so if given for void deed of land, 542.

References are to sections: Vol. 1, secs. 1–469; Vol. 2, secs. 470–767; Vol. 3, secs. 768–1296.

PROMISSORY NOTES AND BILLS OF EXCHANGE — continued.
defense of want of consideration, etc.: effect of total breach of warranty in suit on note for purchase-money, 542.
the covenant of warranty not sufficient consideration, 542.
instances of total want of consideration, 542.
what is a total failure of consideration, 542.
instances of, 542.

PROOF —
difference as to, between actions for tort and breaches of contract, 100, 104.

PROOF OF VALUE —
of goods, 445, 504, 566, 654, 680, 933, 1089, 1099, 1113.
of the value of crops, 120, 443.
of dogs, 449.

PROOFS OF LOSS (see INSURANCE) —
stipulations for, how construed and enforced, 809, 810.
should be made at the time and in form required by the policy, 809.
may be waived expressly or by conduct, 810.
when waiver of a question for the jury, 810.
preliminary, for information only, 811.
effect of, 811.
cases relating to, 811.

PROPERTY —
effect where wrong-doer improves, 102, 103.
value of, as element or measure of damages, 105.

PROSPECTIVE DAMAGES —
when recoverable, 107, 113, 120.
to insurance agent, 137.
in cases of personal injury, 944, 952, 1251.
for recovery in advance, how present worth ascertained, 1251.

PROVOCATION —
effect of, as a mitigation of damages, 151.
in case of assault and battery, 1255.
libel and slander, 1232.

PROXIMATE CAUSE (see CONSEQUENTIAL DAMAGES) —
damages limited to, 12.

PUBLIC ENEMY —
what injury to private property to oppose, *damnum absque injuria*, 3.

PUBLIC USE —
when entire demised premises taken for, rent ceases, 853.
taking part produces no effect between landlord and tenant, 853.
each entitled to his compensation, 853.
apportionment of damages between landlord and tenant, 853.
the power of eminent domain, 1061.
what is subject to be taken, 1061.
what is a public use, 1061.
taking of property for, subject to condition of making just compensation, 1061.
what the compensation must be, 1061.
universally provided for, 1061.
scope of compensation in cases of taking for, 1061–1064.
measure of, and the facts which may be taken into consideration, 1064.

References are to sections: Vol. 1, secs. 1-469; Vol. 2, secs. 470-767; Vol. 3, secs. 768-1296.

PUBLIC USE — continued.
injury to property not taken, 1065.
what facts pertinent, 1066–1073.
remote damages, 1071.
expenditures to lessen loss, 1072, 1073.
basis for estimating value of land, 1074.
a mine in the land condemned is only to be considered so far as it affects market price, 1074.
aggravations connected with the entry to take and use land for public purpose are to be considered only with a view to compensation, 1070.
no allowance for remote or fanciful damages, 1071.
none for new competitions, 1071.
nor for changes made by the progress of the age, 1071.
none for inconveniences suffered alike by the whole community, 1071.
allowance should be made for expenditures rendered necessary by the taking of part of a tract to protect residue, 1072.
the expense of fences and farm crossings, 1073.
not if the railroad is required to fence it, 1073.
in the assessment of damages it is assumed that the property will be appropriated and used according to law, and all legal duties performed, 1073, 1090.
what included and excluded in assessing compensation where one railroad crosses another, 1073.
where a highway laid over a railroad, 1073.
if a building must be removed from land condemned, the expense of and loss of time in removal to be assessed, 1073.
and expense of restoring adjacent structures, 1073.
damages assessable, when allowed, for changing grade of street adjacent to ground built on, 1073.
not confined to injury from withdrawing lateral support, 1073.
property taken for one public use may be again condemned for another, 1077.
how damages then apportioned, 1077.
what a condemnation will include, 1074, 1077.
the right to remove other property, 1077.
the injury to all partial interests to be compensated, 1081.
the division of ownership not to increase total compensation, 1081.
value for special purposes, 1075.
compensation for wrong-doer's improvements, 1076.
compensation affected by title and nature of interest taken, 1077.
condemnation of railroad property, 1078.
injury to franchise, 1079.
New York elevated railroad cases, 1080.
injury to various interests, 1081, 1082.
to whom compensation to be made, 1082.
the necessary investigation of title, 1082.
where a claim has accrued to an entire tract by construction of railroad over part, the damages though not assessed belong to then owner, 1082.
with reference to what time should damages be assessed, 1083, 1084.
how damages assessed when taken for public use and improved before condemnation, 1083.
deduction for benefits, 1084–1087.
in Kentucky, 1087.
proof of value and damages, 1089.
effect of judgment, 1090.
what lands considered in assessing benefits and damages, 1088.
owner may demand further damages where there is a change of the plan of public use, making it more injurious, 1090.
when interest allowed on the damages, 1091.

PUBLIC WRONGS —
not ground of private action except for special injury, 4.

References are to sections: Vol. 1, secs. 1-469; Vol. 2, secs. 470-767; Vol. 3, secs. 768-1296.

PUNITIVE DAMAGES (see EXEMPLARY DAMAGES), 390–412.

PURCHASE-MONEY —
vendor's right to collect before conveyance, 567, 569.
purchaser's defenses against collection of, 570, 571.
what may be shown on defense to note for, 552, 554.
defenses and cross-claims against, 632–641.

PURCHASER —
his right to rescind for seller's inability to convey a good title, 571, 572.
is entitled to perfect title, 572.
effect of his taking and retention of possession, 572, 574.
right of recoupment for defect of title, 573.
measure of recovery against, for land where the price is not fixed by the contract of sale, 575.
where conveyance in consideration of non-pecuniary covenants, 576.
measure of damages in his favor against vendor who is unable to convey a good title, 578.
the rule laid down in Flureau v. Thornhill, 578.
doctrine of this case adhered to in England, 578.
what exceptions there admitted, 578.
conflict of American decisions, 579.
the general rule is the same as applies in other cases, but relaxed where vendor unexpectedly finds himself unable to make title, 579–581.
this exception not universally recognized, 580.
sometimes disapproved when followed, 580, 581.
elements of damage under the milder rule, 582.
recovery on parol contract, 583.
elements of damage where Flureau v. Thornhill does not apply, 584.
where the vendor has extinguished or bought in the adverse title, 584.
rights of a defaulting purchaser, 585.
conflict in American cases, 586.
on rescission of contract, 587.
adjustment of equities between vendor and purchaser in suits for specific performance, 588–590.
specific performance allowed more liberally to purchaser than to vendor as to part, compensation being given as to residue, 590.
after acceptance of deed, must look to covenants in latter, 591.
extent of his right of recovery for breach of the covenant of seizin and good right to convey, 593.
damages recoverable by, on vendor's breach of contract for sale of goods, 651, 652.
for delivery of stocks, 657.
sale of good-will, 658.
consequential damages recoverable by, 670–675.

QUANTITY —
what description of land in contract implies no warranty of, 590.

QUANTUM MERUIT —
claim, how affected where contract intentionally violated, 99.
to interest, 324.
between vendor and purchaser, 328.
tender may be made on, 261.
recovery on, for services rendered, 679, 687–692.
any evidence admissible to show merit and value, 679.
what services are reasonably worth if faithfully performed may be recovered though employer not benefited, 679.
attorneys may recover for their services on, 682.
also brokers, 683.

References are to sections: Vol. 1, secs. 1-469; Vol. 2, secs. 470-767; Vol. 3, secs. 768-1296.

QUANTUM MERUIT — continued.
services may be recovered on when rendered under contract repudiated by employer because void under statute of frauds, 684.
when services verbally agreed to be paid for in land, 684.
when recovery may be had on, for services performed under entire contract not completely fulfilled, 686–690.
when recovery may be had on, for work done under special contract partly performed, 687, 690.
contracts for personal services, on implied condition that life and health continue, recovery may be had for any work done, if prevented from completing by sickness or death, 689.
general discussion of, for part performance, 690.
this claim, when the privilege of quitting at pleasure reserved in contract, 690.
recovery may be had on, for services performed where employer gives servant cause to quit or wrongfully discharges him, 692.
in contractor's action on, contract price should be taken as true value of work done, 708.
recovery may be had on, for part performance, where entire contract has been rescinded, or full performance prevented by law or act of God, 709.
there is then an apportionment of so much of the agreed compensation as has been earned, 709.
when there is a deviation, by consent, from contract, 709.
when recovery for part performance requires this count, 709.
when recovery cannot be had in general *assumpsit*, 709.
effect of fraudulent or intentional violation of contract, 709, 711.
where objection for delay in performance waived, 709.
what will be a waiver of objections to work, so as to entitle contractor to recover on, 709.
recovery on, is not precluded by the contract having provided for payment otherwise than in money, 710.
recovery allowed in some states for part performance of contract where there has been an honest endeavor to fulfill it, 711.
in such cases recovery can be had to the extent of the benefit to the employer, 711.
waiver of objections to work so as to permit recovery for part performance of entire contract; such recovery limited to particular cases, 711.
what is a substantial performance for the purpose of this equitable recovery, 711.
what deductions will be allowed, 711.
contractor may recover on, for work done, where employer stops the work and prevents full performance, 713.
claim for use and occupation is such, 843.

QUIET ENJOYMENT, COVENANT FOR —
what is a breach, and the measure of damages therefor, 604.
implied condition on which tenant bound to pay rent, 848, 863.
damages for breach of, may be recouped against rent, 876.
measure of damages in favor of tenant against lessor, 864–868.

RAILROAD COMPANY —
on condemning land for right of way, may take less than legal width, and less than that described in petition, 1077.
condemnation of property of, 1073, 1078, 1079.
for elevated railroads, 1080.

RATE OF EXCHANGE —
when creditor entitled to it in addition to debt, 213.

REAL PROPERTY —
damages on contract relating to, exceptional, 78.
injury to, by removing lateral or subjacent support, 114.
continuing trespass, 115.

References are to sections: Vol. 1, secs. 1-469; Vol. 2, secs. 470-767; Vol. 3, secs. 768-1296.

REAL PROPERTY — continued.
what an entire wrong, 115.
how suit to be brought by tenants in common, 137.
who may sue in trespass to, 138.
stipulation of damages for breach of contract to buy or sell, 290-293.
damages for withholding, 991-1000.
injuries to, 1008.
trespass to, 1008-1032.
injury to inheritance, 1033, 1034.

RECEIPT —
when note given in place of, facts may be shown in defense to action on the note, 554.

RECOUPMENT —
for breach of warranty in actions for purchase-money of personal property, 676.
for fraud in sale, 676.
by employer, in employee's action for wages, 694, 695.
by employer against contractor for particular works, 708-710.
against notes and bills, 547-549.
in actions for purchase-money of lands, 552-554, 571, 632-641.

RECOUPMENT AND COUNTER-CLAIM —
definition and history of, 168, 169.
formerly, sums certain and even *quantum meruit* demands not subject to defense for reduction, 168, 169.
founded on the natural equity that connected demands should compensate each other, 170.
also on the policy of saving litigation, 170.
allowed in action for price of article when there is breach of warranty, 170.
and in action for work, non-performance, 170.
merely defense, not a cross-action, 170.
not based on a failure of consideration, 171.
based on the opposite principle, 171.
distinct causes of action are set off against each other, 171.
how distinguished from circuity of action, 171.
constituent features of, 172.
remedy by counter-claim, 173.
validity of claim essential to, 174.
the claim for must be a valid cause of action, 174.
differs from mitigation of damages, 174.
requisites as to parties, 175, 176.
defendant's claim must be against the real plaintiff, 175.
not good against nominal plaintiff suing in a fiduciary capacity, 175.
a demand against a sheriff for his tort cannot be subject of, against his demand in behalf of execution creditors, 175.
nor damages for fraud of executors in sale against purchase-money due them as executors, 175.
cross-claim belonging to defendant and another admissible, 175.
surety may set up demand due principal, 175.
otherwise in New York, 175.
claim against administrator arising after death of intestate not matter of, against debt due the estate, 175.
where plaintiff is assignee, 176.
where note sued on taken by the husband payable to his wife without consideration moving from her, 176.
maturity of claim or demand, 177.
defendant's demand must arise out of the same transaction as the plaintiff's cause of action, 177.
must rest on same contract or subject-matter of action, 177, 178.
will include damages for fraud, breach of warranty, negligence, etc., 179.
scope of transaction, 179, 180, 183.

References are to sections: Vol. 1, secs. 1-469; Vol. 2, secs. 470-767; Vol. 3, secs. 768-1296.

RECOUPMENT AND COUNTER-CLAIM — continued.
what acts may be the basis of, 181.
between landlord and tenant, 182, 876.
between vendor and purchaser, 184.
may include unliquidated damages, 185.
affirmative relief not obtainable by recoupment, 186.
defendant has an election between, and suing upon his demand, 187.
burden of proof, 188.
measure of damages, 188.
cross-claim used in defense cannot be sued upon, 189.
notice of, must be given, 190.
between carrier and shipper, 180, 896.

RE-EXCHANGE ON BILLS DISHONORED, 560.
what re-exchange bill may include, 560.
not necessary to the right to re-exchange that it be actually paid, 560.
the doctrine of, founded upon equitable principles, 561.
the amount depends on actual course of exchange, 561.
question whether acceptor liable for, 561.
liable to reimburse it to drawer, 561.
when not recoverable, 562.
not allowed on promissory notes, 562.
but damages equal to rate of exchange between the place where sued and where payable, 562.
such damages do not depend on any principles peculiar to commercial paper, 562.
notes may be drawn to include exchange, 562.
damages in this country given in lieu of re-exchange, 562.

REIMBURSEMENT —
agent entitled to, 789.
See EXPENSES.

RELEASE —
definition, 253.
differs from accord and satisfaction, 254.
construction of, 255.
who may execute, 256.
effect of when executed by or to one of several claiming and liable, 257.
simple contract cannot operate as, 257.
what may operate as, 258.
no special form of words necessary, 258.
covenant not to sue, 259.
cannot take effect *in futuro*, 259.

REMITTITUR —
to cure error or remove objection of excess of damages, 459, 460.
the court may indicate amount to be remitted, 460.

REMOTE CAUSE —
as distinguished from proximate cause, 13, 44.

RENT —
interest on, recoverable, 339.
conditional agreement for reduced sum for prompt payment, 288.
when lien for, discharged by purchaser he may recover on implied warranty of title, 669.
actions for, 844.
amount, how fixed, 845.
construction of rent agreement, 844-846.
when payable in a proportion of product of mine or quarry, 844.
contract to pay in specific articles, 846.
effect of surrender, eviction or other determination of lease during the term, 847.

References are to sections: Vol. 1, secs. 1-469; Vol. 2, secs. 470-767; Vol. 3, secs. 768-1206.

RENT — continued.
apportionment of, 848, 849.
follows the reversion, 849.
covenant for, runs with land, 849.
loss of, when item of damage to landlord, 868.
no abatement of, on account of bad condition of the demised premises 851, 858.
nor on partial destruction, 851.
entire destruction of premises ends liability for, 852.
same result from entire premises being taken for public use, 853.
so when lessor's estate is determined or defeated, 853.
interest allowed on, though payable in service or property, 339, 854.
doctrine in Virginia, 854.

RENTS AND PROFITS —
what account made of, on rescission of land contract, 587, 589.
vendor's liability for, when he withholds possession, 588.
consideration of, in reduction of damages for breach of covenants of seizin and good right to convey, 597-602.
in case of breach of covenants of warranty and for quiet enjoyment, 616.
consideration of, in reduction of damages for breach of covenants for title, 597-599.

REPAIRS —
consequential damages against town for non-repair of highways, 26.
against parties bound to repair fences, 18.
mitigation of trespass on ground of plaintiff's fences out of repair or defective, 88.
damage recoverable against lessor for failure to make, 872, 874.
such damages may be recouped against rent, 876.
covenant for, 855.
binds covenantor to make good any injury to premises, 855.
extends to new buildings, 855.
does not bind tenant to insure against natural wear and decay, 855.
nor to give landlord new buildings for old, 855.
how term "good repair" construed, 855.
covenant for, to be construed according to its particular words, 855.
exception of damages by the elements or acts of Providence, 855.
covenant to keep outside premises in repair, 855.
damages, how recoverable for continuing breach of covenant to repair, 856.
what not a continuing covenant for, 856.
measure of damages for non-repair in action by landlord during term, 856-858.
where landlord has made the repairs, 858.
measure of damages for tenant's failure to repair at end of his term, 858.
where there is a covenant to insure for stated sum and to repair, 858.
covenant for, runs with land and binds assignee of the term, 859.
damages for repairs and non-repairs in special cases, 860.

REPLEVIN —
owners of distinct interests cannot unite in, 139.
aggravation connected with wrongful taking of property provable in, without special allegation, 422.
measure of damages in, when plaintiff obtains property, 1144, 1149.
securities for money, 1144.
corporate stock, 1144.
damages in, limited to compensation, 1144.
interest on value or value of use recoverable, 1144, 1149.
value of fence not recoverable in replevin for materials, 1144.
exemplary damages recoverable in, 1145.
aggravations need not be averred, 1145.

References are to sections: Vol. 1, secs. 1-469; Vol. 2, secs. 470-767; Vol. 3, secs. 768-1296.

REPLEVIN — continued.
special and consequential damages in, 1146.
damages in, when property not obtained on the writ, 1147, 1148.
when alternative judgment must be rendered, 1148.
damages affected by the object of the action, 1149.
recovery for use and increase in value, 1150.
when value recoverable, at what time taken, 1150.
recovery for depreciation or destruction of property between taking and return to owner, 1151-1153.
where the value has been increased by wrong-doer, 1554.
damages recoverable by defendant, 1155.
a plaintiff obtaining possession by, and failing in his suit, a wrong-doer, 1156.
measure of damages in favor of defendant, 1157.
special and consequential damages recoverable by defendant, 1158.
what may be estimated as part of the property replevied, and what must be estimated as damages, 1158.
mitigation of defendant's damages, 1159.
how recovery affected by special interest of prevailing party, 1160.
recoupment in, 1161.
recoveries where part of property found for each party, 1162.

REPLEVIN BONDS —
their original conditions, 499.
the condition to prosecute, and that to return the goods if return be awarded, independent, 499.
what the former requires, 499.
on forfeiture, there can be recovered, within the penalty, the value of the property, and costs of the replevin suit, 499.
liability of the sheriff for taking insufficient bail, or other official neglect resulting in a loss of the security, governed by the same rule, 499.
the condition for return, 500.
defendant may, but is not obliged to, enforce return by writ, 500.
he may sue at once on the bond, 500.
the provision for return is for benefit of defendant, 500.
the consideration and import of it, 500.
the conditions required by modern statutes more direct and precise, 501.
there are generally three conditions — to prosecute to effect or to final judgment; to return the property if adjudged, and to pay such sum as shall be recovered in the replevin suit, 501.
explanation of them, 501.
what is a breach and what a satisfaction of them, 501.
not necessary to assess damages in the replevin suit, 502.
if there assessed and paid, they cannot be assessed on the bond, 502.
when sureties not bound by the judgment in the replevin suit, 503.
measure of recovery on the bond not invariably the value of the property and interest, 503, 505.
when returned interest will compensate for delay, but not for deterioration, 503.
neither plaintiff nor defendant can claim damages for depreciation while he has the property in his own possession, 503.
the party in default should be charged with the value of the property at the date when the duty to return attaches, 503.
if of less value than when taken, the difference should also be compensated, 503.
and such damages are recoverable on the bond, 503-505.
statement of value in the bond evidence against plaintiff and his sureties, 504.
evidence of value, 504.

References are to sections: Vol. 1, secs. 1-469; Vol. 2, secs. 470-767; Vol. 3, secs. 768-1296.

REPLEVIN BONDS — continued.
if the value has increased in the possession of the obligor, the obligee is entitled to the benefit of it, 504.
not, however, if the value has been increased by the labor of the obligor, 504.
interest recoverable on the value from the time of fixing the value, 505.
also special damage, if any, 505.
expenses of procuring teams, etc., to remove the property rendered useless by the replevin have been recovered, 505.
attorney fees incurred in the replevin suit, it has been held, cannot be recovered on the bond, nor compensation for the obligee's attendance in court in that suit, 505.
it has been ruled otherwise in Alabama and Illinois, 505.
effect of the judgment in the replevin suit, 506.
how far conclusive upon the parties and sureties, 506.
what may be shown in defense, 507.
the limited nature of the obligor's property, or that he had none, may be shown, if not precluded by the judgment in replevin, 507, 508.
effect of failure to render alternative judgment, 507.
equitable mitigation, 507.
when the obligee will only be entitled to recover as special owner, 508.
not so when the replevin suit brought by a mere stranger, without right or title, 508.
bond by the defendant to retain the property, 509.
measure of recovery thereon, 509.

REPORT —
agent bound by his, to principal, 769.

REPRISALS —
against damages for detention of dower, 1005.

RESALE —
damages on contracts of sale, when measured by price in contract for resale, 52.
when profits on, an item of damages for vendor's breach of contract to sell and deliver goods, 662.
when evidence of value against a vendee, 570, 646, 664.

RESCISSION —
the parties to be put in *statu quo* on, and for this purpose compensation to be reciprocally made for what has been enjoyed, 589.
payments to be recovered and expenditures compensated, 589.
in equity allowance to be made purchaser for beneficial expenditures, either in improvements or repairs, 589.
limitation as to time of, 589.
rents to be deducted, 589.
where vendor cannot make title to part, vendee may elect whether he will rescind *in toto* or as to that part, 589.
compensation in case of election to rescind *in toto*, 589.
compensation in case of partial rescission, 589.
allowance for improvements, taxes, etc., only made in account for rents where merely nominal damages allowed for loss of the bargain, 589.
and purchaser will be charged with any waste or deteriorations by his act or negligence, 589.
compensations to purchaser where, for vendor's fault, he is entitled to recover the value of his bargain, 584.
recovery for total breach of contract of seizin and good right to convey not on theory of rescission, 596.
defense of failure of consideration produces it, 548.
adjustment of the rights of the parties on rescission of a land contract, 587.

References are to sections: Vol. 1, secs. 1–469; Vol. 2, secs. 470–767; Vol. 3, secs. 768–1296.

RES GESTÆ —
defendant entitled to prove, in mitigation of damages, 159, 166, 430.

RESTITUTION AFTER REVERSAL —
action may be brought for, 468.
may be obtained by motion, 468.
what may be restored, 468, 469.
when discretionary, 469.

RETURN OF PROPERTY TORTIOUSLY TAKEN —
considered in mitigation, 156.
a mitigation in case of wrongful attachment, 515.
in trover, 1138.
right of defendant to return property, 1140.

REVERSION (see INHERITANCE) —
damage to, 1033, 1034.
what the declaration in action by reversioner should allege, 1033.
definition of, and damages for waste, 1034.
rent follows it, 849.
injuries to, in case of non-repair, 856.

RIGHTS —
common law defines and professes to afford remedy for infraction of, 1.
damages at law given as such remedy, 1.
every infraction an injury, 2.

RIPARIAN OWNER —
rights of, 10.
may recover for polluting stream running through his farm and for loss of opportunity to rent mill, 54.
for inconvenience in working of farm, caused by the pollution, 54.
what provable under general allegation, 418.

ROADS AND BRIDGES —
consequential damages resulting from non-repair, 26.

ROOF —
damages for breach of contract to roof a livery-stable, 702.

ROPE —
damages for breach of warranty of suitableness for crane, 672.

SALES (see CONTRACTS FOR SALE OF PERSONAL PROPERTY), 642.
damages for breach of contract for, 51, 52.
when measured by price of contract for resale, 52.
when contract made for special use of property, 45, 50, 52.
when agent entitled to make, to reimburse himself, 790.
when he is liable, and to what damages, for making sale contrary to instructions, 777–781.

SALVAGE —
requisites of salvage service, 715.
how claim for, distinguished from one on the *quantum meruit*, 715.
a *quantum meruit* claim may be good for services not amounting to salvage services, 715.
a specific amount may be fixed by agreement, 715.
such agreement will not be set aside because a hard one for the salvor, 716.
what will limit the claim of one hired to assist, 716.
contracts for exorbitant amounts for salvage service will be closely scrutinized, 716.
a special contract must make the compensation depend on saving the property in peril, 716.
parties may agree on the principles on which salvage service shall be compensated, 716.

References are to sections: Vol. 1, secs. 1–469; Vol. 2, secs. 470–767; Vol. 3, secs. 768–1296.

SALVAGE — continued.
what is necessary in respect to the peril, 717.
how the claim affected by the claimant's duty to the vessel, 717.
salvors cannot force themselves on a vessel in distress, 717.
the objection to seamen being salvors, 717.
when pilots may be, 717.
property must be saved by salvage service, 718.
those are salvors who begin the service and successfully prosecute it, though wrongfully interrupted, 718.
ship, cargo and freight saved make one salvage fund, 718.
salvage is a single service, 718.
amount recoverable as salvage, 719.
it is in the discretion of the court, 719.
is not reducible to rule, 719.
depends on the peculiar circumstances of each case, 719.
varies from one-eighth to half of the property saved, 719.
when less is allowed it is usual to adjudge a compensation *in numero*, 719.
compensation made on the basis of a fair division of the saved property between the owners and the salvors, 719.
what may be considered to enhance the merit of salvage service, 719.
where money is saved, a fifth or a tenth, according to circumstances, has been allowed, 719.
under special circumstances the whole net proceeds have been awarded, 719.
in awarding on a foreign vessel the rate will be that of the courts of the owner's country, 719.
the rate for services at sea inapplicable to rivers, 719.
where there are several sets of salvors they do not have separate liens, for salvage service is single, 719.
derelict property, 720.
salvage on, governed by same principles as where other property involved, 720.
amount allowed out of such property, 720.
reasons why reward for services in cases of such property should be liberal, 720.
salvage forfeited by misconduct, 721.
what is such misconduct, 721.

SAMPLE —
implied warranty on sales by, 667.

SATISFACTION —
effect of satisfying judgment for total breach of covenant of seizin and good right to convey, 596.

SEA —
what interference with private property to prevent encroachments of, *damnum absque injuria*, 3.

SEAMEN —
reasons for excluding them from claiming for salvage service, 717.
under what circumstances they may be salvors, 717.

SECURITY —
released by tender, 277.

SEDUCTION —
damages to parent for, may include mental suffering, 95, 1283.
mitigation in action for, 158, 163, 1284.
actual connivance a bar to action for, 163.
an aggravation of damages in actions for breach of marriage promise, 984, 990.

References are to sections: Vol. 1, secs. 1-469; Vol. 2, secs. 470-767; Vol. 3, secs. 768-1296.

SEDUCTION — continued.
the technical not the real gist of the action for, 1281.
there must be some loss of service, or expenses incurred, 1281.
an action for, not maintainable on mere relation of parent and child, 1282.
who may maintain an action for, 1282.
recovery for, not limited to the loss of service, 1281.
nor to compensatory damages, 1283.
what a jury may consider in the estimate of damages, 1283.
criminal conversation,— what must be proved in actions for, 1285.
damages for, 1285.
evidence in mitigation, 1285.

SEED —
damages from being mixed with seeds of obnoxious weeds, 45.
for breach of warranty, 61, 673, 675.

SEIZIN, COVENANT OF —
damages for breach of, 593.

SEIZURE OF GOODS —
damages from, to business and credit, 512, 1101.

SERVANTS —
damages for enticing away, 29, 31, 122.
no recovery therefor in consequence of losses in dealings with others hired in their place, 31.
enticing away employees maliciously, 29.
must exert themselves to find employment after being discharged to lessen damages, 88, 693.
recoupment in action for wages, 180.
liquidation of damages in contracts with, 292.

SERVICES —
recovery on a hiring for fixed wages, 678.
on *quantum meruit*, 679.
contract to pay may be inferred from circumstances, 679.
and the price may be tacitly fixed by them, 679.
duty to pay may be imposed by law when there was no intention to pay, 679.
promise generally implied to pay for, 679.
may be made in a will, 679.
no recovery for services rendered as a gratuitous kindness, 679.
trustees not entitled to recover for services, 679.
proof of the value of, 680.
statutory day's work, 681.
recovery for attorney's services, 682.
what may be shown to reduce recovery, 682.
broker's services, 683.
when he sells goods to arrive he may recover his commissions, though the goods fail to arrive, 683.
is entitled to compensation though his services do not prove beneficial, 683.
where, by custom, he is not entitled to pay unless the business intrusted to him is completed, 683.
where no special compensation agreed on he is entitled to customary rate, 683.
if one not a broker employed to negotiate he is entitled to reasonable compensation, 683.
must perform his services in such manner as to reasonably answer the intended purpose, 683.
if he or any agent so carelessly perform his services that they are useless, he cannot recover for them, 683.
he will forfeit his right to compensation by misconduct, 683.

References are to sections: Vol. 1, secs. 1-469; Vol. 2, secs. 470-767; Vol. 3, secs. 768-1296.

SERVICES — continued.
various modes of compensating, 684.
the compensation may be a share of net profits of a business, 684.
may be a share of crops to be raised on a farm, 684.
may be such sum as may be raised by voluntary subscription for that purpose, 684.
may be specific property, 684.
and then if not delivered its value may be recovered, 684.
employer has a right to make compensation in mode agreed, 684.
and if in no default he cannot be required to pay otherwise, 684.
this so though the contract void by the statute of frauds, 684.
but if he repudiate such void contract, services rendered under it may be recovered for on a *quantum meruit*, 684.
presumption of same terms where employee continues work, 685.
necessity of full performance of entire contract, 686.
dispensed with in certain cases, 687–690.
where the right to quit reserved on giving notice, and notice not given, 690.
distinction made on a wilful breach of the contract of hiring, 690.
entire and apportionable contracts of service, 691.
whether apportionable or not depends on the intention of the parties, 691.
illustrations of entire and apportionable contracts, 691.
liability of employer where he gives servant cause to quit or unreasonably discharges him, 692–694.
employee may recover damages on the contract according to actual loss, 692.
cannot afterwards recover in general *assumpsit* for services actually performed, 692.
full damages on the basis of wages cannot be prospectively recovered, 692.
after expiration of term agreed, wages may be recovered if there has been a wrongful dismissal, 693.
but subject to reduction by amount the servant has otherwise earned or could have earned, 693.
duty of dismissed employee to seek other employment, 693.
opportunity for other employment will not be presumed; employer must show the deduction he is entitled to, 693.
in some states the employee as plaintiff must show diligence and what his loss has been, 693.
employee dismissed is not obliged to engage in a different business nor go to another place, 693.

SET-OFF OF JUDGMENTS —
power of court to order, 198.
when it will or will not be granted, 199.
discretionary, 199.
allowed only between real parties in interest, 200.
granted only after rendition of judgment, 201.
assignee must make absolute purchase, 202.
nature of action immaterial, 203.
attorney's lien, 204.

SEVERAL DELIVERIES —
contracts for, when severable, 645.

SEVERAL RIGHTS OR LIABILITIES (see ENTIRETY OF ACTIONS), 140-142.

SHEEP —
liability of owner for allowing to trespass and communicate disease, 1028.

References are to sections: Vol. 1, secs. 1–469; Vol. 2, secs. 470–767; Vol. 3, secs. 768–1296.

SHERIFF —
damages for neglect of duty, 160, 489–492.

SICKNESS —
a ground of damage, 942.
an element of damage for nuisance, 1051.

SIDE TRACK OF RAILROAD —
damages for breach of contract to build and maintain in front of covenantee's lots, 703.

SLANDER AND LIBEL —
law implies some damage from, 10.
two or more cannot be held jointly for, 140.
provocation in mitigation, 152.
truth of words not provable in mitigation, 152, 153.
necessary to give notice of excuse for uttering to prove it in mitigation, 165, 166.
nature of the wrong, 1203.
accusations actionable *per se*, 1204.
general damages for, how proved, and aggravations, 1206–1210.
left to the discretion of the jury, 1206.
malice as an ingredient and an aggravation of, 1205, 1206.
when plaintiff's good reputation may be proved, 1210, 1211.
what the jury may consider in their estimate of damages, 1206.
repetitions of the same charge, 1208.
repetitions by others, 1221, 1222.
that defendant knew the charge to be false, 1209.
refusal of editor to publish a retraction, 1209.
expressions indicative of ill-will, 1209.
language and manner of publication, 1209.
injury to feelings, 1214, 1220.
the rank and condition of the parties, 1210.
evidence supporting or disparaging plaintiff's reputation, 1210, 1212.
the action for, intended to afford indemnity and vindicate plaintiff's character, 1209, 1211.
defamation of one in his office or calling, 1213.
special damages for, 1215.
exemplary damages, 1216.
damages in discretion of jury, 1217.
action for words not actionable in themselves, 1218–1222.
how it differs from action for actionable words, 1218.
slander of title, 1223.
effect of pleading and not establishing justification, 1224, 1225.
in some states unsupported plea of justification does not necessarily prove malice, 1224, 1225.
changes made by statutes, 1225.
proof of plaintiff's bad character in mitigation, 1226.
must be of general reputation, not of particular acts, 1226.
as to the admissibility of rumors and common report, 1227.
truth of the words not provable in mitigation, 1228–1230.
generally allowed under statutes, 1230.
other facts provable in mitigation, 1231–1233.
effect of giving name of author in repetition of slander, 1233.

SLANDER OF TITLE, 1223.

SPECIAL CONTRACTS —
profits and damages on, 63–69.

SPECIAL DAMAGES —
necessary to private action for public wrong, 4.
must be specially alleged, 419.
in case of public nuisance must be alleged, 420.

References are to sections: Vol. 1, secs. 1–469; Vol. 2, secs. 470–767; Vol. 3, secs. 768–1296.

SPECIAL DAMAGES — continued.
in trespass to real property to be alleged, 1028, 1029.
instances, 1028–1032.
in trespass to personal property, 1100–1102.
in trover, 1129.
for slander and libel, 1115.

SPECIAL OWNERS —
damages recoverable by, 139.
entitled to recover full value against a stranger, 139.
recoveries by, on replevin bond, 508.
recovery by legal holder of commercial paper who has only partial beneficial interest, 541.
their right of recovery in trespass to personal property, 1097.
in trover, 1136, 1137.
in replevin, 1160.

SPECIFIC ARTICLES —
rent payable in, bears interest, 846.

SPECIFIC PERFORMANCE —
by vendor recovering full purchase-money before conveyance, 567.
objections to, at law, 569.
the practice in Pennsylvania, 570.
adjustment of counter equities in suits for, 588.
damages decreed in suits for, 590.

SPLITTING CAUSES OF ACTION 106, 111.
duty of banks to pay checks, an exception to the rule against, 287.
See ENTIRETY OF DAMAGES.

STATUTES —
8 and 9 Wm. III., and its effect, 472.
3 and 4 Anne, and its effect, 473.
regulating security on appeal, 532–536.

STATUTORY BONDS —
given in judicial proceedings, recoveries on include costs and counsel fees, 85, 475.

STIPULATED DAMAGES —
contracts for, valid, 279.
only in valid contracts, 280.
modes of liquidating damages, 281.
alternative contracts, 282.
as distinguished from penalty, 283–295.
the evidence and effect of intention to liquidate damages, 283, 284.
stipulated sum where damages otherwise certain or uncertain, 285, 289–293.
contracts for payment of money, 286.
large sum stipulated to secure payment of a smaller, 288.
where same sum given for partial or total breach, 294, 295.
effect of accepting part performance, 296.
are in lieu of performance, 297.
effect of stipulation on right of action, 298.
waiver of right to, 299.

STOCK —
damages on contracts for the sale or replacing of, 657.
for converting, 1135.
in replevin for detaining, 1144.

STREAM —
nominal damages at least for wrongful fouling of, 11.
damages due riparian owner for fouling, 54.

References are to sections: Vol. 1, secs. 1–469; Vol. 2, secs. 470–767; Vol. 3, secs. 768–1296.

STREETS —
injury from change of grade of, *damnum absque injuria*, 3.
See PUBLIC USE.

SUBCONTRACT —
damages on principal contract may include, 78.
when excluded from consideration, 64.

SUBROGATION —
surety's right of, 736.
stranger paying debt not entitled to, 230.

SUCCESSIVE ACTIONS —
when allowed, 114–117, 125–127.
may be brought for continuing nuisance, 1038.
damages recoverable in, 1039.
the principle requiring such actions, 1039.
See NUISANCE; CONTINUING OBLIGATIONS AND WRONGS.

SUIT —
when prosecution of groundless, *damnum absque injuria*, 3.
when actionable, 3, 1235.
expenses of, when recoverable, 44, 1235.
for continuing cause, damages limited to commencement of, 125.
damages for single tortious act, occurring after, recoverable, 113–121.

SUNDAY —
how breach of Sunday laws affects damages for injury on that day, 5.

SUPPORT —
contracts for, entire or severable, 127.

SURETY (see INDEMNITY) —
damages recoverable by, 82.
include costs and expenses, 82.
not bound to pay principal's debt to lessen damages, 90.
discharged by tender, 277.
effect of releasing principal, 259.
entitled to interest on money paid, 326.
may not direct application of payment by principal, 235.
may direct application of his own payments, 235.
adjustment between different sets of sureties on bonds of fiscal officers, 480–482.
how official bonds construed as against, 485.
measure of damages against, on official bonds, 488.
effect of assurance given by obligee that signing only a matter of form, and that he should not be called on for payment, 554.
a favorite of the law, 735.
contract of suretyship, 722.
liability of, cannot extend beyond that of principal, 723.
when bound to the same measure of responsibility, 723.
only liable on his contract, 723.
interpretation of his contract, 724.
obligations of, strictly confined to his contract, 725.
they cannot be extended by implication, 725.
instances of the application of this principle, 725.
liability of, on bonds given for good conduct of clerks to a partnership afterwards changed in membership, 725–727.
his right on his principal making default on a guarantied contract, 728.
when liable for interest, 723, 728.
liable like the principal for attorney fees when stipulated for in the contract, 728.
or stipulated damages, 728.

References are to sections: Vol. 1, secs. 1-469; Vol. 2, secs. 470-767; Vol. 3, secs. 768-1296.

SURETY — continued.
discharge of, by creditor's conduct, 735.
whatever will discharge him in equity will have that effect at law, 735.
effect of creditor rendering securities unavailable to surety, 736, 738, 740.
his right of subrogation, 736.
release of one or more of several parties, 742.
discharged by tender, 737.
creditor's duty to realize on securities, 737.
his duty to acquire liens, 739.
surety's right to put creditor in motion, 741.
diligence required of creditor to preserve securities, 737–739.
not discharged by release of securities by creditor unless injured, 737.
and only to the extent he is injured, 737.
illustrations, 738–742.
his right to defend between the principal parties, 743.
what defenses may be set up by principal and surety, or the surety alone, 743, 744.
failure of surety to defend, 743.
when sued alone may make the judgment conclusive as to the principal by notice to defend, 743.
entitled to indemnity for money paid for principal, 745.
the law implies a promise by principal to refund to surety all sums he has had to pay as such, 745.
if there is an express indemnity surety confined to it, 745.
the law implies promise of repayment by principal; not by all persons who may be benefited, 746.
who may be considered principal within this rule, 746.
has a right of action where he has paid money for his principal to the extent of the payment, 746.
it is not necessary to obtain leave of the principal to make the payment, 747.
the law implies request, 747.
when he pays a debt in instalments, he is entitled to sue for each instalment as soon as it is paid, 747.
may pay the debt before it is due, but cannot sue for reimbursement until it would be due, 747.
must be legally bound to pay, 747.
is not bound to set up the statute of limitations where it has not run against the principal, 747.
measure of recovery, 748.
the implied undertaking of the principal is one of indemnity, and the surety has no right of action merely because the principal has not paid the debt when due, 748.
nor can the surety recover more than he has paid and interest thereon, 748.
when he pays in depreciated currency he can recover only its value, 748.
may recover the amount he pays to compromise, if there was an actual liability, 748.
his relation of surety precludes him from speculating at the expense of his principal, 748.
if he has knowledge that the debt is tainted with usury, and still pays it, he cannot recover from his principal beyond what the creditor could have recovered from the principal, 748.
may pay a judgment against himself and principal, though part is usury, and recover of the latter, 748.
usury which he pays to obtain time to pay his principal's debt he cannot recover, 748.

References are to sections: Vol. 1, secs. 1-469; Vol. 2, secs. 470-767; Vol. 3, secs. 768-1296.

SURETY — continued.
entitled to indemnity, etc.; measure of recovery; how right to indemnity affected by statute limiting the right of recovery of interest against a decedent estate, 748.
what is payment by a surety to entitle him to recover for money paid, 750, 751.
surety may compel debtor to pay, 749.
liability of principal for costs incurred by or recovered against a surety, 752.
principal not liable to surety for consequential damages, 763.
indemnification of, by principal, 758.
contribution recoverable between co-sureties, 754, 756, 759, 760.
foundation of the obligation and legal liability to contribute, 754.
who are and who are not co-sureties, 755.
See CONTRIBUTION.
insolvency of co-surety, 757.
adjustment of liability between different sets of sureties on bonds of official depositaries of money, 480–482.
the liability of sureties on a probate bond, 495.
liability of, on a guardian's bond, 496.
surety in replevin bond, when bound by the judgment in the replevin suit, 506.
on official bond, not generally concluded by judgment against principal, 495.
liability of different sets of sureties on official bonds, 498.
on injunction bond, when by judgment in injunction suit, 529.
not bound beyond statutory measure, 530.
nor if injunction void, 530.
liability on appeal and *supersedeas* bonds, 536.
effect of assurance to, by obligee, that signing only matter of form and that he would not be called on for payment, 554.
the contract of a, 722.
interpreted like other contracts, 724.
illustrations of the interpretation of such contracts, 536, 537, 724.
obligation of, not to be extended to any other subject, person or period of time than is expressed, 725–728.
illustrations, 728, 729.

SURRENDER (see LANDLORD AND TENANT), 876.

TAVERN —
damages to owner for breach of contract involving diversion of patronage, 55.

TAXES —
damages for failure to fulfill contract to pay, 77.

TELEGRAPH COMPANY —
nominal damages at least for failure to send or deliver message, 10.
damages against, include mental distress for negligence in not sending or delivering message, 97, 975–981.
what necessary to such recovery, 97.
charges, when item of damages, 77.
nature of the duty and responsibility of, 957
liable only for care, skill and diligence, 957.
may adopt reasonable regulations, 958.
that requiring repetition of message, reasonable, 958.
exonerating them from liability for negligence, not so, 958.
measure of damages against, 959–971, 982.
where contents of message not known to operator or affords no information of its purpose, 959–964.
when contents known, effect of negligence, 960.
illustrations, 960–964.

References are to sections: Vol. 1, secs. 1–469; Vol. 2, secs. 470–767; Vol. 3, secs. 768–1296.

TELEGRAPH COMPANY — continued.
construction of messages to give operator notice of object, 966–971.
liability for expenses, 966.
loss of employment, 967.
when charged with knowledge of sender's purpose, 968–971.
action against, may be on contract or for tort, 972.
in England company owes only contract duty and not liable to receiver, 972.
otherwise in this country, 972.
who may sue, 972.
instances, 972.
mitigation of damages by injured party, 973.
damages for injured feelings, 975–981.
exemplary damages, 975.

TENANTS IN COMMON —
how suits to be brought in respect of their property, 137.
may apportion rent among themselves, 850.

TENDER —
right to make, 260.
on what demands it may be made, 261.
when it may be made, 262.
in what money, 263.
by whom, 264.
to whom, 265.
must be sufficient in amount, 266, 267.
how made, 268.
where to be made, 269.
must be unconditional, 270.
when mutual acts are to be done, 270.
effect of accepting, 271.
must be kept good, 272.
waiver and omission of, on sufficient excuse, 273.
must be pleaded and money paid into court, 274.
effect of plea of, 275, 276.
effect of, on collateral securities, 277.
paying money into court, 278.

TERM OF YEARS —
right to land for, how estimated as an item of damages for breach of the covenant of warranty, 612.

TITLE —
defendant in trespass may show title in himself in mitigation, 159.
implied warranty of, 668.
on purchase of notes, stocks, etc., 668.
exception in cases of sales by executors, etc., 668.
measure of damages on breach of warranty of title, 669.
same on breach of warranty on sale of notes and other choses in action, 668.

TORT —
joint and several liability for, 140.
extent of individual participation immaterial, 140.
why damages for may be given more liberally, 100.
when interest allowed as damages for, 355.

TOTAL BREACH —
stipulation of damages on, 590.
elements of damages for, 78.
of contracts for support, what is, 127.
of other contracts, 111, 120.
when value of bargain or profits recoverable, 580.
when not, 578, 581.
on covenants for title, 594–597.

References are to sections: Vol. 1, secs. 1-469; Vol. 2, secs. 470-767; Vol. 3, secs. 768-1296.

TOWNS —
liability of, for non-repair of highway, 26.

TRADE —
stipulation of damages for violating agreement not to carry on, 290.

TRANSACTION —
scope of same transaction in the law of recoupment and counter-claim, 177–180.

TRANSPORTATION —
consequential damages for delay in, 36, 37, 52, 906–914.
damages for delay of, 903–914.

TREASURY NOTES, 210, 211.

TRESPASS —
law infers some damages from, 10.
measure of damages for, 105.
mitigations admitted in actions for, 154, 157.
court may require acceptance of return, 154.
payment by one of several trespassers, 158.
special owner may recover according to his interest, 139.
defendant may show title in himself in mitigation, 159.
mitigation that property destroyed to stay progress of fire, 154.
that defendant as landlord entered to make repairs, 154.
license may be shown in mitigation, 154.
interest recoverable when, 105, 355.
matter of aggravation connected with trespass to real property may be proved without being specially alleged, 422.
when trespass to real property is the gist of the action, whatever is done after illegal entry matter of aggravation, 422.
to real property, 1008.
the gist of the action is injury to possession, 1009.
the party actually or constructively in possession may sue, 1009.
vacant lands in possession of the owner, 1009.
lands presumed, in absence of other evidence, to be in possession of the owner, 1009.
and that his possession is co-extensive with his grant, 1009.
every unauthorized intrusion upon another's land a trespass, 1010.
the amount of actual injury not material to the cause of action, 1010.
the owner's legal right being invaded he is entitled to at least nominal damages, 1010.
when illegal entry made there is at once a cause of action; what is done after the entry mere aggravation of damages, 1010.
damages confined to compensation, 1011.
what the action embraces, 1010.
one act may be injurious to several persons having different interests, 1012.
each may have a separate action, 1012.
the injury to a tenant when stranger cuts trees, 1012.
or puts premises out of repair, 1012.
limits to tenant's right to recover, 1012.
damages where suit by executors, etc., 1013.
measured by benefit received, 1014.
for destruction of property, 1015.
occupation of land by railways, 1016.
measure of damages, 1011–1026.
what facts may be shown, 1015.
principle of compensation governs except when facts exist which warrant exemplary damages, 1011, 1015.
damages may be assessed on value of a part severed, 1014, 1015.

References are to sections: Vol. 1, secs. 1–469; Vol. 2, secs. 470–767; Vol. 3, secs. 768–1296.

TRESPASS — continued.
to real property; damages for removing a sidewalk, 1015.
where the trespass suspends the enjoyment of the premises, 1015.
removing and converting part of land where part severed is valuable, 1015, 1017.
delaying the completion of house, 1015.
injuring sluiceway to and stopping a mill, 1015.
laying down and using railroad track over land, 1016.
such occupation a continuing wrong, 1016.
and successive actions may be brought, 1016.
when by single act a permanent injury done, damages assessed once for all, 1017.
depreciation of the value of the land an element of damage, 1017.
what an estimate of damages on this basis presupposes, 1017.
as in the deposit of a bar of gravel on the plaintiff's land, 1017.
damages where injury remediable, 1018.
where trees severed, the severance the essential fact, 1019.
value of property severed may be recovered, 1019.
when trees severed and carried away, the injury twofold, 1019.
diversity of decisions as to measure of damages, 1020.
liability for additional injury to land, 1021.
destroying or carrying away growing crops, 1023.
damages to unsecured ice, 1022.
removing fences, 1024.
injuries to party-walls, 1025.
malicious trespasser liable to any injured person, 1029.
injury to business, 1029.
exemplary damages may be given, 1031.
interest, 1020.
mitigation of damages, 1027.
aggravations and special damages, 1028–1030.
when damages for trespass to personal property may exceed compensation, 1092.
certainty of damages, 1093.
remedy more comprehensive than trover, 1094.
aggravations increase damages, 1095.
when exemplary damages for, recoverable, 1069.
what the damages for, may include, 1092–1103.
for taking or destroying property, 1096–1103.
quantity of interest, 1097.
retail price not taken as value, but the market value of quantity in question, 1098.
proof of value, 1098, 1099.
special and consequential damages for, 1100–1103.
return of property as a mitigation, 1103.
expenses to recover or restore property, 1103.
mitigation of damages, 1104.
where property taken is applied under legal process for owner's benefit, 1105.
damages against trespasser from beginning, 1106.
liability of the trespasser from beginning, 1106, 1107.

TRESPASSER FROM BEGINNING —
liability of, 1106, 1107.

TRIAL —
when damages may be computed down to, 112, 113, 121–123.
interest should be computed to verdict, 113.

TROVER (see CONVERSION) —
measure of damages in, 103.
special owner to recover according to his interest, 139, 1136.
mitigation of damages in, 155, 156, 301, 1138.

References are to sections: Vol. 1, secs. 1–469; Vol. 2, secs. 470–767; Vol. 3, secs. 768–1296.

TROVER — continued.
damages assessed on equitable principles, 156, 1137.
court may require acceptance of return in mitigation, 156.
effect of application of property or its proceeds to plaintiff's debts, 156.
interest allowed in, on value of property, 105, 355, 1115.
general rule of damages in, 515, 1109, 1110.
other rules of damages, 1111.

TRUSTEE —
negligently keeping money in bank which fails, 37.
damages against for property lost, value and interest, 105.
must sue for damages to trust property, 130.
mitigation where guardian authorized waste, 157.
executor *de son tort*, what mitigations to, 156, 157.
tender should be made to trustee, 256.
entitled to interest on money paid, 593.
when interest allowed against, 353.

TRUTH —
of words uttered, in actions for slander, not provable in mitigation, 152, 153, 1228, 1229.

UNBORN CHILD —
for what purposes recognized as a personality, 8.

UNDERGROUND STREAM —
injury from diverting, when *damnum absque injuria*, 3.

UNDERTAKINGS —
under code to stay proceedings on appeal, 536, 537, 539.

UNLIQUIDATED DEMAND —
interest not allowed on, 347.
what is, within the sense of the law of interest, 347, 349.

USABLE PROPERTY —
damages for taking or depriving of use, 55.
for injuring, 56.
when holder of note for price takes, 229.

USAGE —
when agent must conform to, 774.

USE AND OCCUPATION —
no recovery after eviction for use during part of rent period, 848.
interest allowed on damages for, 854.
action for, may be general *assumpsit*, 841.
must be founded upon contract express or implied, 841.
how amount recoverable for, determined, 842.
evidence of former rate continuing or not, 842.
special action for, may be maintained on agreement though there has been no enjoyment, 842.
general *assumpsit* will not lie in such a case, 842, 843.
mere tenant at will liable only for actual occupation, 843.
action for, an equitable one, 843.
recovery based on *quantum meruit*, 843.
evidence of rental value, 843.

USE OF PROPERTY —
loss of, when an element of damage, 503, 510–512.

USURY —
damages for non-payment of money cannot be so fixed by stipulation as to evade statutes against, 311.
effect of, found, 313.
who may take advantage of, 314.

References are to sections: Vol. 1, secs. 1–469; Vol. 2, secs. 470–767; Vol. 3, secs. 768–1296.

USURY — continued.
equitable that creditor should receive and debtor pay debt and legal interest, 313.
when contract not void for, 315.
computations under statutes against, 316, 317.
stipulations for interest above legal rate after maturity not usurious, 318.
doctrine in Illinois, 319.
law of what place governs, 361.
contract affected by, not void, 370.

VALUE —
proof of, 445–448, 504–654.
of dogs, 449.
and interest, when measure of damages, 105.

VALUED POLICY (see INSURANCE) —
definition of, 806.
can only be impeached for fraud, 806.
recovery on, where a partial loss has happened, 806.
illustrations, 806.
what is a total loss, 806.
effect of requiring proof of loss under such a policy, 806.

VENDOR —
damages limited to expense to cure defects, 89.
entitled to purchase price and interest, 567.
effect of deposit of his deed in court in action for purchase-money, 568.
his right of recovery on notes given for purchase-money, 571.
effect on the contract of purchase of giving notes for the purchase-money, 571.
defense thereto after deed due that vendor is unable to make good title, 547, 548.
liability of, when he retains possession as security for purchase-money, 588.
at most entitled to purchase price and interest, 567.
reciprocal rights of parties where agreement to pay and to convey mutually dependent, 567.
theory of the vendor's legal remedy, 567.
not for specific performance, but damages, 567.
some cases give vendor legal remedy which is specific performance, 567.
the legal rights of the parties, 568.
the objections to allowing the vendor to recover the full purchase-money, 568.
the proper measure of damages, 569.
what he is entitled to recover for land when price not fixed by contract, 575.
adjustment of rights of vendor and purchaser on rescission of land contract, 587.
and in actions for specific performance, 588–590.
may sometimes have specific performance though not able in all particulars to fulfill contract, compensation being made for deficiency, 590.
defaulting vendor of personal property liable for consequential damages, 662.
liable for profits on resale of personal property when within the contemplation of the parties, 662, 663.
or damages with reference to a known special use, 663, 671.
to damages for delay of performance, 664–666.
increased freights where goods bought for transportation, 664.
for delay of carrier to transport, what damages disallowed, 665.

References are to sections: Vol. 1, secs. 1-469; Vol. 2, secs. 470-767; Vol. 3, secs. 768-1296.

VENDOR — continued.
defaulting vendor; what profits may be taken into account as part of damages against, 665, 666.
warranties of quality and title, 667, 668.
liability of, on warranty in sales of choses in action, 668.
damages for breach of warranty of title, 669.
bound to protect vendee from all actions on prior and paramount rights to the property, 669.
elements of damages against, for breach of this obligation, 669.
damages for breach of warranty as to quantity or quality, 670–675.

VERDICTS —
courts have power over and may set aside, 3.
interest on before judgment, 388.
rendering of, and amending, 457, 458.
excessive or insufficient, 459, 460, 1256.
must be certain, 461.
other requisites, 461.
general, on several counts, 462.
where there are several parties, 463.
deliberations of jury, 456.
when affidavits of jurors may be read to affect verdict, 456.
when court may require jury to reconsider, 458.
when objection of excess may be removed by *remittitur*, 459, 460.
when new trial will be granted for failure to grant nominal damages, 460.
surplusage in, may be rejected, 461.
when plaintiff may enter judgment *de melioribus damnis*, 463.
double or treble damages, 464.

VINDICTIVE DAMAGES (see EXEMPLARY DAMAGES), 716.

WAGES. See SERVICE.

WARRANTIA CHARTÆ —
measure of damages for breach of the covenant of seizin analogous to that by this ancient writ, 593.

WARRANTY —
party having may incur cost on faith of, 84.
not after he learns the warranty is false, 84, 87.
recoupment for breach of, 170.
against incumbrances no more than nominal damages can be recovered on the general assignment of a breach, 420.
the plaintiff must allege the discharge of incumbrance to recover it, 420.
damages for breach of, as to seeds, 61.
of breeding qualities, 61.
liability of warrantor for costs and expenses, 84–87.
notice to him to defend, 82–87.
warrantee may sell with warranty, 84–87.
when no consideration for note, 542.
when breach of, may be shown in reduction of damages in action on note, 548.
breach of, when shown to establish failure of consideration, works rescission, 548.
what not a waiver, 548.
implied from drawing a bill of indorsement or transfer of commercial paper, 555.
measure of damages on, 555.
in what cases goods sold warranted, 667.
classification of English decisions, 667.
theory of vendor's liability there, 668.

References are to sections: Vol. 1, secs. 1–469; Vol. 2, secs. 470–767; Vol. 3, secs. 768–1296.

WARRANTY — continued.
effect of acceptance of goods on contract for those of particular description, 667.
acceptance where defect warranted against, or absence of quality stipulated for, can only be determined by consumption, 667, 672–675.
implied warranty of articles bought for food, 667.
in case of sales by sample, 667.
sales by certain name or description, 667.
none of title in sales by executors or trustees, 668.
rule in other cases, 668.
on sales of notes and other choses in action, 668.
damage for failure of title; assignor liable for costs, 668.
recovery in case of payment of forged check against payee who indorsed it, 668.
exceptional doctrine in regard to, in South Carolina, 668.
no particular words necessary to constitute, 668.
what defects covered by general warranty, 668.
vendee not entitled to return goods on breach of warranty, 668.
otherwise in some states, 668.
not obligatory to return warranted goods unless required by the contract, 668.
action may be brought at once on a breach, 668.
measure of damages on breach of warranty other than of title, 669, 670.
what evidence of value at time of sale, 669, 670.
warranty of title protects against prior lien as well as adverse title, 669.
damages from disease of animals warranted against, 675.
from personal injury from vice of animals or other thing warranted against, 675.
agent's warranty of his authority, 797.
no warranty by lessor of fitness of demised premises for any use, 848, 851.

WARRANTY, COVENANT OF —
damages for breach of, 605.

WASTE —
vendor liable for, on rescission of land contract, 587.
and while he retains possession as security for purchase-money, 588.
in action for by mortgagee, what may be proved in mitigation, 164.
what it is, 1033.
damages recoverable for, 1034.

WEALTH OF DEFENDANT —
when provable in mitigation or aggravation of exemplary damages, 404.
proof of as affecting compensatory damages, 1254.

WHALING VOYAGE —
uncertainty of profits of, 61.

WIFE —
husband's right to damages for personal injury to, 952.

WILFUL OR MALICIOUS INJURIES —
rule of damages for, same as to remoteness as in other cases, 43.
damages for, given with liberal hand, 43.
elements of damages for, 43.
difference made in case of confusion of goods, 101.

WRIT OF INQUIRY, 427.

WRONG-DOER —
effect on damages when he improves property, 102, 103.
distinctions made in matter of proof, 104.
partial satisfaction by one of several, a mitigation, 158.
See EXEMPLARY DAMAGES, 390.

WRONGFUL ATTACHMENT —
may damages for include mental suffering? 95, 1102.

MAR 16 1953

LAW LIBRARY
UNIVERSITY OF CALIFORNIA
LOS ANGELES

UC SOUTHERN REGIONAL LIBRARY FACILITY
AA 000 839 410 8